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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIGA TECHNOLOGIES, INC. A Delaware Corporation	§	
Defendant Below, Appellant/ Cross Appellee,	§	No. 20, 2015
v.	§	REDACTED PUBLIC VERSION DATED: APRIL 10, 2015
PHARMATHENE, INC.,	§	
Plaintiff Below, Appellee/ Cross Appellant.	§	

CORRECTED PLAINTIFF BELOW, APPELLEE/CROSS-APPELLANT PHARMATHENE, INC.'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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[redacted]

TABLE OF CONTENTS

Page

[redacted]

[redacted]

[redacted]

[redacted]

TABLE OF AUTHORITIES

Page(s)

CASES

[redacted]

[redacted]

[redacted]

STATUTES

OTHER AUTHORITIES

[redacted]

NATURE OF PROCEEDINGS

In its prior Opinion in this case, *Siga Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 351-52 (Del. 2013) (the "Opinion") (attached as "Ex. A")[1], this Court held that the license agreement terms sheet at issue here (the "LATS") was a Type II preliminary agreement and that expectation damages are available for breach of a Type II preliminary agreement. This Court then went on to say:

> "Because we had not previously addressed whether Delaware recognizes Type II preliminary agreements and permits a plaintiff to recover expectation damages, and because it is unclear to what extent the Vice Chancellor based his damages award upon a promissory estoppel holding rather than upon a contractual theory of liability predicated on a Type II preliminary agreement, we reverse the Vice Chancellor's damages award and remand the case for reconsideration of the damages award consistent with this opinion." *Id.* at 351-52.

This Court then gave the Court of Chancery the following direction: "On remand the Vice Chancellor shall redetermine his damage award . . . ." *Id.* at 353. This is precisely what the Court of Chancery did. It reconsidered its prior decision on damages and "determined that PharmAthene has carried its burden of demonstrating its entitlement to lump sum expectation damages for its lost profits

[1] Unless otherwise indicated, references are to SIGA's Appendix A and the specific number, such as "A __", and to PharmAthene's Appendix B and the specific page number, such as "B __." References to Exhibits A through D are to the various opinions and orders in the Court of Chancery which have been filed by the Appellee/Cross-Appellant as Exhibits concurrently with the Appellee/Cross-Appellant's Answering Brief and Opening Brief. Ex. B is the Court of Chancery's August 8, 2014 Memorandum Opinion, *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2014 WL3974167 (Del. Ch. Aug. 8, 2014); Ex. C, is the Court of Chancery's September 22, 2011 post-trial decision, *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 4390726, at *44 (Del. Ch. Sept. 22, 2011); Ex. D is the January 15, 2015 Final Order and Judgment.

[redacted]

related to ST-246 by a preponderance of the evidence." Ex. B at *20.

The issue before this Court is whether or not the Court of Chancery's factual findings leading to this determination were clearly erroneous.

It is SIGA's (Defendant Below, Appellant/Cross Appellee) position that notwithstanding this clear directive to reconsider damages, the Vice Chancellor was barred from reconsidering lump sum expectation damages because of his prior finding that they were too speculative was law of the case. First as noted above what the Court of Chancery did was to follow this Court's clear directive.

Second the Court's Opinion does not in any way support the contention that it implicitly affirmed the Court of Chancery's ruling that expectation damages would be too speculative in this case. PharmAthene (Plaintiff Below, Appellee/Cross Appellant) had argued on its prior cross-appeal that the trial court's finding that expectation damages would be too speculative was erroneous, and urged this Court to reverse that ruling. This Court refused to even consider PharmAthene's cross-appeal, given its decision to remand for reconsideration of expectation damages. SIGA cannot seriously contend that *while* this Court was *explicitly disavowing any intention to reach the cross-appeal's issue whether expectation damages were too speculative, this Court was simultaneously implicitly holding just the opposite*, affirming the finding below that such damages would be too speculative. If SIGA's interpretation were correct, it would mean

[redacted]

that PharmAthene was arbitrarily denied its right to appeal the Court of Chancery's original ruling as to whether expectation damages would be too speculative.

Third if this Court believed that the Court of Chancery was bound by its prior conclusion regarding lump sum expectation damages and no other remedy, including damages in the form of cash flow, were available to the Court of Chancery, it would have remanded to the Court of Chancery for a determination of out-of-pocket reliance damages. It is abundantly clear, however, that this Court did no such thing.

SIGA's second argument is that even if not law of the case there was no basis for the Vice Chancellor to change his mind. However, the issue here is not whether the Vice Chancellor was right or wrong initially, but whether his current factual findings leading to his award of expectation damages were clearly erroneous.

A. Summary Of Factual Background

In early 2006, SIGA and PharmAthene negotiated and finalized the LATS for ST-246, an early stage smallpox antiviral drug candidate then being developed by SIGA. The parties' understanding was that if their planned merger did not close, PharmAthene would obtain an exclusive license in accordance with the terms of the LATS. The Merger Agreement contained a provision stating that if the merger fell through the parties would "negotiate in good faith with the intention

[redacted]

of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]" and a Bridge Loan Agreement had a similar provision. (A271 § 12.3; A132 § 2.3)

When the merger did not occur by the September 30, 2006 deadline, SIGA terminated the Merger Agreement. At the time of SIGA's breach its own documents valued ST-246 in excess of 3 billion dollars. Rather than honor its license commitment, SIGA refused to negotiate in good faith, insisting on economic terms for the license significantly more onerous to PharmAthene than those in the LATS, leading to this action. Following a bench trial, the Court of Chancery found that SIGA breached its contractual obligations to negotiate in good faith and also that SIGA was liable under the doctrine of promissory estoppel. The Court of Chancery awarded a constructive trust and equitable lien giving PharmAthene a share of SIGA's profits from the sale of ST-246, plus a portion of PharmAthene's attorneys' fees and expenses. SIGA appealed and PharmAthene cross-appealed.

B. Summary of this Court's Prior Decision

In its opinion, this Court confirmed that agreements to negotiate in good faith are enforceable under Delaware law, and held "that where the parties have a Type II preliminary agreement to negotiate in good faith, and the trial judge makes a factual finding, supported by the record, that the parties would have reached an

[redacted]

agreement but for the defendant's bad faith negotiations, the plaintiff is entitled to recover contract expectation damages." Ex. A at 350-51. Among the key findings of the Court of Chancery affirmed by this Court were the following:

(a) "The record supports the Vice Chancellor's finding that 'SIGA disregarded [the LATS's] terms and attempted to negotiate a definitive license agreement that contained economic and other terms drastically different and significantly more favorable to SIGA than those in the LATS.' The Vice Chancellor further found that [SIGA CEO and MacAndrews & Forbes ("M&F") vice chairman Donald] Drapkin, . . . left the negotiations of the license agreement to those who . . . acting in their own self-interest . . . were more than happy to disregard the economic importance of the LATS.'" Ex. A at 346.

(b) "Evidence that 'SIGA began experiencing 'seller's remorse' during the merger negotiations for having given up control of what was looking more and more like a multi-billion dollar drug' bolsters the Vice Chancellor's finding that SIGA failed to negotiate in good faith for a definitive license agreement in accordance with the terms of the LATS. Therefore, we affirm the Vice Chancellor's conclusion that SIGA acted in bad faith when negotiating the license agreement in breach of its contractual obligations under both the Merger Agreement and the Bridge Loan Agreement." Ex. A at 347.

[redacted]

(c) "Under Delaware law, 'bad faith . . . . . implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.'" *Id*. at 346.

(d) "In this case, the Vice Chancellor made two key factual findings, supported by the record: (1) 'the parties memorialized the basic terms of a transaction in . . . the LATS, and expressly agreed in the Bridge Loan and Merger Agreements that they would negotiate in good faith a final transaction in accordance with those terms' and (2) 'but for SIGA's bad faith negotiations, the parties would have consummated a license agreement.' The Vice Chancellor's factual conclusions support a finding that SIGA and PharmAthene entered into a Type II preliminary agreement and that neither party could in good faith propose terms inconsistent with that agreement." Ex. A at 351.

C. The Court's Mandate

The Court's mandate to the Court of Chancery was as follows:

(a) "Because we had not previously addressed whether Delaware recognizes Type II preliminary agreements and permits a plaintiff to recover expectation damages, and because it is unclear to what extent the Vice Chancellor based his damages award upon a promissory estoppel holding rather than upon a contractual theory of liability predicated on a Type II preliminary agreement, we reverse the Vice Chancellor's damages award and remand the case for

[redacted]

reconsideration of the damages award consistent with this opinion." *Id*. at 351-52.

(b) "On remand the Vice Chancellor shall redetermine his damage award in light of this opinion and is free to reevaluate the helpfulness of expert testimony. Therefore, we reverse the award of attorneys' fees and expenses so that the Vice Chancellor may determine on remand the proper award consistent with this opinion." Ex. A at 353. The Court did not reach PharmAthene's cross appeals related to an alternative payment stream, specific performance, or unjust enrichment. As this Court stated "all those claims are alternative contentions advanced in the event we do not affirm the Vice Chancellor's judgment. Because we affirm the Vice Chancellor's finding that SIGA is liable for breaching its contractual obligations to negotiate in good faith in accordance with the LATS's terms, we do not reach these arguments." Ex. A at 353.

In dealing with PharmAthene's appeal of the failure to award lump sum expectancy damages this Court said: "*PharmAthene also contends that the Vice Chancellor erroneously failed to award PharmAthene its lump-sum expectation damages on the basis that they would be too speculative. We do not reach this claim either, because we reverse the Vice Chancellor's damages award and remand for him to reconsider it in light of this opinion*." *Id.* (emphasis added).

Nowhere in its opinion did this Court (1) say that the Court of Chancery was barred from awarding lump sum expectation damages, (2) criticize the Court of

[redacted]

Chancery's award of expectation damages in the form of a payment stream[2], or (3) otherwise limit the equitable powers or discretion of the Court of Chancery.

After the remand hearing the Court of Chancery issued on August 8, 2014 its Memorandum Opinion, *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2014 WL3974167 (Del. Ch. Aug. 8, 2014) ("Remand Opinion") ("Ex. B"). The Court of Chancery concluded that "[t]he plain language of the Supreme Court's decision indicates that I may reconsider my prior finding that an award of lump sum expectation damages to PharmAthene would be improper because such a measure of damages is too speculative. In addition . . . the Supreme Court held explicitly that I am free to 'reevaluate the helpfulness of expert testimony' when determining a new damages award. The Court's guidance in that respect would be rendered largely superfluous if the rest of its decision is read as prohibiting me from reconsidering whether PharmAthene is entitled to lump sum expectation damages for SIGA's bad faith breach." Ex. B at *3. The Court of Chancery found it was "free to determine anew if PharmAthene is entitled to a payment stream from SIGA based on the terms of the LATS". *Id*. at *4. The Court of Chancery concluded that PharmAthene was entitled to lump sum expectation damages of $113,116,985.00. Ex. D at 1. The total judgment including interest, costs and fees came to $194,649,041.74 Ex. D at 3.

[2] This Court repeatedly referred to the Court of Chancery payment stream remedy as expectation damages. *See* Ex. A. at 351 n.102, 352, 353.

[redacted]

SUMMARY OF ARGUMENT

A. Response to SIGA

The Court of Chancery erred by awarding PharmAthene expectation damages on remand: (a) PharmAthene's expectation damages are speculative and contingent; (b) The law of the case prohibits an award of expectation damages and an award based on patent law principles; (c) The Court of Chancery improperly and selectively considered post-breach evidence; (d) The Court of Chancery erroneously relied on SIGA's "bad faith" to cure the speculative nature of PharmAthene's expectation damages.

PharmAthene's response: Denied.

B. PharmAthene's Arguments

If this Court reverses the Court of Chancery's award of lump sum expectation damages PharmAthene respectfully submits that in the first instance this Court should remand to the Court of Chancery to determine another remedy appropriate for the facts of this case including damages in the form of a cash flow or this Court should direct the Court of Chancery to award PharmAthene specific performance in the form of a license incorporating the terms of the LATS or direct the Court of Chancery on remand to reconsider specific performance.

[redacted]

STATEMENT OF FACTS

> [T]his is not a situation where two parties simply failed to come to terms on a prospective transaction. Rather, it is one where SIGA, in bad faith, torpedoed the negotiations that it had agreed to conduct . . . . I find that SIGA breached its contractual obligations and engaged in a glaring "egregious instance [ ] of overreaching" . . . . *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 4390726, at *34, *44 (Del. Ch. Sept. 22, 2011) ("Trial Court Opinion") ("Ex. C").

Under Delaware law "[a] court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty" in determining damages. Ex. B at *8 (quoting *Cura Fin. Servs. N.V. v. Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *20 (Del. Ch. Oct. 22, 2001) (quoting Restatement (Second) of Contracts § 352 cmt. a (1981))). Therefore it is important to review SIGA's conduct to understand why the Court of Chancery as affirmed by this Court held SIGA had acted "egregiously" in bad faith. Ex. C at *44. Unless indicated otherwise the facts recited here are the facts affirmed in this Court's prior Opinion. Ex. A at 334-40.

By late 2005 SIGA had experienced difficulty developing ST-246 and was out of money. NASDAQ threatened to delist SIGA's shares and SIGA's largest shareholder, M&F was unwilling to invest additional money. SIGA also lacked much of the institutional experience to take a drug successfully to market. Towards the end of 2005 SIGA, because of its dire financial situation, approached PharmAthene about entering into a license agreement. After extensive

[redacted]

negotiations the companies reached agreement on the LATS. Ex. A at 335.

PharmAthene Provides SIGA Funding To Keep SIGA and ST-246 Alive

Having agreed upon the LATS the parties began to negotiate a merger. SIGA needed a bridge loan from PharmAthene while the parties negotiated the merger agreement because SIGA was running out of money. PharmAthene agreed to lend SIGA $3 million and the Bridge Loan Agreement was signed on March 30, 2006 and the LATS was attached to it. The Bridge Loan Agreement obligated the parties to negotiate in good faith a license agreement in accordance with the terms of the LATS. Ex. A at 337-38. Once the Bridge Loan Agreement was signed PharmAthene provided SIGA with financial, technical and administrative support while the parties negotiated the Merger Agreement. Ex. C at *8, *8 n.60.

On June 8, 2006, PharmAthene and SIGA signed the Merger Agreement. Section 12.3 also provided if the merger terminated the parties would negotiate in good faith a definitive license agreement in accordance with the terms of the LATS. The LATS was attached to the Merger Agreement. The Merger Agreement had a drop dead date of September 30, 2006. Ex. A at 338.

On June 9, 2006 Dennis Hruby, SIGA's chief science officer, was notified of a $5.4 million funding award for ST-246 from NIAID.[3] (B808); Ex. C at *8. By now his attitude towards a merger with PharmAthene, previously SIGA's savior,

[3] National Institute of Allergy and Infectious Diseases.

[redacted]

had changed dramatically. (B2568-69 (Hruby)) Ex. C at *8. Hruby forwarded the news to SIGA's CFO, Thomas Konatich who responded "it's a damn shame we had to merge." (B807) Hruby responded that with the "$5.4 M grant being activated, the $10.9 M BAA award on its way, an $8 M grant pending . . . we could have gone all the way ourselves. Instead we got sold into slave labor and if anything [PharmAthene] will drag us down." *Id.*

The Prospects for ST-246 Improved Dramatically

On July 13, 2006 SIGA announced "that its lead smallpox drug candidate, SIGA-246, has successfully completed the first planned human clinical safety trial" – a trial conducted at PharmAthene's request, and paid for with money loaned by PharmAthene. (B811; B806) On September 13, 2006 Hruby called PharmAthene's CEO Eric Richman and told Richman that he and the government personnel at the CDC where the test was conducted were "very excited" and "beside themselves" about the successful results of ST-246 in a variola (smallpox) challenge conducted in primates. (B1133); (B2570-2571 (Hruby)) On September 27, 2006 Hruby received notice of a $16.5 million contract from the NIH, which he believed was sufficient to fund all remaining ST-246 development. Ex. A at 338.

Hruby Sends A September 27, 2006 Email to SIGA'S Management to Prevent the Merger

On September 27, 2006, Hruby sent an email to Donald Drapkin, CEO of

[redacted]

SIGA, and SIGA board member Adnan Mjalli. (B1135) The clear purpose of the email was to prevent the merger. The email noted that in the last few months "major" progress had been made on ST-246 product development, that funding had been obtained which he believed was sufficient to finish development of the drug, and further noting that as a result, "I have grave concerns about the merger as it is currently going forward in that it appears that the merged company will not be SBIR compliant. In that case, we would have to shut down 30 M in current grants and contracts . . . ."[4]

Subsequently Steven Fasman, a lawyer at M&F, emailed Hruby telling him: "Here is the decision to be reached: should Siga continue with its merger plans, or should it try to go it alone?" Conspicuously absent is any mention of SIGA's duty to negotiate a definitive license agreement. (B1141)

As the Merger Agreement's September 30 date approached the SEC had still not approved SIGA's draft proxy statement. The Court of Chancery found (Ex. C at *9, *23), and this Court affirmed (Ex. A at 339), that this failure was the reason the merger was terminated, and not due to any failure by PharmAthene to raise money as alleged without basis in SIGA's brief, p. 10 n.2. In fact, PharmAthene could not even begin to raise money until the SEC approved SIGA's proxy. (B2517-18 (Baumel)); (B2513; B2524 (Richman))

[4] On cross-examination Hruby admitted this statement was false. See *infra* p. 28, n.15.

[redacted]

SIGA's Board Decides It No Longer Needs PharmAthene

PharmAthene asked SIGA to extend the merger drop-dead date. On October 4, 2006, SIGA's Board of Directors met and after a presentation by Hruby about the status of ST-246 decided to terminate the merger. (B1142) Shortly after terminating the Merger Agreement, SIGA publicly announced it had received the $16.5 million NIH grant and that ST-246 provided 100% protection against smallpox in a primate trial. After the announcement, SIGA sold two million shares of its stock at $4.54 per share, more than triple its 2005 share price. Ex. C at *9.

SIGA's Bad Faith Negotiations So It Can Keep For Itself What It Now Believes Is At Least A $3 Billion Drug

On October 26, PharmAthene's counsel, Elliot Olstein, emailed SIGA's counsel and said PharmAthene was ready to sign the attached license agreement because it contained "all the essential terms of a license agreement and is completely consistent with the [LATS]." Ex. A at 339. Nicholas Coch, a SIGA attorney, responded that the nature of the negotiations required "a robust discussion." *Id*. Meanwhile, SIGA had internal discussions and its controller concluded that past and future development costs equaled $39.66 million[5] and that $40 million up front from PharmAthene would support a 50-50 split. Ex. C at *9.

The parties met on November 6. SIGA's representatives proposed a $40-

[5] Most of this had been reimbursed by the U.S. government. *See infra* pp. 21-22.

[redacted]

$45 million up front payment and a 50-50 profit split. PharmAthene said that the parties were bound by the terms contained in the LATS but it was willing to listen to avoid a dispute. SIGA agreed to send a proposal. *Id*.

The LLC Agreement Which The Chancery Court Found as Affirmed by This Court Was Intended to "Torpedo the Negotiations"

On November 21, 2006, SIGA sent PharmAthene a 102-page Draft LLC Agreement. The Court of Chancery concluded that the Draft LLC Agreement was created to deliberately "torpedo" the negotiations. Ex. C at *34, *44. The Court of Chancery contrasted the LATS to the draft LLC Agreement thusly:

> [T]he Draft LLC Agreement included the following economic changes: (1) the upfront payment from PharmAthene to SIGA increased from $6 million to $100 million; (2) the milestone payments to SIGA increased from $10 million to $235 million; (3) the royalty percentages owed to SIGA increased from 8%, 10%, and 12% depending on the amount of sales to 18%, 22%, 25% and 28%; and (4) SIGA would receive 50% of any remaining profit whereas the LATS provided for profit sharing only from U.S. government sales having a margin of 20% or more. In addition, several noneconomic terms were revised to favor SIGA heavily and to undermine PharmAthene's control of ST-246. These provisions included: (1) SIGA's right to resolve disputes unilaterally; (2) SIGA's ability to block any distribution to PharmAthene; (3) PharmAthene's obligation to fund fully the LLC's costs, despite having to split profits 50/50; and (4) SIGA's right to terminate the LLC under certain conditions, with PharmAthene having no right to cure and with all rights to the product reverting to SIGA. Ex. C at *10.

SIGA values ST-246 Conservatively at $3 Billion

On November 27 and 28 a series of emails are exchanged among Fasman, Drapkin, Dugary, Eric Rose, a board member and SIGA's present CEO, Mjalli and

[redacted]

others. (B1189); (B1192); (B1193); (B1198); (B1195) Fasman's initial email has attached a comparison of PharmAthene's revenue projection assumptions and SIGA's assumptions. (B1190) His cover email says "all of the individual assumptions are easily justified, and the result shows a $3 billion valuation for SIGA-246 . . . ." (B1189) In response Dugary says if you used a 75% margin "the net present value increases to $5.1 B." (B1193) Fasman responded that "Ayelet [Dugary] was mostly correct . . . . Correcting the formulas and making these changes results in a net present value of $5.6 billion." (B1198)

The parties exchanged correspondence in which PharmAthene said SIGA's proposal was "radically different from the terms set forth in the [LATS]," but that PharmAthene was "willing to consider" changes to the LATS, including a 50/50 profit split. Ex. C at *10 (citing (A361)). On December 4, 2006, Coch sent Olstein a letter that said "SIGA believes the actual value of SIGA-246 is well in excess of $5 billion (based on projected sales that incorporate more realistic assumptions of the size of the market and up-to-date information concerning the likely uses of SIGA-246) . . . ." (B1204 at n.1) The letter contained no counterproposal. On December 12, SIGA's attorney terminated the negotiations by issuing an ultimatum that unless PharmAthene responded by December 20 that it was prepared to negotiate "without preconditions" regarding the LATS's binding nature, the parties had "nothing more to talk about." (B1207) It was this

[redacted]

ultimatum that terminated the negotiations, not PharmAthene's December 20 lawsuit as alleged by SIGA in its brief at page 7. On December 20, 2006, PharmAthene filed suit in the Court of Chancery.

Federal Funding Existed for Development and Acquisition of A Smallpox Antiviral Like ST-246 Long Before BARDA

SIGA makes much of the point that BARDA didn't come into existence until the day before SIGA's breach. While true, it is a significant distortion of the record. Long before SIGA's breach, the U.S. government pursuant to the Project BioShield Act of 2004 had set aside significant funding to develop and purchase medical countermeasures to biologic agents posing the greatest threat, smallpox being listed as one of them.[6] Much of this money was used to acquire non-FDA approved drugs. Both SIGA and PharmAthene were well aware of this in 2006, and as previously noted SIGA received millions of dollars in funding from NIAID well before its breach on December 20, 2006 including $16.5 million in September 2006. Ex. C at *11. (B2560-62 (Rose)); (B1511) BARDA was set up in November 2006 as part of the Department of Health and Human Services ("HHS") to further assist in funding the development and procurement of drugs like ST-246 that had been going on since 2005.

[6] Biodefense funding was over $8 billion in fiscal 2005 and averaged approximately $5.5 billion for 2006, 2007 and 2008. (B1454-57)

[redacted]

SIGA Enters Into a Contract With BARDA With Options Worth $2.8 Billion

In the latter part of October 2010, BARDA informed SIGA of BARDA's intention to award SIGA a contract for an initial 1.7 million courses of ST-246 with an option for the government to purchase 12 million more courses, with estimated revenues to SIGA of approximately $2.8 billion if all options were exercised. Following a subsequent challenge by an unsuccessful competitor for the contract, SIGA after the trial in 2011 agreed to a settlement that gave it a contract for 1.7 million courses of ST-246, with a dollar value of over $460 million. Ex. B at *6 n.31, *12.

SIGA Has Been Paid Over $160 Million By BARDA

As of the date of the remand hearing, SIGA had already been paid "over $160 million." *Id.* at *6 n.31. SIGA's profit margin on the BARDA contract is between [redacted] (B2556-58 (Baliban)); (B1743; B1746; B1752; B1708; B1532)). None of SIGA's sales to BARDA required FDA approval.[7]

SIGA'S Bad Faith Continues After Trial In Its Decision Not to Recognize as Revenue Money from BARDA

After the Court of Chancery's 2011 trial decision awarding a profit share

[7] Upon application for FDA approval, SIGA will receive an additional $20 million and upon receipt of FDA approval an additional $102 million. (B2719 (Dietrich)) If the FDA does not approve ST-246 SIGA is entitled to retain all the payments it has received. (*Id.*) The only catch is if the FDA approves but requires a different dosage or formulation, then SIGA will have to replace the prior dosages to receive the $102 million. (*Id.*) With the [redacted] profit margin it will still make a substantial additional profit.

[redacted]

remedy but before this Court's reversal and remand, SIGA announced that even though it had received $162.1 million for the delivery of 725,000 courses to BARDA it was not going to recognize this income as revenue from the sale of ST-246 (now called Arestvyr), and therefore would have no profits to split with PharmAthene. (B2447-49) Notably, SIGA still took the position it could do anything it wanted to with the money. (B2720 (Dietrich))

SIGA'S Inappropriate Valuation of the BARDA Contract

SIGA's expert Kurt Ugone took the position that if the LATS were applied to the BARDA contract PharmAthene would owe SIGA $11.2 million. SIGA Br., 15. This conclusion was completely unsupported and patently false. Ugone's report lists the documents he was provided with and relied upon to prepare the report. They were all given to him the day before his report. First, Ugone testified repeatedly he was solely relying upon SIGA to provide him with accurate and complete information. Regarding Capital Payments to CMO's (B2463), Ugone testified that he doesn't know how it was prepared, did not discuss it with anyone after he received it the day before his report, and did not review any documents it might have been based on. (B2696-97 (Ugone)) The Ugone report (B2161 at n.34) states "some of the payments to CMO's were reimbursed by the government . . . [t]hese payments are removed from this spreadsheet." However, he did not ask to see if these government payments are taken into consideration in preparing the

[redacted]

summary of payments to CMO's as a cost. (B2697 (Ugone)) He also never asked why SIGA removed information about reimbursed expenses from the spreadsheet. (B2697-98 (Ugone)) No one ever made a written representation to Ugone that the numbers SIGA was giving to him were accurate. (B2698 (Ugone)).

Regarding the cost of goods sold, R&D, SG&A direct costs and indirect costs documents, the relevant document (PJTX 23) is stamped DRAFT 2.7.13, a date prior to this Court's decision. (B1917) Someone from SIGA deleted row after row of line items on the document (or created a separate spread sheet), even though they were necessary to arrive at the few numbers that are on the document. Ugone never bothered to ask for the information. (B2698 (Ugone)) In fact, PJTX 24 reflects that all the courses will be delivered by the [redacted] while PJTX 23, page 13 shows R&D expenses continuing *at the same rate* of [redacted] per quarter until [redacted]. (B2239; B1929; B2701 (Ugone)) The same is true for SG&A expenses out [redacted]. (B1930) Ugone never checked these projections, just accepted them and still used them in determining his NPV of the BARDA Contract. [8] (B2702 (Ugone))

Second, Ugone did not attribute any value to the $102 million payment due on FDA approval, even though SIGA in PJTX 24 projected [redacted]

[8] PharmAthene moved to obtain the SIGA documents that supposedly were the bases for the conclusory numbers given to Ugone, but the Chancery Court determined they were not necessary facts for the remand hearing. (B2630; 2638; 2671)

[redacted]

[redacted] (B2692; 2693 (Ugone)) and even though the FDA has granted ST-246 "fast track" status.[9] In fact, Ugone accepted every assumption SIGA gave him for his NPV's without question, except this one. (B2693 (Ugone)) If told there was a 95% likelihood of FDA approval of ST-246 in its present formulation and dosage, Ugone testified he still would not consider the $102 million payment in valuing the BARDA Contract. (B2694 (Ugone)) Even though the BARDA Contract is a known fact, Ugone applied a 23.3% discount rate for his NPVas of 2006 and a 18.5% discount for his NPV as of 2011. (B2695 (Ugone))

Third, in valuing what PharmAthene would receive under the LATS, Ugone included costs incurred prior to the date of the LATS even though nothing in the LATS provided for this. In fact the upfront payments in the LATS were there to deal precisely with this as compensation for SIGA's past efforts. (B2703-04 (Ugone)) Accordingly, Ugone's conclusion as cited in SIGA's brief, p. 15, that PharmAthene's share of the contract SIGA valued at $463 million (*see* B2247-49) applying the LATS would be a negative $11.2 million was completely without basis.

ST-246 was Funded by the U.S. Government, Not SIGA

What the record does show is that virtually all of the costs of developing ST-

[9] SIGA's form 10K dated March 16, 2013 for the period ending December 31, 2012. (B1960) Interestingly nowhere in this document does SIGA say it has any concerns about FDA approval of ST-246.

[redacted]

246 were funded by the government. "By December 2006, ST-246 had received millions of dollars in U.S. government funding." Ex. B at *12. "Indeed, by the end of September 2006, SIGA believed it had secured independent government funding to support the remaining development of ST–246." *Id.* at *12 n.61 (quoting Ex. C at *24). "On September 1, 2008, SIGA received a five-year, $55 million contract from NIAID. Shortly thereafter on September 18, 2008, SIGA received another $20 million from NIAID. Approximately one year later, on September 2, 2009 SIGA received a three-year $3 million contract from NIH." Ex. C at *11 n.79. In 2011, $14 million was eligible to cover SIGA's performance through August 2013. (B2283 at n.11)

PharmAthene's Expert's NPV of ST-246

PharmAthene's expert, Vincent Thomas, also did a NPV of the BARDA contract using the terms of the LATS. He found that using the completely unsupported and unjustified expenses used by Ugone the value of the BARDA contract to PharmAthene would have been $57.5 million and using the only verifiable fact Cost of Goods Sold, $140.8 million. (B2329) Also if the terms of the LATS were applied PharmAthene would receive 62% of cash received on future sales of ST-246.[10] *Id.*

[10] The percentage rises depending on whether or not the sales are to the U.S. government. Under the Court of Chancery's profit split remedy, PharmAthene would have received 50% of the net profits on future sales.

[redacted]

The Realty of ST-246 Future Prospects as Publically Announced by SIGA

SIGA describes in numerous places the reality of ST-246:

"We have obtained a "Fast Track" designation from FDA for Arestvyr." (B1960) (SIGA's 2012 10-K)

In the fourth quarter of 2013, . . . Eric A. Rose, CEO and Chairman of SIGA, noted "The Arestvyr business is performing well and has established a strong competitive position. We are building on the successes of the Arestvyr business by laying the groundwork for the next phase of our innovation and growth." (B2459) ("SIGA Technologies Reports Financial Results for the Third Quarter 2013," Globe Newswire, Nov. 6, 2013)

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ARGUMENT

I. The Court of Chancery Properly Found that PharmAthene was Entitled to an Award of Lump Sum Expectation Damages for SIGA's Bad Faith Breach of Contract

A. Question Presented: Did the Court of Chancery properly find that PharmAthene is entitled to an award of lump sum expectation damages for SIGA's bad faith breach of contract?

B. Standard of Review: The factual findings of the Court of Chancery as to the parties' reasonable expectations regarding PharmAthene's potential profits at the time of SIGA's breach are subject to review under the "clearly erroneous" standard. *See Bank of N.Y. Mellon v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011); *Reserves Dev. LLC v. Crystal Props., LLC,* 986 A.2d 362, 367 (Del. 2009). The choice of remedy by the Court of Chancery is subject to review under the "abuse of discretion" standard. *See Int'l Telecharge, Inc. v. Bomarko,* 766 A.2d 437, 439 (Del. 2000) (this Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy"); *Weinberger v. UOP, Inc.,* 457 A.2d 701, 715 (Del. 1983) (noting the "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate."). The Chancery Court's determination that it was not bound by its previous findings as "law of the case" is subject to *de novo* review. *See Bank of N.Y. Mellon*, 29 A.3d at 236.

C. Merits: SIGA asserts that the Court of Chancery's prior finding that

[redacted]

lump sum expectation damages were too speculative to be awarded is law of the case[11] or alternatively the Court of Chancery should have found lump sum expectation damages to be too speculative on remand.

First, as described on pages 2-3, *supra* if SIGA's interpretation were correct, it would mean that PharmAthene was arbitrarily denied its right to appeal the Court of Chancery's original ruling as to whether expectation damages would be too speculative. Second as noted at page 1, SIGA's first argument falls under its own weight. If this Court believed that the Court of Chancery was bound by its prior conclusion regarding lump sum expectation damages and no other remedy, including damages in the form of cash flow, were available to the Court of Chancery, it would have remanded to the Court of Chancery for a determination of out-of-pocket reliance damages. It is abundantly clear, however, that this Court did no such thing. What the Court of Chancery properly did was to follow the mandate of this Court:

> ". . . because it is unclear to what extent the Vice Chancellor based his damages award upon a promissory estoppel holding rather than upon a contractual theory of liability predicated on a Type II preliminary agreement, we reverse the Vice Chancellor's damages award and remand the case for reconsideration of the damages award consistent with this opinion." Ex. A at 351-52 (emphasis added).

The Court of Chancery concluded that:

[11] In the same sentence SIGA asserts that the award is an improper patent measure of damages. (SIGA Br., p. 21. However it is clear from the Court of Chancery decision (Ex. C at *7-*17) that it was awarding contract expectation damages.

[redacted]

> "[t]he plain language of the Supreme Court's decision indicates that I may reconsider my prior finding that an award of lump sum expectation damages to PharmAthene would be improper because such a measure of damages is too speculative." Ex. B at *3.

The Court of Chancery also explained that its previous finding that expectation damages were speculative was based, in part, on the "legal uncertainty" of "whether, as a matter of law, SIGA's bad faith breach of a 'Type II' agreement could support an award of expectation damages."[12] *Id*. *7.

1. SIGA's Expectation at the Time of Its Breach of Its Obligations to Negotiate in Good Faith

"[U]nder Delaware law, the standard remedy for breach of contract is based on the reasonable expectations of the parties that existed before or at the time of the breach." *Id.* at *7. SIGA set forth in its own documentation and analysis what it thought its reasonable expectations were before and at the time of the breach.

First we have the analysis of Hruby, SIGA's CSO and the man most

[12] SIGA's cases cited in support of its law of the case argument are inapposite. In *Cede*, the appellee's argument to alter factual findings was a new position taken contrary to its prior position in the case. Appellee had also abandoned a prior appeal where it attempted to change its position on the findings. *Cede & Co. v. Technicolor Inc.*, 884 A.2d 26, 40 (2005). Here, PharmAthene's position has always been that damages have been sufficiently proven, and PharmAthene appealed the Chancery Court's prior determination against expectation damages – a position not reached during the last appeal because the damages award *was reversed*. In *Thorpe*, plaintiff's argued in a renewed fee application that all findings related to the prior application should have been reconsidered on remand. The Vice Chancellor barred reconsideration of certain issues as law of the case because the Supreme Court in reversing some aspects of the prior decision had expressly affirmed others, which made them not open to reconsideration. *Thorpe v. CERBCO, Inc.*, 1997 WL 67833, at *3-*4 (Del. Ch. Feb. 6, 1997). Rather than affirm the Vice Chancellor's findings that expectation damages were too speculative, this Court instead ordered the Vice Chancellor to reconsider his award consistent with the Court's opinion and even encouraged him to "reevaluate the helpfulness of expert testimony" in so doing. Ex. A at 353.

[redacted]

knowledgeable about ST-246. This is contained in his September 27, 2006 email (B1135):

> 1) We have completed Phase I single dose, dose escalation trials (500-2000 mg) in both fed and fasted human volunteers . . . *no adverse events* . . . .
>
> 2) We have completed a rabbitpox aerosol challenge in rabbits. *We saw 100% protection from disease* . . . .
>
> 3) We have done a mouse study to test the effect of co-administration of ST-246 and vaccine . . . . we observed . . . enhanced protection. *This would suggest that in the event of a bioincident the drug and vaccine can be co-administered.*
>
> 4) We are completing a variola virus (smallpox) challenge in NHP primates at the BSL-4 lab at CDC . . . . *Total protection.* This is far superior to any drug previously tested in the model including the gold standard, IV cidofovir.
>
> 5) We have a monkeypox:NHP challenge in progress in New Mexico . . . . We are only at day 7 but . . . *both treatment groups were totally without symptoms* . . . .
>
> 6) We have received a 5.4M SBIR Phase II continuation grant to fund ST-246 mechanism of action studies and animal efficacy studies, NIH has issued a 2.2M contract to IITRI to fund the NDA-enabling toxicology studies, DTRA has committed ~7M to fund primate studies with smallpox and monkeypox, and we just received today notice of award on a 16.5M contract from the NIH to fund all ST-246 development activities up to and through the NDA filing. *Bottom line is the product's entire development is supported, we have all the necessary partnerships and advocates in place, and have the team in place to see it through. Estimated time to file NDA is Q408.*
>
> * * *
>
> *I have grave concerns about the merger as it is currently going forward in that it appears that the merged company will not be SBIR*

[redacted]

> *compliant. In that case we would have to shut down 30M in current grants and contracts . . .*[13] (emphasis added).

Hruby presented the same facts in even greater detail at SIGA's October 4, 2006 board meeting. (B1142) SIGA's board of directors considered the facts so compelling that it decided to terminate the merger with PharmAthene. Ex. C at *9.

After terminating the merger SIGA did an internal analysis of the NPV of ST-246 as of November 2006. The analysis was summarized in an attachment to Fasman's November 28, 2006 email. His email says "all of the individual assumptions are easily justified, and the result shows a $3 billion valuation for SIGA-246 . . . ." (B1189) In response Dugary says if you used a 75% margin "the net present value increases to $5.1 B." (B1193) Fasman responded that "Ayelet was mostly correct . . . correcting the formulas and making these changes results in a net present value of $5.6 billion" at attaches a slightly revised analysis. (B1198) SIGA's revised analysis summarizes valuation of ST-246 as the following:

SIGA-PHTN License Negotiations
Comparison of Revenue Projection Assumptions

	PHTN's Assumptions	SIGA's Assumptions
	SNS holds 206MM smallpox vaccine doses	Same
	SNS purchase of 246 intended to address 5% of vaccinated	246 can be therapeutic, prophylactic and adjuvant. Easier

[13] On cross examination Hruby admitted that this statement was false. Less than half of the $30 million involved SBIR funding. Also the SBIR funding for the current year (2006) would not have been lost. (B2572-74 (Hruby)) Hruby's response to this significant misrepresentation was "It might have been an exaggeration." (B2574 (Hruby))

[redacted]

SNS Purchase	population for which there is contra-indication	and much faster to distribute and administer than vaccine. Purchase equals 15% total U.S. population (currently 300MM)
	SNS orders delivered 25% per yr, except for 1st year of production	SNS orders delivered 25% per yr
	SNS contract renews every 4 yrs and grows at 5%	SNS contract renews every 4 yrs and grows at 5%
	Requirement does not yet exist -- dependent on DHHS "integration plan" to be released 1Q07	Same
DOD Purchase	2.3MM military personnel (1.45 MM active duty, 860K reserves)	Current number is accurate but will grow with population
	90% of military will be vaccinated and not need 246 (10% contra-indication)	For reasons above, will purchase for 50% of military population
	DOD orders delivered 25% per yr.	Same; contract renewals also grow at 5%
	"Small" requirement exists for unknown amount	New requirements being written now
	DOD sales may require FDA licensure	Not true, or not an obstacle
ROW	50% of US SNS	U.K. = 6MM (10% of population Australia/Canada = 1MM Japan/China = 10MM Israel = 6MM Italy = 5MM Germany/France = 10MM Switzerland = 3MM Rest of World = 1MM Grows at 5% every 4 yrs
Pricing	$100 per course of therapy U.S., $150 ROW	$60 U.S., $75 ROW, but greater marketing expense in ROW; net margin = 75%; 10% price increase every 4 yrs (2.5% inflation)
Course of Therapy	21 days of 1/day dosing	21 days of 1/day dosing; 250 mg API per dose

[redacted]

It concluded PharmAthene's determination of NPV was too conservative.[14] For instance, where PharmAthene believed that government's purchase of ST-246 would be intended to address 5% of the population for which the vaccine was contraindicated, SIGA concluded that because "246 can be therapeutic, prophylactic and adjuvant. Easier and much faster to distribute and administer than [the] vaccine. Purchase equals 15% of total U.S. population." (B1200)

Therefore this case is probably unique in that the defendant: (1) Made its own analysis of what its expectations were of the NPV of ST-246 in November 2006; and (2) Considered this valuation to be sufficiently reasonable to make the deliberate decision to breach its obligation to negotiate in good faith a license in accordance with the terms of the LATS in order to take for itself what it believed to be a $3 billion plus drug.

We believe the Court of Chancery would have been well within its power to award lump sum expectation damages based on SIGA's own expectations when it decided to breach. It is against this backdrop that this Court should review the Court of Chancery's even-handed and extremely conservative analysis of Baliban's report and of the parties' own expectations and analysis. The Court of Chancery after reviewing all of this awarded PharmAthene $113 million less than 11% of the $1.07 billion in damages calculated by Baliban and less than 3.8% of SIGA's

[14] PharmAthene valued it at $1 billion. (B1189)

[redacted]

conservative $3 billion expectation of the NPV of ST-246 in November 2006.

2. The Law on Expectation Damages

SIGA argues that the Court of Chancery erred in awarding PharmAthene lump sum expectation damages on the grounds that PharmAthene failed to prove *the amount* of its expectation damages with "certainty." SIGA Br., p. 21. However, "Delaware does not 'require certainty in the award of damages where a wrong has been proven and injury established.'"[15]

> "Proof of the fact of damages in a lost profits case means proof that *there would have been some profits*. If the plaintiff's proof leaves uncertain whether plaintiff would have made any profits at all, there can be no recovery. But once this level of causation has been established for the fact of damages, less certainty (perhaps none at all) is required in proof of the amount of damages. *While proof of the fact of damages must be certain, proof of the amount can be an estimate, uncertain, or inexact*. *Agilent Technologies, Inc.*, 2010 WL 610725, at *29 n.271 (emphasis added) (quoting *Square D Co. v. Breakers Unlimited, Inc.*, 2009 WL 1468700, at *3 (S.D.Ill. May 21, 2009) (quoting Robert L. Dunn, Recovery of Damages for Lost Profits (6th ed. 2005))).

Also as held in *Beard Research, Inc. v. Kates*:

> Delaware does not "require certainty in the award of damages where a wrong has been proven and injury established." Indeed, "[t]he quantum of proof required to establish the amount of damages is not as great as that required to establish the fact of damage." *Responsible estimates of damages that lack mathematical certainty are permissible*

[15] *Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. Apr. 23, 2010), *aff'd sub nom. ASDI Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010) (quoting *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *15 (Del. Ch. Oct.23, 2002) (quoting *Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Prods., Inc.,* 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992))). *See also Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *29 n.271 (Del. Ch. Feb. 18, 2010) (*quoting* Robert L. Dunn, *Recovery of Damages for Lost Profits* § 1.3 (6th ed. 2005))).

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> *so long as the court has a basis to make such a responsible estimate*. Public policy has led Delaware courts to show a general willingness to make the wrongdoer "bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven." 8 A.3d 573 at 613 (emphasis added) (citations omitted).

The Court of Chancery correctly detailed the law on expectation damages applicable to this case, citing to precisely these principles. *See* Ex. B at *7-*8 (relying on both *Agilent* and *Beard Research*).

> "Proof of the fact of damages in a lost profits case means proof that there would have been some profits. If the plaintiff's proof leaves uncertain whether plaintiff would have made any profits at all, there can be no recovery. But once this level of causation has been established for the fact of damages, less certainty (perhaps none at all) is required in proof of the amount of damages. While proof of the fact of damages must be certain, proof of the amount can be an estimate, uncertain, or inexact." *Id*. (quoting *Agilent*, 2010 WL 610725, at *29 n.271) (citations omitted).

Here PharmAthene established "proof of the fact of damages." Indeed, SIGA's entire justification at trial for the inflated terms of the LLC was that the value of ST-246 had grown "enormously" between January 2006, when the LATS was agreed to, and November 2006[16] when SIGA willfully breached its obligation to negotiate in good faith a license with the terms of the LATS. In fact, after SIGA

[16] *See* (B2576 (Fasman)) (by fall of 2006, "this drug had made what the company considered to be substantial breakthroughs"); (B2579 (Fasman)) (value of the drug grew enormously between January and November 2006; "a value in excess of a billion dollars for the drug"); (B2580 (Fasman)) (by the fall of 2006, "yes, we assumed it [sales of ST-246] would happen soon"); (B2581-82 (Fasman)) (by the fall of 2006, "we knew that the drug was very valuable."). *See also* (B1135); (B1137); (B2563-64 (Rose)) (describing the successful primate tests obtained in September 2006 as a "transformational experimental finding" that "dramatically increased" the value of ST-246).

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publicly announced in October 2006 the recent test results and government grants it was able to sell shares of its stock at $4.54 per share, more than three times SIGA's 2005 share price. Ex. A at 339.

PharmAthene also could have realized value by exercising its right to sublicense this "very valuable" drug under the provisions of the LATS that granted PharmAthene the right to sublicense ST-246 to others.[17] SIGA's breach immediately denied PharmAthene the benefit of that option and the benefit of the undisputed increase in value of ST-246. *See Smith v. Shell Petroleum, Inc.*, 1990 WL 186446, at *5 (Del. Ch. Nov. 26, 1990); *see also Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 391 (2d Cir. 2006). The Court of Chancery found that PharmAthene had established proof of the fact of damages.

> "*PharmAthene was and continues to be harmed by SIGA's bad faith breach of its contractual obligations.* That harm includes, but is not limited to, the opportunity PharmAthene would have had to develop a successful smallpox antiviral and the reputational enhancement and government funding attendant to such development." Ex. B at *8 n.41 (emphasis added).

a. The Case Law Cited by SIGA is Not on Point

SIGA's argument that it is more difficult to determine damages in cases involving a new drug (*see* SIGA Br., pp. 22-23) ignores the unusual and unique facts of this case. Here there is not only a government-mandated market for a

[17] The LATS expressly permitted PharmAthene to grant sublicenses: "The right to grant sublicenses shall be specifically included in the license." (A352)

[redacted]

smallpox antiviral but the government has in fact put up almost all of the funding for development of ST-246, and both now and in December 2006 ST-246 had no real competitor. Ex. B at *16. Consequently, SIGA's reliance on *Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2004 WL 1192602 (Del. Ch. May 28, 2004) is misplaced. In that case, the plaintiff failed to continue the development of the product at issue and there is no current "established market for the technology." *Amaysing Techs. Corp.*, 2004 WL 1192602 at *4. Likewise, *Pharmanetics Inc. v. Aventis Pharms. Inc.*, 2005 WL 6000369 (E.D.N.C. May 4, 2005) *aff'd*, 182 F. App'x 267 (4th Cir. 2006) is not helpful because it involved "a 'novel technology that was targeted to a 'theranostics' market that itself was innovative and unestablished' and plaintiff's damages model included 'several assumptions that do not reflect the circumstances of this case.'" *Pharmanetics Inc.*, 2005 WL 6000369, at *12, *14. *Alphamed Pharms. Corp. v. Arriva Pharms. Inc.*, 432 F. Supp. 2d 1319 (S.D. Fla. 2006) is inapposite because the plaintiff was a struggling business, the drug wasn't even past the "proof of concept" phase, which plaintiff was unable to fund, the development of the drug was unlikely to be completed prior to other facts that would sever the chain of causation, and plaintiff presented no expert testimony on "the scientific or regulatory aspects" of the case. *Id.* at 1345-51.

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b. Import of SIGA's Bad Faith on The Court of Chancery's Damages Calculation

Delaware and other courts have also held that once a breach is established, uncertainties in the calculation of damages are resolved against the wrongdoer. *Beard Research, supra*.[18] As the court in *Beard Research* went on to state: "Public policy has led Delaware courts to show a general willingness to make the wrongdoer 'bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven.'" *Beard Research*, 8 A.3d at 613.

> "Doubts [about the extent of damages] are generally resolved against the party in breach. A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred. *A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser*

[18] *See Beard Research, 8 A.3d at 613; Agilent Techs., Inc.,* , 2010 WL 610725, at *26-*27 ("[I[n cases where a specific injury to the plaintiff cannot be established, the defendant's actual gain may be considered.") (citations omitted); *Thorpe v. CERBCO, Inc.*, 1993 WL 443406 at *963 (Del. Ch. Oct. 29, 1993); *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1023 (Del. 2001); *Am.* Gen. *Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 10 (Del.Ch.1992) (explaining that because the acts of a wrongdoing defendant created uncertainties, "fundamental justice requires that, as between [the plaintiff] and [the defendant], the perils of such uncertainty should be 'laid at the defendant's door'" (quoting *Madison Fund, Inc. v. Charter Co.*, 427 F. Supp. 597, 608 (S.D.N.Y. 1977)); *Tanner v. Exxon Corp.*, 1981 WL 191389, at *2 (Del. Super. July 23, 1981); (citing 5 Arthur L. Corbin, *Corbin on Contracts* § 1020 (Rev. Ed. 1969)) (citations omitted); s*ee also, Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565, 51 S.Ct. 248, 251, 75 L.Ed. 544 (1931) ("[W]hatever uncertainty there may be in this mode of estimating damages is an uncertainty caused by the defendants' own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced.") (quoting *Gilbert v. Kennedy*, 22 Mich. 117, 131 (1871)*; Boyce*, 464 F.3d at 391 ("[W]here 'the existence of damage is certain, and the only uncertainty is as to its amount, . . . the burden of uncertainty as to the amount of damage is upon the wrongdoer." (*quoting Schonfeld v. Hilliard*, 218 F.3d 164, 182 (2d Cir. 2000) (quoting *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir. 1977))); *see also* 17A Am. Jur. 2d Contracts § 611; Restatement (Second) of Contracts § 352 cmt. a (1981).

[redacted]

> *degree of certainty, giving greater discretion to the trier of the facts.* Damages need not be calculable with mathematical accuracy and are often at best approximate.
>
> Because the defendants intentionally breached the Non-Circumvention Agreement, it is just that they bear a fair share of the costs of that uncertainty that their own improper acts caused."

Cura Fin. Servs. N.V. v. Elec. Payment Exch., 2001 WL 1334188, at *20 (emphasis added) (quoting Restatement (Second) of Contracts § 352 cmt. a (1981)) (citations omitted).

As this Court said and affirmed in the context of the Court of Chancery's finding that SIGA acted in bad faith:

> "bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." Ex. A at 346 (citations omitted).

Therefore, the Court of Chancery properly found that "'*A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts*. Damages need not be calculable with mathematical accuracy and are often at best approximate.'" Ex. B at *8 (emphasis in original) (citations omitted).

SIGA claims that its actions did not create the uncertainty for calculating PharmAthene's damages. It therefore argues that the cases stating that "public

[redacted]

policy . . . shows a willingness to make the wrongdoer 'bear the uncertainty of a damages calculation where the calculations cannot be mathematically proven'" are inapplicable.[19] However, the Court of Chancery found directly to the contrary.

> Moreover, at least with respect to Baliban's cost projections, to the extent PharmAthene could not project those figures with certainty, such uncertainty was caused by SIGA's bad faith breach of its contractual obligations. *Had SIGA negotiated in good faith, SIGA and PharmAthene would have reached a license agreement in which PharmAthene would have controlled ST-246's development and would have been in a position to know the exact amount of such cost figures*. Ex. B at *14 n.67 (emphasis supplied).

SIGA tried to distinguish cases awarding expectation damages[20] under similar circumstances on the grounds that "there is no finding in this case that the parties would have agreed on a license agreement incorporating the terms set forth in the LATS." SIGA Br. p. 26. This simply ignores the factual findings in the Court of Chancery's post-trial decision as affirmed by this Court, including:

> "In this case, the Vice Chancellor made two key factual findings, supported by the record: (1) 'the parties memorialized the basic terms of a transaction in . . . the LATS,[21] and expressly agreed in the

[19] Ex. B at *8 n.39 (quoting Great *Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *23 (Del. Ch. Jan. 29, 2010).

[20] *See Network Enterprises, Inc. v. APBA Offshore Productions, Inc.*, 427 F.Supp.2d 463 (S.D.N.Y. 2006); *Teachers Ins. & Annuity Ass'n of Am. v. Ormesa Geothermanl*, 791 F.Supp. 401 (S.D.N.Y. 1991); *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F.Supp. 491 (S.D.N.Y. 1987).

[21] In fact, the Court of Chancery found that the LATS contained all of the economic terms of the transaction. Ex. C at *5, *19. Accordingly, SIGA's claim that the LATS was missing terms might be relevant to specific performance but is irrelevant to expectation damages and is completely contradicted by the Court's prior Opinion.

[redacted]

> Bridge Loan and Merger Agreements that they would negotiate in good faith a final transaction in according with those terms' and (2) 'but for SIGA's bad faith negotiations, the parties would have consummated a license agreement.'" Ex. A at 351.

The Court of Chancery went on to conclude that the parties would have reached agreement on terms that varied from the LATS to PharmAthene's detriment[22] but this Court went even further. In affirming the Court of Chancery's finding that if SIGA had negotiated in good faith the parties would have reached agreement. It went on to say:

> "The Vice Chancellor's factual conclusions support a finding that SIGA and PharmAthene entered into a Type II preliminary agreement *and that neither party could in good faith propose terms inconsistent with that agreement*."
>
> * * *
>
> "We now hold that where the parties have a Type II preliminary agreement to negotiate in good faith, the trial judge makes a factual finding, supported by the record, that the parties would have reached an agreement but for the defendant's bad faith negotiations, the plaintiff is entitled to recover contract expectation damages." Ex. A at 350-51 (emphasis added).

Therefore this Court held that the parties would have reached agreement on a license consistent with the terms of the LATS, and breach of that agreement in bad faith entitles PharmAthene to expectation damages.

Quoting this Court's language above, the Court of Chancery observed that

[22] PharmAthene acknowledged in its correspondence with SIGA that in order to avoid litigation it was willing to accept terms different from the LATS such as a 50/50 profit split. Ex. C. at *10, *38.

[redacted]

this Court appeared "to place greater weight on the terms specified in the LATS than I afforded those terms in determining my prior damages award . . . the Supreme Court Opinion requires that I reexamine the role of the terms of the LATS in crafting any such award." Ex. B at *4. Therefore in determining expectation damages the Court of Chancery properly looked to the economic terms of the LATS. *Id.* at *9.[23]

3. The Court of Chancery Properly Looked at Post-Breach Facts for a Very Limited Purpose

As the Court of Chancery noted "SIGA itself recognizes that 'the Court is not barred from considering post-breach evidence'" and the "case law suggests that the Court can consider post-breach events 'in order to aid its determination of proper expectations at the time of the breach.'" *Id.* at *9, *9 n.43 (citing *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003); *Cura Fin. Servs. N.V. v. Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *23 (determining damages, in part, by "clinging to known facts" including post-breach events); *Honeywell Int'l, Inc. v. Hamilton Sundstrand Corp.*, 378 F.Supp.2d 459, 465 (D. Del. 2005). The Court of Chancery did exactly that, looking to the existence of the BARDA contract for the narrow purpose of determining the reasonableness of the parties' expectation that ST-246 would be sold to the U.S. government.

[23] The Court of Chancery also said if it looked to a payment stream it would also base it on the terms of the LATS. Ex. B at *6.

[redacted]

SIGA tries to distinguish *Honeywell* on the grounds that it is a patent case. However *Honeywell* makes it clear that it is adopting the "book of wisdom" approach from contract cases that have used it. "Indeed, the flexibility offered by the 'book of wisdom' [*i.e.*, the knowledge that particular events actually occurred after the date of the wrong] is as important in the context of patent law *as it is in the context of contract law* because it discourages infringement." Ex. B at *9 n.43 (emphasis added) (quoting *Honeywell Int'l. Inc.*, 78 F.Supp.2d at 465). SIGA's efforts to distinguish *Comrie* and *Cura Financial* similarly fail, as nothing in those decisions limits a court to using post-breach evidence only to limit damages.

4. The Court of Chancery's Determination that PharmAthene Was Entitled to Lump Sum Expectation Damages Was Not Clearly Erroneous

In determining the damages calculation, the Court of Chancery (1) looked at Jeffrey Baliban's report determining damages based on what the parties knew as of December 20, 2006, and (2) analyzed it in terms of the reasonableness of the parties' own expectations for ST-246 in December 2006 when SIGA valued the drug at $3 to $5 billion dollars. Ex. B. at *9-*11. While the Court of Chancery did not discuss it in its remand opinion it found in its September 22, 2011 decision that: (1) BARDA in March 2009 "issued a request for proposal for smallpox antivirals . . . as a small business set-aside" and (2) "In October 2010, BARDA informed SIGA of its intention to award it a contract under the RFP, with estimated

[redacted]

revenues of approximately $2.8 billion if all options were exercised."[24] Ex. C at *11.

The Court of Chancery concluded that PharmAthene's expectation as to ST-246's prospects were driven primarily by four factors: "(1) the likelihood that ST-246 ever would be sold commercially in meaningful quantities; (2) the timing of when any such sales would begin; (3) the price at which ST-246 would be sold; and (4) the quantity of ST-246 that would be sold."[25] Ex. B at *10.

a. The Court of Chancery as of December 2006 Properly Found That PharmAthene Had a Reasonable Expectation That ST-246 Would be a Viable Product

The Court of Chancery found "that PharmAthene had a reasonable expectation at the time of the breach that the U.S. government soon would begin acquiring ST-246 for use in the SNS [Strategic National Stockpile]." Ex. B. at *12.

> (1) "At the time of the breach, ST-246 apparently had been developed sufficiently to be eligible for acquisition for the SNS under the guidelines set out in The Project Bioshield Act of 2004 passed by the U.S. Congress… These requirements did

[24] The contract was for an initial 1.7 million courses at $285 per course with an option for an additional 12 million courses of treatment at $180 a course. (B256-257 (Baliban)); (B2557 (Baliban)); *see also* (B1708) As noted at p. 18, *supra*, the contract was later revised to a 1.7 million course $463 million contract. Nothing in the record suggests that the government is no longer interested in acquiring another 12 million courses.

[25] For the Court of Chancery's in depth analysis see Ex. B *10-17.

[redacted]

not include FDA approval… for acquisition."[26] *Id.* at *11.

(2) "By December 2006, ST-246 not only had achieved a number of material developmental milestones, but also had received millions of dollars in U.S. government funding based on both its potential and its achievement of tangible milestones. Since BARDA was established in late 2006 and entrusted with determining the criteria for drugs to be eligible for the SNS, those criteria actually have been lowered." *Id*.

(3) ". . . 'by the end of September 2006, SIGA had secured independent government funding to support the remaining development of ST-246, which it believed made PharmAthene's continued involvement unnecessary.'); ('By the end of September 2006, the tables had turned. It then appeared that ST-246 would be a fantastic success and that SIGA could obtain all the capital it might need in the future from sources independent of PharmAthene. . . .')" *Id*. at 12 n.61 (quoting Ex. C at *24-*25).

(4) Baliban's damages model was premised on BARDA's acquisition. . . . Baliban used the low end of Dr. Peck's FDA approval probability [84%] rather than Dr. Peck's 95% BARDA acquisition probability so as to represent a "conservative estimate of PharmAthene's damages." Ex. B at *11.

(5) BARDA has in fact purchased the drug. *Id*. at *12.

The Court of Chancery concluded that "as of December 2006, ST-246 objectively had a very high likelihood of being commercialized in the near future via sales to the SNS, and that Baliban's use of an 84% "probability of success" factor was both reasonable and supported by the evidence. *Id*.

[26] Therefore the Chancery Court found SIGA's claimed uncertainty related to FDA approval was without merit. Ex. B at *11.

[redacted]

b. PharmAthene Had a Reasonable Expectation That ST-246 Sales Would Begin in 2010 at the Latest.

Baliban used 2008 as a start date for sales of ST-246. This was the date the parties had used themselves. *Id*. at *13. The Court of Chancery found that "The parties knew in December 2006 that the establishment of BARDA was imminent and that ST-246 likely was going to be eligible for BARDA acquisition almost immediately." *Id*. at *13. "What was known at the time of the breach included that ST–246 had shown tremendous promise in preliminary studies, enabled SIGA to raise over $20 million in development funding, and had been granted 'orphan drug' and 'fast track' status by the FDA."[27] *Id.* The Court of Chancery concluded that based on the above facts PharmAthene had a reasonable expectation that sales would begin in four years, "by 2010, at the latest."[28] Ex. B at *13.

c. PharmAthene Has Established a Reasonable Expectation of Selling ST-246 for $100 Per Course

The Court of Chancery properly found that PharmAthene had established a reasonable expectation of selling ST-246 for $100 per course. In making this determination, the Vice Chancellor noted that both SIGA and PharmAthene were

[27] Ultimately, the BARDA contract was entered into in 2011, shortly after trial. The Court of Chancery noted that Dr. Peck opined that "to the extent there has been a delay in the sale of ST–246 relative to Baliban's projections, the delay is a function of SIGA's failure to develop the drug efficiently or properly due to its lack of experience in commercializing pharmaceuticals. Ex. B. at *13.

[28] Of course, but for the challenge by a competitor, BARDA could have awarded a contract with estimated revenues including options, of $2.8 billion in October 2010. Ex. C at *11.

[redacted]

negotiating with each other based on being able to sell ST-246 at $100, a number that "was comparable to what the U.S. government had paid for other bioterrorism-related countermeasures." *Id.* at *14. Baliban made an independent assessment of this by analyzing U.S. government purchase of pharmaceutical countermeasures, which established $100 comported with prior purchases. *Id*. The Vice Chancellor found it significant that BARDA contracted to pay SIGA "significantly more than $100 per course" for ST-246.[29] *Id.*

Based on the above, the Vice Chancellor found that "PharmAthene has proven by a preponderance of the evidence that Baliban's assumption that PharmAthene could expect to sell ST-246 for $100 per course to the U.S. government was reasonable at the time of the breach." *Id*.

d. PharmAthene Established the Number of Courses it Reasonably Expected to Sell to The U.S. Government

PharmAthene made its sales analysis by multiplying the size of the SNS smallpox vaccine stockpile, estimated by it to be 206 million, by the percentage of the population contraindicated for the vaccine (five percent). Ex. B at *15. Baliban used this extremely conservative 5 percent contraindication rate despite the fact that he determined the rate was 20%.[30] SIGA believed the actual number

[29] At least $180 per course of treatment which SIGA gets to keep even if the FDA never approves ST-246. Ex. B at *14 n.66.

[30] Baliban's research also determined that "actual contraindication rate was . . . (twenty to thirty percent)." Ex. B at *15.

[redacted]

to be 15% of the then U.S. population estimated to be 300 million because "246 can be therapeutic, prophylactic and adjuvant. Easier and much faster to distribute and administer than the vaccine." (B1200); pp. 28-29 *supra*.

Baliban's then used the most recent census before December 2006 to estimate the U.S. stockpile of vaccine at 295.5 million and adjusted the stockpile estimate upward to be consistent with the actual population. Ex. B at *15.

The Court of Chancery found that based on:

> "the evidence presented at trial, I conclude that Baliban's model incorporates a reasonable estimate of PharmAthene's projected ST-246 sales at the time of SIGA's bad faith breach. The evidence supports a reasonable inference that the PHTN model understated significantly the size of the SNS smallpox vaccine stockpile . . . . It is reasonable to conclude that the size of the stockpile continued roughly to track the U.S. population during that time period . . . . In that regard, Baliban's 295.5 million estimate of the size of the SNS smallpox vaccine stockpile was reasonable and supported adequately by record evidence." *Id*.

The Court of Chancery reached the same conclusion as to a 5% contraindication rate:

> "Baliban's use of a conservative contraindication estimate of five percent also indirectly accounts for two of Dr. Ugone's criticisms of his model: (a) the failure to account for the emergence of competitive pharmaceuticals; and (b) the failure to account for the seven-year duration of the orphan drug status for which ST-246 had been designated." *Id*.

SIGA attempts to argue that the 5% contraindication rate relied upon by Baliban is unsupportable because an untried second smallpox vaccine purchased

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by BARDA for the population contraindicated to the traditional vaccine negates BARDA's need to purchase ST-246. This is patently ridiculous, as BARDA has voiced its intent to purchase both the second vaccine *and* ST-246.[31]

The Court further noted that Ugone's criticisms were "dubious." "At the time of the breach, ST-246 appears to have been 8,000 times more effective than its closest competing product, and SIGA points to no evidence that suggests that either the PHTN or Baliban's model included an assumption, explicit or implicit, that ST-246's orphan drug status was the driving force behind the selection of a ten year model." Ex. B at *16.

Finally, the Court of Chancery found Ugone's approach [SIGA's expert] unpersuasive.

> Dr. Ugone's credibility was undermined by the fact that at trial he merely attempted to discredit Baliban's analysis without providing an alternative calculation of his own. This Court has been critical of such an approach in the past. *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *29 (Del. Ch. Feb. 18, 2010) . . . I find that the use of such an approach in this case largely was unpersuasive. Ex. B at *16 n.78.

[31] *See* Justification for Other than Full and Open Competition (Dec. 13, 2010), *available at* https://www.fbo.gov/?s=opportunity&mode=form&id=0e1f950a6966c14ceb0a146b8efbc1db&tab=core&_cview=1 (in support of BARDA contract with SIGA to supply ST-246). Further, "a smallpox antiviral may also have potential as an important secondary prophylaxis option for the 4% of the U.S. population (12 million) currently estimated to have an uncertain immune response to smallpox." *Id.* The Court may take judicial notice of publicly filed documents. *In re Wheelabrator Techs., Inc. S'holders Litig*., 1992 WL 212595, at *801 (Del. Ch. Sept. 1, 1992); D.R.E. 201. The 12 million number cited by BARDA closely tracks the number of estimated sales used to calculate PharmAthene's damages by the Vice Chancellor based on the Baliban report, demonstrating that the reality verifies and reinforces the reasonable expectations of the parties.

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e. Sales to The Department of Defense

Regarding potential sales to the Department of Defense, the Court rejected Baliban's 10% contraindication rate, and instead held that he should have maintained the 5% rate used for the BARDA analysis, but otherwise found that "PharmAthene has demonstrated sufficiently that, at the time of the breach, it had a reasonable expectancy of selling ST-246 to the DoD." *Id*. at *16-*17. Accordingly, the Court of Chancery concluded that "PharmAthene has proven with the requisite certainty that it had a reasonable expectation of selling approximately half of the quantity of ST-246 to the DoD that Baliban projected." *Id*. at *17.

Accordingly, PharmAthene respectfully submits that the Court of Chancery's award of expectation damages of $113 million with total damages including interest, attorneys' fees and costs of $194,649,041.74 should be affirmed. Ex. D at 3.

f. Sales to The Rest Of The World (ROW)

While SIGA has repeatedly announced publicly that it expects to make significant sales to ROW the Court of Chancery found that PharmAthene had not established this with sufficient certainty. However, PharmAthene has not sought in its cross-appeal a higher number because it recognizes that the Court of Chancery's choice of remedy can only be reversed for an abuse of discretion and its factual findings reversed only if clearly erroneous.

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II. If This Court Finds That The Chancery Court's Award Of Lump Sum Expectation Damages Is Improper It Should Remand for The Court Of Chancery to Award Expectation Damages in the Form of a Cash Flow or Exercise Its Equitable Powers to Fashion an Appropriate Remedy

A. Question Presented: In the event that this Court reverses the Court of Chancery's award of lump sum expectation damages was the Court of Chancery correct in concluding that an equitable payment stream was an option as PharmAthene preserved for appeal? (B630-B673; B708-B730) (Ex. A, pp. 25-26).

B. Standard of Review: The choice of remedy by the Court of Chancery is subject to review under the "abuse of discretion" standard. *Int'l Telecharge, Inc. v. Bomarko*, 766 A.2d 437, 439 (Del. 2000) (this Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy"); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (noting that "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate.")

C. Merits: The Court of Chancery correctly concluded that based on this Court's decision that if after reexamining lump sum expectation damages it concluded they were too speculative, it was "free to determine anew if PharmAthene is entitled to a payment stream based on the terms of the LATS." Ex. B at *4, *6.

Nowhere in its decision did this Court criticize the Court of Chancery's prior award of expectation damages in the form of a cash flow or say it was limiting the

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equitable powers or discretion of the Court of Chancery. This is further confirmed by this Court's finding that it need not reach PharmAthene's arguments on its cross-appeal because it was affirming the Court of Chancery's finding that SIGA was liable for breaching its contractual obligations to negotiate in good faith in accordance with the terms of the LATS.[32]

In fact as addressed earlier at pp. 1-3, 24-26, *supra*, the Court of Chancery properly concluded that it could reconsider its conclusion in its September 2011 Opinion on the issues raised in PharmAthene's cross appeal.[33]

First, expectation damages can be awarded in the form of a cash flow. In *Cura Fin. Servs. N.V. v. Elec. Payment Exch., Inc.*, a breach of contract case, the Court awarded damages in the amount of 100 basis points of the moneys processed as of time of the trial along with a future cash flow of "100 basis points of any such future processing . . . ." *Cura Fin. Servs.*, 2001 WL 1334188, at *24 (Del. Ch. Oct. 22, 2001). In *ID Biomed. Corp. v. TM Techs. Inc.*, the plaintiff had entered into a letter agreement with TM Technologies, Inc. ("TM") for TM to use its technology and expertise to develop improvements to ID's DNA diagnostic systems ("IDB

[32] The Court's prior remedy would be appropriate under either a breach of contract or promissory estoppel basis of liability. *Chrysler Corp. v. Quimby*, 144 A.2d 123, 133-34 (Del. 1958) (expectation damages available for both breach of contract and promissory estoppel); *RGC Int'l Investors v. Greka*, 2001 WL 984689, at *15-*16 (Del. Ch. Aug. 22 2001) (remedies for breach of contract and promissory estoppel often overlap.)

[33] The one exception was its decision that PharmAthene was not entitled to specific performance granting it a license with the terms of the LATS. The Court of Chancery found this was law of the case. This is discussed at Point III, *infra*.

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system"). *ID Biomed. Corp.*, 1995 WL 130743, at *1 (Del. Ch. Mar. 16, 1995). TM developed but did not disclose the improvements to ID and instead filed patent applications for them in its own name. *Id*. at *13. ID then licensed the rights to SUNY. *Id*. at *7. The court found that TM breached the letter agreement, "including the implied covenant of good faith and fair dealing." *Id.* at *13. The court imposed a constructive trust on future cash flows.[34] *Id*. at *17.

The Court of Chancery in its September 2011 Decision repeatedly referred to its cash flow remedy as "expectation" damages:

> "the Court's reasoning in *Greka*[35] supports careful consideration to PharmAthene's request for *expectation damages* in the form of a *future payment stream* or share of the profits . . . ." Ex. C at *37 (emphasis added).
>
> "Thus, SIGA retained its exclusive interest in ST-246 only as a result of its bad faith conduct toward PharmAthene, and SIGA is enriched thereby. Under these facts, *expectation damages* in the form of an *equitable payment stream akin* to a constructive trust or an equitable lien on a share of the proceeds of ST-246 deserves serious consideration." *Id*. at *38 (emphasis added).
>
> "Employing what Chancellor Strine termed 'remedial discretion' in *Greka*, I find that a *payment stream* consistent with the above terms would compensate PharmAthene for its *expectancy interest with sufficient certainty to meet the requirements for relief from a breach of contract and promissory estoppel and to prevent injustice in the circumstances of this case*." *Id*. at *42 (emphasis added).

[34] SIGA has cited no case to the contrary. The Court of Chancery was concerned that there were other elements to each case, but each case makes it clear that it the court was applying a breach of contract remedy.

[35] *RGC Int'l Investors v. Greka*, 2001 WL 984689, at *15-*16 (Del. Ch. Aug. 22, 2001).

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This Court also referred to the Court of Chancery's cash flow remedy as a damages award.

> "Because we had not previously addressed whether Delaware recognized Type II preliminary agreements and permits a plaintiff to recover expectation damages, and because it is unclear to what extent the Vice Chancellor based his *damages award* upon a promissory estoppel holding rather than a contractual theory of liability predicated on a Type II preliminary agreement, we reverse the Vice Chancellor's *damages award* and remand the case for reconsideration of the *damages award* consistent with this opinion." Ex. A at 351-52 (emphasis added).

If this Court believed that the Court of Chancery was barred from awarding a cash flow damages award for breach of contract it presumably would have said something quite different.

1. Whether a Cash Flow Remedy is Treated as a "Damage" Award or an Equitable Remedy It Is an Appropriate Remedy for The Court of Chancery in This Case.

Second, if this Court holds that any lump sum expectation damage award is too speculative then the Court of Chancery may award an equitable remedy including a cash flow remedy. Equity may provide remedies "in redress of legal rights for which the legal remedy of the award of damages is inadequate or impracticable." *Chavin v. HH Rosin & Co.,* 246 A.2d 921, 922 (Del. 1968). A legal remedy may be "inadequate where a party's injury from breach of contract is either noncompensable or cannot be valued with reasonable certainty." *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 40 (Del.

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1995) (citation omitted). "A remedy at law must be as practical to the ends of justice . . . as the remedy in equity." *Id.* at 39. The courts look to the "adequacy of the legal remedy as a practical matter." *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4054231, at *12 (Del. Ch. Nov. 9, 2007). The question of whether a damage remedy is "adequate" is left to the discretion of the Court of Chancery. *See Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2010 WL 3724745, at *4 (Del. Ch. Sept. 24, 2010).

The Court of Chancery was well aware that PharmAthene "theoretically could pursue a remedy at law" on a reliance damage theory to recover the value of its employees' time and salaries, but held repeatedly that "such a remedy would not adequately redress the harm alleged here." Ex. C at *29; *see also* Ex. C at *35 (reliance damages would have been "basically *de minimis*" under the circumstances of this case and, therefore, inadequate).

In the event this Court holds that lump sum expectation damages are too speculative, it is respectfully submitted that this Court should remand the case to the Court of Chancery to enable it to exercise its equitable powers to fashion a remedy. It is a maxim of equity that "equity will not suffer a wrong without a remedy" (*Id.* at *34), and nothing in the Supreme Court's prior decision here has changed the law in this respect. As the Supreme Court stated in *Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964):

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> "Fundamentally, once a right to relief in Chancery has been determined to exist, the powers of the Court are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action . . . . It is necessary for the Court to adapt the relief granted to the requirements of the case so as to give to the parties that to which they are entitled." (citations omitted)

"[W]hen a contract or agreement is silent as to the remedy for a breach, the Court of Chancery has the discretion to award any form of legal or equitable relief and is not limited to awarding contract damages for breach of the agreement." *Cobalt Operating, LLC v. James Crystal Enters. LLC*, 2007 WL 2142926, at *29 (Del. Ch. July 20, 2007) *aff'd*, 945 A.2d 594 (Del. 2008).[36]

[36] In the present case Section 7.13 of the bridge loan agreement entitled "Remedies" specifically contemplates the possibility of an equitably remedy, stating in pertinent part: "the Holder may proceed to protect and enforce its rights, whether *by suit in equity* and/or by action at law, including an action for damages as a result of any such breach *and/or any action for specific performance of any such covenant or agreement.*" (A148) (emphasis added)

[redacted]

III. If This Court Reverses The Court of Chancery's Expectation Damages Award and Remands For The Court Of Chancery to Determine a Different Remedy, Specific Performance Is a Remedy Available to The Court

A. Question Presented: Did the Court of Chancery err in concluding that it was barred from reconsidering its prior decisions not to order specific performance on the grounds that it was law of the case and to the extent the Court of Chancery addressed specific performance did it err in not granting the remedy as PharmAthene preserved for appeal? (B630-B673; B708-B730) (Ex. A, pp. 25-26).

B. Standard of Review: Because PharmAthene's appeal is based on the unambiguous language of the agreements the standard of review is *de novo*. *See J.S. Alberici Constr. Co. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 510 n.2 (Del. 2000).

C. Merits: PharmAthene raised the issue of specific performance on its prior appeal. As previously noted this Court declined to reach the issues raised on the cross appeal "because we reverse the Vice-Chancellor's damages award and remand for him to reconsider it in light of this opinion." Ex. A at 353. For the reasons set forth on pages 1-3, 24-26, *supra*, the Court of Chancery was not barred from revisiting this remedy by "law of the case." As to the merits, this Court's decision that the parties were bound by the terms of the LATS reinforces PharmAthene's right to specific performance granting it a license on those terms.

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Accordingly it is respectfully submitted that this Court, if it remands the case, should direct the Court of Chancery to award specific performance or to alternatively reconsider its prior decision in light of this Court's decision.

CONCLUSION

It is respectfully requested that this Court affirm the judgment of the Court of Chancery below. Alternatively, if this Court does not affirm it is respectfully requested that this Honorable Court remand to the Court of Chancery to determine an appropriate remedy including damages in the form of a cash flow or another remedy appropriate for the facts of this case, or direct the Court of Chancery to award specific performance in the form of a license incorporating the terms of the LATS or to reconsider on remand the availability of specific performance.

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