IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PHARMATHENE, INC., a Delaware corporation, Plaintiff, v. SIGA TECHNOLOGIES, INC., a Delaware corporation, Defendant.	)))))))))))	Civil Action No. 2627-VCP

MEMORANDUM OPINION

Submitted: June 1, 2007
Decided: January 16, 2008

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PARSONS, Vice Chancellor.

This is essentially an action for breach of contract. Plaintiff is a company with extensive experience in developing and launching pharmaceutical products. According to the Complaint, before the events that give rise to this dispute, Defendant was a "struggling biodefense pharmaceutical company with little money, no experienced management, no development, regulatory, clinical, government relations, or marketing staff" and an unapproved and early stage drug that might become an important weapon against smallpox. Beginning in late 2005, the parties negotiated a framework for a collaboration between them for developing and marketing this drug. In January 2006, Plaintiff and Defendant memorialized the major terms of that framework in a two page term sheet that bore the legend "Non Binding Terms." Over the next six months, Plaintiff performed its obligations under the contemplated collaboration and the parties entered into several signed agreements. Two of the agreements contained a provision obligating the parties in circumstances now present to "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth" in the two page term sheet. In October 2006, by which time the drug had achieved several significant success thresholds, Defendant offered to negotiate a definitive license agreement in keeping with the general framework of the term sheet, but on economic terms far different and more favorable to Defendant.

Plaintiff's Complaint asserts claims for breach of a binding license agreement and a contractual duty to negotiate such an agreement in good faith, promissory estoppel, and unjust enrichment. Contending that it never agreed to be bound by the term sheet,

Defendant has moved to dismiss all the counts in the Complaint for failure to state a claim.

For the reasons stated, I conclude the allegations in the Complaint are sufficient to support a preliminary finding that the relevant documents and agreements are ambiguous as to whether the parties intended the term sheet to be binding when they incorporated it into their later agreements. Under one possible construction, but not the only one, Defendant would be obligated to enter into a license agreement with terms consistent with those specified in the term sheet. I also find the circumstances of the parties' communications and conduct conceivably could support Plaintiff's alternative claims for promissory estoppel and unjust enrichment. Accordingly, I deny Defendant's motion to dismiss.

I. BACKGROUND

A. Facts

Plaintiff, PharmAthene, Inc. ("PharmAthene"), is a Delaware corporation with its principal place of business in Annapolis, Maryland. Defendant, SIGA Technologies, Inc. ("SIGA"), is a Delaware corporation with its principal place of business in New York, New York. Both PharmAthene and SIGA are pharmaceutical companies.

In 2004 SIGA acquired the technology for a product now known as SIGA-246, an orally administered anti-viral drug for the treatment of smallpox.[1] At that time, the viability of SIGA-246, its potential uses, safety, and efficacy, and the possibility of its

[1] Unless otherwise indicated, the facts recited in this Memorandum Opinion are drawn from the allegations in the Complaint.

obtaining government approvals and government contracts were all unknown. There was a possibility that, with cash, marketing, and technical knowledge, SIGA-246 might become an important weapon against smallpox and therefore extremely valuable. There was also the possibility that any money or effort invested in SIGA-246 would be for naught.

By late 2005, SIGA experienced difficulties developing SIGA-246 and bringing it to market. Around this time, SIGA and PharmAthene discussed a possible collaboration.[2] Through an exchange of oral and written communications, SIGA and PharmAthene negotiated a framework agreement for their collaboration regarding the development and commercialization of SIGA-246.

1. The License Agreement Term Sheet

On January 26, 2006, the parties memorialized their agreement to collaborate in a two page document entitled "SiGA/PharmAthene Partnership," referred to in the Complaint as the "License Agreement Term Sheet" (the "LATS").[3] The LATS describes the parties' objective as: "To establish a partnership to further develop & commercialize SIGA-246 for the treatment of Smallpox and orthopox related infections and to develop

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[2] Earlier, in or about December 2003, SIGA also held discussions with PharmAthene concerning a potential collaboration. SIGA had never developed or commercialized a drug, while PharmAthene and its executives had developed and launched over 25 pharmaceutical products.

[3] The LATS is in the form of a table that includes the following headings: objective, fields, products, territory, patents, know-how, materials, licenses, R&D committee, license fee, deferred license fee, milestones, and royalties. Decl. of Harold P. Weinberger in Supp. of Mot. to Dismiss Pl.'s Compl. ("Weinberger Decl."), Ex. A, the LATS.

other orthopox virus therapeutics."[4] The LATS also sets forth a framework for, among other things, patents covered, licenses, license fees, and royalties. The LATS is not signed and contains a legend in the footer of each page that states "Non Binding Terms."

2. Letter of Intent and Annexed Merger Term Sheet

The Complaint alleges that pursuant to its contractual obligations to work cooperatively to develop, secure approval for, and market SIGA-246, PharmAthene expended funds, transferred information, and provided management and technological know-how to SIGA. Over the next ten months, PharmAthene pushed for, modified, and funded clinical trials of SIGA-246, evaluated and recommended manufacturers, assisted and advised on quality control and quality assurance, and was in constant communication with SIGA.

As the parties' collaboration continued, SIGA suggested to PharmAthene that the companies consider a merger. On or about March 9, 2006, the parties signed a Letter of Intent with an annexed Merger Term Sheet.[5] The Letter of Intent stated that it was not an offer to complete a merger, but rather an "indication of [the parties'] intention to consummate" a merger between SIGA and PharmAthene.[6] In the Letter of Intent, the parties agreed to "negotiate in good faith" and "use their best efforts" to execute a definitive merger agreement.

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4 The LATS at 1.

5 *See* Weinberger Decl., Ex. B, the Letter of Intent and annexed Merger Term Sheet.

6 The Letter of Intent at 1.

The annexed Merger Term Sheet for the merger of PharmAthene into SIGA contained clauses concerning, among other things: tax treatment, consideration, bridge financing, license agreement, financing, and its binding nature. According to the Merger Term Sheet, upon any termination of it or a definitive merger agreement, the parties agreed to negotiate in good faith the terms of a definitive License Agreement in accordance with the terms set forth in the LATS.[7] Additionally, with the exception of the Fiduciary Out, Expenses, and Exclusivity sections, the Merger Term Sheet states that it "is non-binding and only an expression of interest and is subject in its entirety to the negotiation and execution of a definitive Merger Agreement."[8]

3. The Bridge Loan Agreement

In March 2006, SIGA required capital which PharmAthene agreed to provide. On March 20, 2006, the parties entered into a Bridge Note Purchase Agreement, referred to in the Complaint as the Bridge Loan Agreement, pursuant to which PharmAthene loaned SIGA $3 million. The Bridge Loan Agreement provided that the $3 million would be used for "(i) expenses directly related to the development of SIGA 246, (ii) expenses relating to the Merger and (iii) corporate overhead."[9] PharmAthene made the bridge loan in reliance on the parties' agreements for a continuing relationship with respect to SIGA-246, whether the relationship ultimately took the form of a merger under a merger agreement or a license agreement in accordance with the LATS.

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7 The Merger Term Sheet at 4.

8 *Id.* at 6.

9 Weinberger Decl., Ex. C, the Bridge Loan Agreement, § 2.6.

The Bridge Loan Agreement explicitly recognized, however, the possibility that the parties ultimately might not agree on either a merger or a license agreement. Specifically, section 2.3 provides that:

> Upon any termination of the Merger Term Sheet . . . , termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed . . . , SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the License Agreement Term Sheet attached as Exhibit C and [SIGA] agrees for a period of 90 days during which the definitive license agreement is under negotiation, it shall not, directly or indirectly, initiate discussions or engage in negotiations with any corporation, partnership, person or other entity or group concerning any Competing Transaction without the prior written consent of the other party or notice from the other party that it desires to terminate discussions hereunder.[10]

The Bridge Loan Agreement further states: "This Agreement and the purchase documents and the rights and obligations of the parties under this Agreement and the purchase documents shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York, without regard to principles of conflicts of laws."[11]

4. The Merger Agreement

Subsequently, SIGA and PharmAthene negotiated and agreed on the terms of a merger agreement. During these negotiations, SIGA represented to PharmAthene that the merger was a sound business decision, because SIGA had reviewed the facts and

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[10] *Id.* § 2.3.

[11] *Id.* § 7.11 (emphasis omitted).

concluded that the depth, experience, and diversity of PharmAthene's management could assist in bringing SIGA-246 to market and that PharmAthene had a broad investment base and experience in raising substantial amounts of capital which would provide an immediate value to SIGA and its shareholders. On June 8, 2006, the parties executed the Merger Agreement. Similar to § 2.3 of the Bridge Loan Agreement, § 12.3 of the Merger Agreement provides:

> Upon any termination of this Agreement, SIGA and Pharmathene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the License Agreement Term Sheet attached as **Exhibit H** and SIGA agrees for a period of 90 days during which the definitive license agreement is under negotiation, it shall not, directly or indirectly, initiate discussions or engage in negotiations with any corporation, partnership, person or other entity or group concerning any Competing Transaction . . . without the prior written consent of Pharmathene or notice from Pharmathene that it desires to terminate discussions hereunder.[12]

Section 13.3, the further action clause, provides: "Each of the parties hereto shall use such party's best efforts to take such actions as may be necessary or reasonably requested by the other parties hereto to carry out and consummate the transactions contemplated by this Agreement."[13] Further, under § 12.4, the good faith and best efforts provisions of the Merger Agreement, set forth in §§ 12.3 and 13.3, will survive its termination. Additionally, § 13.5 states that the Merger Agreement "shall be governed by

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12 Weinberger Decl., Ex. D, the Merger Agreement, § 12.3.

13 *Id.* § 13.3.

and construed in accordance with the laws of the State of Delaware applicable in the case of agreements made and to be performed entirely within such State."[14]

5. Events following the Merger Agreement

After the Merger Agreement, PharmAthene and SIGA continued to collaborate. Over the course of the parties' dealings, SIGA-246 achieved several significant success thresholds. In its Complaint, PharmAthene avers that, throughout the course of their dealings, SIGA and its representatives continued to assure PharmAthene that "it would proceed with the Merger or that the parties' relationship would continue, as it had been, in accordance with the terms of their agreement and the [LATS]."[15]

While the parties continued to collaborate, either party could terminate the Merger Agreement if the closing did not occur on or before September 30, 2006. As that date approached, PharmAthene sent SIGA a letter requesting an extension. SIGA never responded. At or about this time, the parties learned the clinical trials of SIGA-246 showed signs of great success, and would demonstrate 100% protection against smallpox in primates, even when administered after exposure. According to PharmAthene, its capital contributions, management, know-how, collaborative efforts on behalf of SIGA-246, and fulfillment of its contractual undertakings greatly contributed to this success of SIGA-246.

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14 *Id.* § 13.5.

15 Compl. ¶ 39.

On October 4, 2006, SIGA sent PharmAthene a notice terminating the Merger Agreement on the ground that the September 30 deadline had passed. Between October 6 and October 12, 2006, PharmAthene attempted to contact SIGA regarding the LATS and the parties' ongoing relationships, but received no response. On October 12, PharmAthene sent to SIGA for execution a definitive License Agreement, ostensibly in accordance with the terms of the LATS. On October 13, 2006, SIGA responded that it would review the draft by October 16 and get back to PharmAthene.

On October 18, 2006, SIGA publicly announced the results of its clinical trials showing that SIGA-246 "completely prevents smallpox disease in [a] preliminary primate trial" even when administered after exposure.[16] SIGA's stock soared. The next day, SIGA informed PharmAthene that it had obtained an additional $9 million in a private placement and wished to pay back the Bridge Loan.

Responding to PharmAthene's requests for action on the License Agreement, SIGA proposed the parties meet on November 6, 2006 to engage in a "robust discussion."[17] When they met, SIGA stated that it did not consider the LATS binding, and that the terms reflected in that document no longer were acceptable. PharmAthene disagreed. Next, SIGA proposed to present and PharmAthene agreed to consider a formal partnership proposal.

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16 *Id.* ¶ 50.

17 *Id.* ¶¶ 52-53.

On November 21, 2006, SIGA forwarded to PharmAthene a 102-page document, entitled "Limited Liability Company Agreement." According to PharmAthene, this document completely ignored the LATS. For example, the upfront payment required for a license of SIGA-246 increased from $6 million in the LATS to $100 million; the milestone payments increased from $10 million to $235 million; and SIGA's royalty percentage doubled. After reviewing the Limited Liability Company Agreement, PharmAthene disputed SIGA's claim that the LATS was not binding, but offered to continue to negotiate in good faith a license agreement with the terms set forth in the LATS and to consider additional terms consistent with the LATS.

In a letter to PharmAthene, dated December 12, 2006, SIGA stated further discussions about a potential partnership would not be fruitful if the parties could not meet "without preconditions" relating to the LATS, the Bridge Loan Agreement, and the Merger Agreement. PharmAthene then commenced this action on December 20, 2006.

B. Procedural History

PharmAthene's Complaint asserts seven claims for relief. The first four counts allege the existence of a contract between PharmAthene and SIGA either in the form of a license agreement in accordance with the terms of the LATS or an enforceable obligation to execute such a license agreement. Count one, for example, essentially seeks specific performance. It alleges PharmAthene offered SIGA a "definitive license agreement" in accordance with the LATS, the Bridge Loan Agreement, and the Merger Agreement and seeks an order directing SIGA to execute that license agreement or such other license agreement in accordance with the terms of the referenced documents as the court directs.

Counts two through four also rely on the LATS, the Bridge Loan Agreement, and the Merger Agreement, among other things. Count two seeks a declaratory judgment that SIGA is obligated to execute a license agreement as in count one and "is precluded from entering into a license agreement for SIGA-246 with any third party or otherwise exploiting the benefits of SIGA-246 developed in collaboration with PharmAthene." Counts three and four both sound in breach of contract and seek damages. Count three asserts SIGA and PharmAthene, through the referenced documents and their conduct, entered into an enforceable license agreement, and SIGA breached that agreement. The alleged breach in count four is of SIGA's obligation to execute a definitive license agreement in accordance with the LATS and other referenced documents.

As to the remaining counts of the Complaint, PharmAthene also seeks damages for breach of contract in count five. The alleged breach, however, is of SIGA's express duty under the Bridge Loan Agreement and the Merger Agreement "to negotiate in good faith towards execution of 'a definitive license agreement in accordance with the terms set forth' in the [LATS]" and its duty under the Merger Agreement to use its "best efforts . . . to carry out and consummate the transactions contemplated" by the Merger Agreement, which included the execution of a definitive license agreement. PharmAthene seeks relief in count six on a theory of promissory estoppel, and in count seven on a theory of unjust enrichment.

On January 9, 2007, SIGA moved to dismiss the Complaint in its entirety pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be

granted.[18] After considering the parties' briefing and argument on SIGA's motion to dismiss, this is the Court's ruling on that motion.

II. ANALYSIS

A. Standard for Dismissal under Rule 12(b)(6)

The standard for dismissal pursuant to Rule 12(b)(6) for failure to state a claim is well settled. A court will grant the motion only if it concludes, after accepting all well-pled factual allegations of the complaint and drawing all reasonable inferences in favor of the nonmoving party, that the "plaintiff would not be entitled to recover under any reasonably conceived set of circumstances susceptible of proof."[19] A court need not accept every interpretation of the allegations proposed by the plaintiff; instead, a court will accept those "reasonable inferences that logically flow from the face of the complaint."[20] Additionally, on a motion to dismiss, a court may consider documents that are "integral to or are incorporated by reference into the complaint."[21]

Consistent with the standard for assessing a Rule 12(b)(6) motion to dismiss, I have not considered the affidavit of Eric Richman. In support of its opposition to SIGA's

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[18] SIGA also moved to stay discovery pending resolution of its motion to dismiss. I granted that motion over PharmAthene's objections on March 8, 2007. *PharmAthene, Inc. v. SIGA Techs., Inc.*, C.A. No. 2627-VCP, at 9 (Del. Ch. Mar. 8, 2007) (TRANSCRIPT).

[19] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

[20] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

[21] *In re Lukes Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).

motion, PharmAthene submitted the affidavit of Richman, its Senior Vice-President for Business Development & Strategic Planning. Under Rule 12(b)(6), however, the Court may not consider matters outside the pleadings when assessing a motion to dismiss for failure to state a claim. The only exceptions to this prohibition relate to documents that either are integral to a plaintiff's claim and incorporated into the complaint or are not being relied upon to prove the truth of their contents.[22] The Richman affidavit does not fall under either exception.

B. Choice of Law

Before applying the 12(b)(6) standard, the Court must determine, as a preliminary matter, which state's substantive law governs Plaintiff's claims. SIGA argues New York law governs, while PharmAthene contends Delaware law applies.

Delaware applies the most significant relationship test from the Restatement (Second) of Conflicts of Laws.[23] Under the most significant relationship test, in a

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[22] *See Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

[23] *See Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991). "As the forum state, Delaware must apply its own choice of law rule." *Nat'l Acceptance Co. of Cal. v. Mark S. Hurm, M.D., P.A.*, 1989 WL 70953, at *2 (Del. Super. June 16, 1989). Under the most significant relationship test, courts consider seven broad policy considerations: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(1) (1997) (hereinafter "REST. 2D CONFL. OF LAWS") (citing REST. 2D CONFL. OF LAWS § 6 (1971)).

contract action, courts consider: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the subject matter of the contract; and (4) the domicile, residence, nationality, place of incorporation, and place of business of the parties to the contract.[24] Unjust enrichment and promissory estoppel claims are governed by the same analysis.[25]

Where a contract includes a choice of law provision, the Restatement (Second) of Conflicts of Laws § 187(1) states that "[t]he law of the state chosen by the parties . . . will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."[26] The choice of law provision will govern even when the issue is one that normally is not resolved by explicit provision in an agreement unless: (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[27]

For cases where a contract or agreement specifies the choice of Delaware law, Delaware's public policy is reflected in 6 *Del. C.* § 2708, which provides:

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[24] *See Feinberg v. Saunders, Karp & Megrue, L.P.*, 1998 WL 863284, at * 7 (D. Del. Nov. 13, 1998) (discussing REST. 2D CONFL. OF LAWS § 188(2) (1971)).

[25] *See id.*

[26] REST. 2D CONFL. OF LAWS § 187(1) (1988).

[27] *Id.* § 187(2)(a)-(b).

> (a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflicts of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process. *The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.*
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> (b) Any person may maintain an action in a court of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part and which contains the provision permitted by subsection (a) of this section.
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> (c) This section shall not apply to any contract, agreement or other undertaking . . . (ii) involving less than $100,000.[28]

Delaware courts generally honor contractually-designated choice of law provisions so long as the jurisdiction selected bears some material relationship to the transaction.[29]

Moreover, Delaware courts have held that a choice of law provision within a contract "should not be interpreted in a crabbed way that creates a commercially senseless bifurcation between pure contract claims and other claims that arise solely

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[28] 6 *Del. C.* § 2708 (emphasis added); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1046-47 (Del. Ch. 2006).

[29] *See J.S. Alberici Const. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 (Del. 2000) (citing *Annan v. Wilm. Trust Co.*, 559 A.2d 1289, 1293 (Del. 1989)).

because of the nature of the relations between the parties created by the contract."[30] As this Court recently noted in *Abry Partners V*:

> When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship. We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of possible failure disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship. Nor do we believe such a person would reasonably desire a protracted litigation battle concerning only the threshold question of what law was to be applied to which asserted claims or issues. Indeed, the manifest purpose of a choice-of-law clause is precisely to avoid such a battle.[31]

Here, the LATS is silent regarding choice of law; the Bridge Loan Agreement, in § 7.11, designates New York law; and the Merger Agreement, in § 13.5, designates Delaware law. In urging application of New York law, SIGA notes its principal place of business is in New York, the subject matter of the license, SIGA-246, is in New York, many of the negotiations as well as much of PharmAthene's part performance took place in New York, and the Bridge Loan Agreement specifies New York law. PharmAthene contends Delaware law should apply because the Merger Agreement states that Delaware law shall govern, and it was the last of the agreements executed by the parties. Further,

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30 *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-33 (Del. Ch. 2005), *aff'd*, 894 A.2d 407, (TABLE) (Del. 2005).

31 *Abry Partners V, L.P.*, 891 A.2d at 1048 n.25 (quoting *Nedlloyd Lines B.V. v. Superior Ct. of San Mateo County*, 834 P.2d 1148, 1154 (Cal. 1992)).

the determination of whether § 12.3 of the Merger Agreement, in conjunction with the appended copy of the LATS, requires the parties to negotiate in good faith a license agreement in accordance with the terms of the LATS, or permits SIGA to insist on a license with materially different terms, lies at the heart of many of the counts of the Complaint.

Consistent with § 187 of the Restatement, the fact that the parties specified the state whose law will be applied in the Bridge Loan Agreement and the Merger Agreement convinces me that I should look to those agreements to determine the appropriate choice of law, rather than the most significant relationship test. As to which of the two agreements should control the choice of law, I conclude the Merger Agreement takes precedence. The sequence of events is likely to be material to the resolution of the disputes presented in this action, and the Merger Agreement is the last of the agreements signed by the parties. In addition, the scope of that agreement in terms of the relationship between the parties is broader than the Bridge Loan Agreement. Based on those factors and the fact that the Merger Agreement bears importantly on the issues before this Court and is involved in each of at least counts one to five, I will analyze the issues presented by SIGA's motion to dismiss under Delaware law.[32]

[32] I also hold that Delaware law should govern the issues raised by PharmAthene's promissory estoppel and unjust enrichment claims, because those claims arise solely from the nature of the relations between the parties reflected in, among other things, the Merger Agreement. *See Weil*, 877 A.2d at 1032-33.

C. Counts One to Four

Counts one through four are premised on the existence of an agreement to enter into a license agreement consistent with the terms of the LATS. Specifically, in counts one through four, PharmAthene seeks specific performance, declaratory relief,[33] and breach of contract damages. PharmAthene primarily argues that the LATS, the Bridge Loan Agreement, the Merger Agreement, and PharmAthene's related conduct, taken together, reflect an enforceable agreement by SIGA to enter into a license agreement consistent with the terms of the LATS. SIGA responds that all four counts fail because no enforceable agreement exists binding it to enter into a license agreement conforming to the LATS. SIGA asserts the parties never intended to make such an agreement to agree, citing the "Non Binding Terms" language of the LATS. Additionally, SIGA argues that, in any event, the Court cannot specifically enforce such an agreement, because the LATS does not contain all of the material and essential terms to be incorporated into the final license agreement.

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[33] Parties to a contract may seek a declaratory judgment to determine "any question of construction or validity" and may seek a declaration of "rights, status or other legal relations thereunder." 10 *Del. C.* § 6502. Declaratory relief is in the discretion of the Court and not available as a matter of right. 10 *Del. C.* § 6506. Here, PharmAthene seeks two declarations – that SIGA is obligated to execute the License Agreement PharmAthene proposed or such other license agreement in accordance with the terms of the LATS, the Bridge Loan Agreement, and the Merger Agreement as the Court decrees; and that SIGA is precluded from entering into a license agreement for SIGA-246 with any third party or otherwise exploiting the benefits of SIGA-246. Neither party discussed the second or preclusionary aspect of PharmAthene's request for declaratory relief. Accordingly, I do not consider it material to resolution of SIGA's motion.

In evaluating SIGA's motion to dismiss as to counts one to four, I first address whether the allegations in the Complaint and reasonable inferences from them could support a conclusion that the parties intended to be bound to an agreement to enter into a license agreement consistent with the terms of the LATS. I conclude that by virtue of the cumulative effect of the LATS, the Bridge Loan Agreement, the Merger Agreement, and the parties' conduct, PharmAthene conceivably could prove the parties intended to be bound to such an agreement. Next, I address whether that agreement to agree could be legally enforceable, and determine that it could be. Lastly, I consider whether PharmAthene adequately has pled a claim for specific performance of the alleged agreement. Because PharmAthene conceivably could establish, by clear and convincing evidence, that the agreement to agree contains all the material and essential terms to be incorporated in the final contract, and overcome SIGA's other objections, I hold SIGA is not entitled to dismissal of PharmAthene's request for specific performance or any of counts one through four.

1. Intent to be bound

a. The LATS

On January 26, 2006, after discussing a possible collaboration in the development and commercialization of SIGA-246, PharmAthene and SIGA memorialized their agreement in the LATS. The LATS, a two page, unsigned document, addresses the parameters of the parties' contemplated partnership. The LATS, which broadly addresses a number of topics, expressly contains the phrase "Non Binding Terms" at the bottom of both pages.

After entering into the LATS, PharmAthene expended funds, transferred information, and provided management and technological know-how to SIGA. Indeed, for the first ten months of 2006, PharmAthene remained in constant contact with SIGA and played an active role in developing SIGA-246.

Neither the LATS alone nor the LATS together with PharmAthene's partial performance are likely to be sufficient to show the parties intended to be bound by the LATS as an agreement to agree. Not even PharmAthene contends the unsigned LATS alone, with the "Non Binding Terms" legend, creates an enforceable contract. PharmAthene does rely, however, on its alleged partial performance between January and October 2006 of its obligations relating to the joint development of SIGA-246 to support making the LATS enforceable. Considered in a vacuum, without regard to the other signed and unsigned documents the parties negotiated in the first half of 2006, the LATS and PharmAthene's part performance might not be sufficient to overcome the nonbinding legend on the LATS itself and demonstrate an intent to bind SIGA to negotiate a license agreement having terms consistent with those specified in the LATS.[34] The parties did

[34] In assessing whether parties intended to bind themselves to a preliminary agreement, the language of the agreement is the "most important" consideration. *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 549 (2d Cir. 1998). Because the LATS expressly states that it contains "Non Binding Terms," it is questionable whether PharmAthene's partial performance could override that language and demonstrate the existence of a binding agreement. In one case applying New York law, because the court could readily determine that a contract of a proposed sale was nonbinding from the agreement's plain language, the court concluded the agreement was nonbinding even though there had been "considerable partial performance." *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989). Similarly, in another New York case, the court rejected an argument that the parties' substantial performance indicated an intent

negotiate several additional documents, however, and PharmAthene bases its claims on those documents, as well.

b. The Letter of Intent and the Merger Term Sheet

On or about March 9, 2006, the parties signed a Letter of Intent regarding the proposed terms of a merger of PharmAthene into a subsidiary of SIGA. The Letter of Intent stated that it was an indication of the parties' intention to consummate a merger with terms "expected to be in accordance with" an attached Merger Term Sheet. The Letter of Intent further stated, "The parties agree to negotiate in good faith, and to use their best efforts to (a) execute a definitive agreement with respect to the [Merger] as expeditiously as possible, on or before April 24, 2006, and (b) close the transaction as soon as is reasonably practicable."[35]

The Merger Term Sheet provides that upon any termination of it or a definitive merger agreement, the parties will negotiate in good faith the terms of a definitive license agreement in accordance with the terms set forth in the LATS, which was attached. The Merger Term Sheet also provides that PharmAthene or its shareholders will provide bridge financing in the form of a promissory note ("Bridge Loan") to SIGA of no less than $3 million. If the contemplated merger failed to close, the Merger Term Sheet specified certain details of SIGA's obligation to repay the Bridge Loan.

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to be bound to a term sheet, when the term sheet expressly reserved the right of the parties not to be bound. *Kreiss v. McCown de Leeuw & Co.*, 37 F. Supp. 2d 294, 300 (S.D.N.Y. 1999). PharmAthene did not cite to any contrary Delaware law.

[35] The Letter of Intent ¶ 1.

c. The Bridge Loan Agreement

As the development of SIGA-246 continued, SIGA required additional capital which PharmAthene agreed to provide. Therefore, consistent with the Letter of Intent, on March 20, 2006, the parties entered into the Bridge Loan Agreement. That Agreement obligated PharmAthene to loan SIGA $3 million for expenses related to the development of SIGA-246 and the Merger and corporate overhead. Although PharmAthene made the Bridge Loan in reliance on the parties' agreements for a continuing relationship regarding SIGA-246, the Bridge Loan Agreement explicitly recognized the possibility that ultimately they might not agree on either a merger or a license agreement. Specifically, the Bridge Loan Agreement provides in § 2.3 that:

> Upon any termination of the Merger Term Sheet . . . , termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed . . . , SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement *in accordance with the terms set forth in the License Agreement Term Sheet* . . . .[36]

Further, the Merger Term Sheet was attached to the Bridge Loan Agreement, and it stated that if no license agreement is executed, the Bridge Loan would be payable no more than two years from the date of the loan, and possibly sooner.

d. The Merger Agreement

On June 8, 2006, the parties executed an agreement and plan of merger, the Merger Agreement. The Merger Agreement is a 74 page document, signed by both parties. Broadly, the Merger Agreement addresses, among other topics: consideration

[36] The Bridge Loan Agreement § 2.3 (emphasis added).

for the merger, the merger's closing, representations and warranties of PharmAthene and SIGA, covenants, and conditions and obligations of PharmAthene and SIGA. Further, by its terms the Merger Agreement would terminate, if the parties did not close the merger by September 30, 2006.

Similar to § 2.3 of the Bridge Loan Agreement, § 12.3 of the Merger Agreement provides, in relevant part:

> Upon any termination of this Agreement, SIGA and Pharmathene will negotiate in good faith with the intention of executing a definitive License Agreement *in accordance with the terms set forth in the License Agreement Term Sheet . . .* .[37]

Section 13.3 provides that each party shall use its "best efforts" to carry out and consummate the transactions contemplated by the Agreement.[38] The meaning of the "in accordance with" language in § 12.3 of the Merger Agreement is critical to whether or not the parties intended to bind themselves to enter into a license agreement consistent with the terms of the LATS.

Under Delaware law, contract construction is a question of law.[39] In interpreting a contract, the court strives to determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent."[40] As part of that

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37 The Merger Agreement § 12.3 (emphasis added).

38 *Id.* § 13.3.

39 *See Rhone-Poulenc Basic Chems. Co. v. Amer. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

40 *Matulich v. Aegis Comm'ns Group, Inc.*, 2007 WL 1662667, at *4 (Del. Ch. May 31, 2007) (citing *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del.

review, the court interprets the words "using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise."[41] If the contractual language is "clear and unambiguous," the ordinary meaning of the language will generally establish the parties' intent.[42] A contract is ambiguous, however, when the language "in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[43] Stated differently, to succeed on its motion, SIGA must establish that its construction of the Merger Agreement is the only reasonable interpretation.

Both parties acknowledge that, when interpreting a contract, Delaware courts try to avoid an interpretation that would render a provision illusory or meaningless.[44] SIGA argues the obligation to negotiate in good faith "in accordance with" the terms set forth in the LATS does not constitute an obligation to actually enter into an agreement, but only to engage in good faith negotiations. Further, SIGA contends the phrase "Non Binding"

1996)); *Brandywine River Prop., Inc. v. Maffet*, 2007 WL 4327780, at *3 (Del. Ch. Dec. 5, 2007).

41 *Cove on Herring Creek Homeowners' Assoc. v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005) (quoting *Paxson Commc'ns Corp. v. NBC Universal, Inc.*, 2005 WL 1038997, at *9 (Del. Ch. Apr. 29, 2005)).

42 *Brandywine River*, 2007 WL 4327780, at *3.

43 *Rhone-Poulenc*, 616 A.2d at 1196. Ambiguity does not exist simply because the parties do not agree on a contract's proper construction. *United Rentals, Inc. v. Ram Holdings, Inc.*, 2007 WL 4496338, at *15 (Del. Ch. Dec. 21, 2007).

44 *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992); *Gillenardo v. Connor Broad. Del. Co.*, 2002 WL 991110, at *7 (Del. Super. Ct. Apr. 30, 2002).

in the LATS meant that it was free to negotiate terms addressed in the LATS, such as economic amounts, in its best interest, even if that meant seeking terms materially different from the LATS. SIGA also notes that the parties could have removed the phrase "Non Binding" when they attached the LATS to the Merger Agreement, but did not.[45]

PharmAthene argues the "Non Binding" legend in the LATS meant the parties could not simply sign the LATS because, while it contained all of the material terms, the parties recognized they needed additional provisions and language to have a definitive license agreement. PharmAthene further asserts that, consistent with § 12.3 of the Merger Agreement, any additional terms had to be consistent or "in accordance with" the terms of the LATS. Therefore, PharmAthene contends its reading of the LATS and the Merger Agreement does not render the language illusory or meaningless, while SIGA's reading does.

I find the "in accordance with the terms set forth in the [LATS]" language in the Bridge Loan Agreement and the Merger Agreement fairly susceptible to at least two reasonable interpretations and therefore ambiguous. The record relevant to SIGA's motion to dismiss indicates the parties originally created the LATS in January 2006 as a stand alone document. There was no accompanying letter of intent or similar document

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[45] Additionally, SIGA unpersuasively argues that PharmAthene's position that the LATS is definite, certain, and sufficient would render § 12.3 meaningless. It is not uncommon for parties to agree on the major terms of a license agreement with the understanding that a definitive agreement including many other relatively standard terms will be necessary. The Complaint and supporting documents support a reasonable inference that that is what occurred here, although the evidence ultimately may show otherwise.

to provide context for the LATS. In these circumstances, it is reasonable to infer the parties intended the "Non Binding Terms" legend on each page to make clear they had not yet reached agreement on a license agreement.[46] The situation is significantly less clear as to the meaning of the provisions of the Bridge Loan Agreement, executed in late March 2006, and the Merger Agreement, executed in June 2006, referencing the terms of the LATS. SIGA's argument that, notwithstanding those documents, it remained free to negotiate terms of a definitive license agreement in its best interests whether or not they comported with the LATS conceivably would render the "in accordance with" language of the two agreements illusory. On the other hand, the Court cannot rule out SIGA's construction as unreasonable, because it draws at least some support from the legend on the LATS indicating that its terms are nonbinding.

PharmAthene's proffered interpretation of the "in accordance with" language, though, is also reasonable. The Bridge Loan Agreement refers to a "proposed license agreement" and states that SIGA and PharmAthene will "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS]." The "in accordance with" language conceivably could reflect the parties' intention to bind themselves to negotiate in good faith with the intention of

[46] In contrast the parties actually signed a Letter of Intent in connection with the Merger Term Sheet in March 2006. The Letter of Intent stated that it was an indication of the parties' intention to consummate a merger with terms "expected to be in accordance with" an attached Merger Term Sheet. This language effectively conveys the nonbinding nature of the Merger Term Sheet.

executing a license agreement consistent with the terms of the LATS, notwithstanding the "Non Binding Terms" legend.

The same reasoning applies with greater force to the nearly identical language relating to the LATS in the Merger Agreement executed on June 8, 2006. The Merger Agreement is a complicated and extensive agreement of the parties regarding a possible mechanism for their continuing collaboration on SIGA-246, among other things. By the time the parties entered into that agreement, PharmAthene allegedly had provided significant partial performance of its perceived obligations. In these circumstances and giving the phrase "in accordance with the terms set forth in the [LATS]" its ordinary meaning, I find PharmAthene conceivably could adduce facts that support the allegations in its Complaint that the parties intended to bind themselves to enter into a license agreement consistent with the LATS.[47] At this early stage in the litigation, the record does not disclose whether the parties ever discussed the apparent inconsistency between the "in accordance with" language in the Merger Agreement and the "Non Binding Terms" legend on the LATS. In sum, because SIGA has not shown its interpretation of the disputed provisions, particularly the "in accordance with" language, is the only

[47] In its briefing, SIGA argued that merely conforming to the general "framework" specified in the LATS in terms of, for example, a collaboration on SIGA-246 that encompassed upfront and milestone payments, royalties, a joint research and development committee, a worldwide territory, and other items within the framework set forth in the LATS, would satisfy the "in accordance with" requirement, even if the substantive terms in those areas materially differed from the LATS. Assuming arguendo such an interpretation might apply, I find PharmAthene's construction requiring conformity to the substance of the terms of the LATS represents a reasonable alternative interpretation.

reasonable one, I find the provisions ambiguous. Contract ambiguities generally are not amenable to resolution on a motion to dismiss.[48]

2. Is the agreement to agree legally enforceable?

Having concluded PharmAthene conceivably could establish that the parties intended to be bound to an agreement to enter into a license agreement consistent with the substantive terms of the LATS, I next address whether that agreement to agree could be legally enforceable.

Under Delaware law, parties may make agreements to make a contract and such an agreement "will be enforced if the agreement specifies all of the material and essential terms including those to be incorporated in the future contract."[49] In evaluating SIGA's motion to dismiss counts one to four, it is reasonably conceivable that PharmAthene could prove, based on the facts alleged in the Complaint, the LATS contains all material and essential terms of the contemplated license agreement.

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[48] *See Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

[49] *Vale v. Atl. Coast & Inland Corp.*, 99 A.2d 396, 399 (Del. Ch. 1953). The cases cited by the parties for this proposition discussed it in the context of a claim for specific performance as a remedy. PharmAthene's count one seeks specific performance and is addressed further in Part II.C.3, *infra*. Counts two through four of the Complaint seek other forms of relief, but also assert the existence of a legally binding contract to enter into a license agreement that includes the substantive terms of the LATS. In my opinion, to succeed on such a claim, as opposed to a claim based solely on contractual duties to negotiate a license agreement in good faith, as asserted in count five (discussed in Part II.D, *infra*), PharmAthene still would have to prove the LATS specified all the material and essential terms of the license agreement.

As previously noted, the LATS is a two page document addressing the parameters of the parties' planned partnership. It describes the parties' objective as: "To establish a partnership to further develop & commercialize SIGA-246 for the treatment of Smallpox and orthopox related infections and to develop other orthopox virus therapeutics." Further, the LATS specifies a collaboration encompassing a worldwide territory in the fields of "[a]ll therapeutic and prophylactic uses of Products," defined as including: SIGA-246; any orthopox related small molecule therapeutic product derived from the same family of lricyclononenes that SIGA-246 was derived from; anti-orthopoxvirus compounds discovered in the original screen which are mechanically identical but chemically distinct; and any compounds covered by patents whose claims include SIGA-246.

According to the LATS's "Licenses" section, "SIGA shall grant a worldwide exclusive license" under the Patents, Know-How, and Materials, as defined, to "use, develop, make, have made, sell, export and import Products in Field. The right to grant sublicenses shall be specifically included in the license." The LATS also provides for a $6 million License Fee, of which $2 million would be due upfront and the remainder in deferred payments according to a schedule outlined in the LATS.

In addition, the LATS sets forth Milestone and Royalty terms. Regarding Milestones, the LATS provides that as the Product development progressed various cash milestones would become due. For example, approval of a new drug application or NDA would trigger a $2 million cash milestone; the first United States Government contract sale exceeding $50 million another of $3 million; and sales in excess of $200 million

another of $2 million. Regarding Royalties, PharmAthene would pay SIGA incremental royalties for corresponding portions of yearly net sales of Patented Products at a rate of 8% for sales less than or equal to $250 million, 10% of sales greater than $250 million, and 12% of sales exceeding $1 billion.

SIGA argues the LATS does not contain all the material terms of a sophisticated biotechnology license agreement. According to SIGA, even the terms that were included were far from certain in that they were expressly "Non Binding." SIGA also avers the parties' conduct and course of dealing in executing letters of intent and term sheets before entering into the Merger and Bridge Loan Agreements demonstrate their understanding that sophisticated multi-million dollar license agreements of this scope and complexity would require a written, formal, comprehensive, definitive agreement.

PharmAthene responds that there is a binding license agreement between the parties because all of the material and essential terms were agreed upon with certainty, as reflected in the LATS. It also points to the parties' subsequent conduct as illustrating the lack of any open material terms.

SIGA's argument is too conclusory to be convincing. SIGA did not cite any legal authority for its contention the LATS lacks certain material or essential terms of a license agreement. Hence, the issue is primarily one of fact. At this early stage in the proceeding, however, the facts remain to be developed. Moreover, SIGA has failed to cite anything in the Complaint and its related documents that would enable me to conclude PharmAthene could not conceivably show from the facts alleged that the LATS addresses all the material and essential terms of the license agreement.

As appears from the previous recitation of various terms prescribed in the LATS, the document does address a number of terms that would be material and essential to a license agreement of the kind contemplated here. Those terms include the technology involved, the geographic scope of the license, the nature of the license rights to be granted, such as the right to grant sublicenses, the products covered, and the royalties to be paid. It certainly is open to question whether the terms mentioned in the LATS constitute *all* of the material and essential terms of the license, but resolution of that issue must await further development of the record.

The parties' conduct, as alleged in the Complaint, further supports this conclusion. Beginning in late 2005, SIGA and PharmAthene discussed and negotiated a framework agreement for their collaboration, through oral and written communications and the exchange of drafts of a term sheet. In January 2006, SIGA and PharmAthene reached agreement on a basis for the development and marketing of SIGA-246 and memorialized their understanding in the LATS.

Extensive discussions and planning about development followed. PharmAthene began expending funds, transferring information to SIGA, and providing management, marketing, and technical know-how. SIGA's and PharmAthene's business, technical, and scientific personnel were in constant contact.

When these discussions occurred, SIGA needed capital for the development of SIGA-246. Thus, as part of the Merger Term Sheet, SIGA sought, and PharmAthene agreed to provide, bridge financing. On March 20, 2006, PharmAthene entered into the

Bridge Loan Agreement and later lent SIGA $3 million. On June 8, 2006, the parties executed the Merger Agreement.

From January 2006 to October 2006, PharmAthene provided capital, management, and technical know-how in reliance on the LATS, which SIGA accepted and used to develop SIGA-246. Among other things PharmAthene pushed for, modified, and funded clinical trials of SIGA-246, prepared for and made presentations to government agencies with SIGA, recommended avenues for advancing the development of SIGA-246, evaluated and recommended manufacturers, and assisted on quality control and quality assurance. Taken together, PharmAthene's actions are sufficient to support a reasonable inference that it, at least, believed the LATS covered all the material and essential terms of the license agreement.

Finally, nothing in the allegations in the Complaint or the documents incorporated in it indicates the LATS did not address all the material terms. The parties' negotiations regarding a definitive license agreement in October and November 2006 appear to have failed because SIGA insisted on substantive terms that differed drastically from the terms set forth in the LATS. SIGA has not cited any instance where the parties reached an impasse about a term not dealt with in the LATS.

In sum, I cannot rule out the possibility that PharmAthene could show the LATS contains all of the material and essential terms to be incorporated into the definitive license agreement. Thus, I will not dismiss counts one to four for lack of an enforceable agreement.

3. Is the agreement to agree specifically enforceable?

Next, I consider whether PharmAthene adequately has pled its claim in count one for specific enforcement of the alleged license agreement. Under Delaware law, "a contract to make a contract may be specifically enforced if it contains all of the material and essential terms to be incorporated into the final contract, and if those terms are definite and certain."[50] Further, a party seeking specific performance has the burden of proving the existence of an enforceable contract by clear and convincing evidence.[51] The decision as to the availability of specific performance rests within the sound discretion of this Court.[52]

As discussed in Part II.C.2, *supra*, based on the allegations in the Complaint and the associated documents, it is reasonably conceivable that PharmAthene could show the LATS contains all of the material and essential terms to be incorporated into the final license agreement. For essentially the same reasons, I consider it conceivable that PharmAthene also could establish that proposition by clear and convincing evidence and show that the terms of the LATS are sufficiently definite and certain to support a claim for specific performance. Thus, I cannot dismiss count one on any of those grounds.

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50 *Hazen v. Miller*, 1991 WL 244240, at *5 (Del. Ch. Nov. 18, 1991) (citing *Vale*, 99 A.2d at 399); *M.F. v. F.*, 172 A.2d 274, 276 (Del. Ch. 1961).

51 *See Williams v. White Oak Builders, Inc.*, 2006 WL 1668348, at *4 (Del. Ch. June 6, 2006) (quoting Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery*, § 12-3, at 12-35 (2000)).

52 *See Gildor v. Optical Solutions, Inc.*, 2006 WL 1596678, at *10 (Del. Ch. June 5, 2006).

SIGA makes additional arguments, however, against specific performance – *i.e.*, that it would be impractical and inequitable and that money damages would be an adequate remedy. Regarding the impractical and inequitable argument, SIGA asserts that ordering the parties to form a joint Research and Development Committee to work together to research and develop SIGA-246, as contemplated by the LATS, is akin to involuntary servitude. Further, SIGA contends such an order may create a contentious and unproductive work environment, to the detriment of the parties and the public at large, since SIGA-246 potentially would protect against biological warfare. In making its argument, SIGA relies on a case in which the court declined to order members of a band to play together involuntarily under the guise of specific performance.[53] Yet, the facts of this case are readily distinguishable in that PharmAthene's Complaint involves allegations of material partial performance and a sophisticated biotechnology license agreement between two corporations. At this early stage, I am dubious about PharmAthene's claim for specific performance, but am not prepared to reject it as either impractical or inequitable.

As to the adequacy of money damages, SIGA argues damages would be sufficient because there is nothing unique about the subject matter of the alleged license agreement. Again, based on the record before me, PharmAthene conceivably could succeed in establishing that the subject matter of the alleged contract is unique. Accordingly, I reject SIGA's additional arguments for dismissal of count one.

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[53] *See Read v. Wilmington Senior Ctr., Inc.*, 1992 WL 296870, at *1 (Del. Ch. Sept. 16, 1992).

D. Count Five

In count five, PharmAthene seeks damages for breach by SIGA of its express duties under the Bridge Loan Agreement and the Merger Agreement to negotiate in good faith a definitive license agreement in accordance with the terms set forth in the LATS and under the Merger Agreement to use its best efforts to carry out and consummate the transactions contemplated by that Agreement.

In moving to dismiss count five, SIGA argues PharmAthene does not allege that SIGA refused to meet or discuss potential collaboration regarding SIGA-246, prematurely cut-off discussions, or negotiated with another party. Rather, PharmAthene acknowledges the negotiations that ensued between the parties after the Merger Agreement expired.[54] SIGA further argues that it satisfied its obligations to negotiate terms in accordance with the LATS by proposing terms consistent with the "general framework" set forth in the LATS. According to SIGA, however, the specific terms of

[54] SIGA contends it did negotiate in good faith, chronicling the parties' negotiations, as alleged in the Complaint: PharmAthene presented SIGA with a draft license agreement; SIGA reviewed and discussed the draft agreement; at SIGA's suggestion, the parties met face-to-face to discuss a potential collaboration on November 6, 2006; SIGA suggested a "formal partnership" between the two companies; SIGA agreed, at PharmAthene's request, to provide a written collaboration proposal; less than three weeks later, SIGA provided PharmAthene with a 102-page draft Limited Liability Company Agreement detailing a potential collaboration; PharmAthene rejected the draft agreement; and SIGA informed PharmAthene that it was willing to meet again to discuss a potential collaboration.

the LATS were "Non Binding," thus permitting it to negotiate in its best interest, for example, the particular economic amounts.[55]

PharmAthene argues that, by negotiating for different economic terms than were in the LATS, SIGA breached § 12.3 of the Merger Agreement and § 2.3 of the Bridge Loan Agreement. For the reasons previously stated, I consider the phrase "in accordance with" in those contract provisions ambiguous and believe PharmAthene conceivably could show § 12.3, for example, committed the parties to the terms they agreed upon in the LATS and to negotiate in good faith other terms consistent with the LATS. Based on that conclusion and the allegations in the Complaint that SIGA insisted materially different terms, PharmAthene conceivably could succeed in proving SIGA breached its obligations under the Bridge Loan and Merger Agreements to negotiate in good faith and use its best efforts to conclude a license agreement with PharmAthene in accordance with the terms set forth in the LATS. Thus, I deny SIGA's motion to dismiss count five for breach of express covenants for failure to state a claim.

E. Promissory Estoppel

In counts six and seven, PharmAthene assumes an ultimate failure to prove an enforceable contract and seeks relief under alternative theories of promissory estoppel

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[55] Additionally, SIGA discounts the "best efforts" clause in the Merger Agreement as a generic provision in the "Miscellaneous" section stating that each party will use its "best efforts to take such actions as may be necessary or reasonably requested by the other parties hereto to carry out and consummate the transactions contemplated by this Agreement." According to SIGA, when applied to § 12.3, the best efforts clause merely requires SIGA to use its best efforts for the prescribed 90 days to negotiate in good faith exclusively with PharmAthene a definitive license agreement.

and unjust enrichment. In count six, PharmAthene requests recovery under promissory estoppel on grounds that it was damaged when it provided SIGA with management expertise, technical know-how, and capital in reliance on SIGA's promise that it wanted and intended to enter into an ongoing relationship with PharmAthene as to SIGA-246 upon the terms set forth in the LATS.

According to SIGA, PharmAthene failed to allege a clear and unambiguous promise to enter into a license agreement on the terms set forth in the LATS. SIGA argues that in the absence of such a promise, any reliance by PharmAthene was unreasonable and unforeseeable, and any supposed injury well short of an actionable injustice. SIGA further contends that the LATS cannot constitute a promise upon which PharmAthene could reasonably rely given that each page plainly states "Non Binding Terms." Similarly, SIGA argues that neither the Bridge Loan Agreement nor the Merger Agreement provides the requisite clear and unambiguous promise, because both agreements require only that the parties negotiate toward a license agreement, indicating there was no such agreement in place.

Under Delaware law, to establish a claim for promissory estoppel, a plaintiff must show by clear and convincing evidence that: (1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (3) the promisee reasonably relied on the promise and took action to his

detriment; and (4) such promise is binding because injustice can be avoided only by enforcement of the promise.[56]

SIGA seeks dismissal of count six on the grounds that the documents on which PharmAthene relies in its Complaint show SIGA never unequivocally promised to enter into a collaboration with PharmAthene on the terms set forth in the LATS and that any alleged reliance by PharmAthene was unreasonable. The Complaint alleges that once PharmAthene and SIGA reached agreement on the LATS, PharmAthene began expending funds, transferring information to SIGA, and providing management, marketing, and technical know-how. On March 20, 2006, PharmAthene entered into the Bridge Loan Agreement. PharmAthene asserts it made this loan in reliance on SIGA's obligation under § 2.3 of the Bridge Loan Agreement to negotiate in good faith a definitive license agreement in accordance with the LATS. Similarly, after execution of the Merger Agreement, PharmAthene continued to provide SIGA advice and assistance for the development of SIGA-246 in reliance on SIGA's representation in § 12.3, that upon termination of the merger the parties would negotiate in good faith a definitive license agreement "in accordance with the terms set forth in the [LATS]." In this context, PharmAthene alleges in its promissory estoppel claim that:

> Siga clearly and unequivocally promised PharmAthene, orally and in writing, and throughout the parties' dealings, that it wanted and intended to enter into an ongoing relationship with PharmAthene with respect to SIGA-246 upon the terms set forth in the [LATS], and that if PharmAthene was

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[56] *See RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2001 WL 984689, at *14 (Del. Ch. Aug. 22, 2001); *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000).

> prepared to take the risks of the uncertainties of SIGA-246, it would share in the rewards.[57]

Based on the record before me, and drawing all inferences in PharmAthene's favor, as I must, I find that PharmAthene could show the existence of a promise by SIGA as alleged and reasonable reliance thereon by PharmAthene.[58] Determining whether the other elements for promissory estoppel are met will require a fact intensive inquiry into the details of the parties' dealings. Those issues cannot be resolved on a motion to dismiss.[59] Thus, SIGA's motion to dismiss PharmAthene's promissory estoppel claim is denied.

F. Unjust Enrichment

In count seven, PharmAthene seeks damages constituting the value of the benefits it bestowed on SIGA to prevent unjust enrichment. The Complaint alleges PharmAthene contributed management expertise, technical know-how, and capital, at SIGA's request and with SIGA's express or implied consent, and that SIGA knowingly solicited,

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57 Compl. ¶ 86.

58 *See RGC Int'l*, 2001 WL 984689, at *14 (finding where a party reasonably relied to its detriment on promises contained in a term sheet, the elements of promissory estoppel were met). SIGA attempts to distinguish *RGC International* on the grounds that the term sheet at issue did not include language that the parties expressly reserved the right not to be bound. Def.'s Reply Br. ("DRB") at 21. If PharmAthene's claims relied solely on the LATS, SIGA's argument might be persuasive. In fact, PharmAthene also relies on the Bridge Loan Agreement, the Merger Agreement, and various other documents. These documents render untenable SIGA's attempt to distinguish *RGC International* based on the "Non Binding" language of the LATS.

59 *See Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 74 (2d Cir. 1989).

accepted, and used those contributions to its economic benefit, without any compensation to PharmAthene.

SIGA argues that PharmAthene's unjust enrichment claim should be dismissed on two grounds – there was a justification for providing the supposed enrichment and there was no injustice in allowing SIGA to retain the supposed enrichment. Citing New York law, SIGA asserts that courts reject unjust enrichment claims where there was a self-interested justification for expenditures, noting that unjust enrichment is not an appropriate remedy for recovery of the expenses of failed negotiations.[60] SIGA contends PharmAthene wanted SIGA-246 to succeed so that if and when it either merged or executed a licensing agreement with SIGA, the drug would be in its most optimal stage for commercialization and implementation. SIGA argues that although the parties' negotiations did not materialize as PharmAthene anticipated, PharmAthene had its own business justification for voluntarily giving assistance to SIGA over the course of the negotiations. Therefore, according to SIGA, PharmAthene had a justification for providing the enrichment, and the fact that no license agreement was ever executed does not transform PharmAthene's self-interested efforts into an actionable injustice.

Additionally, SIGA relies on *Palese v. Delaware State Lottery Office*,[61] in which the court dismissed an unjust enrichment claim where there was no injustice in allowing

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60 *See Songbird Jet Ltd. v. Amax Inc.*, 581 F. Supp. 912, 926-27 (S.D.N.Y. 1984); *Beekman Inv. Partners, L.P. v. Alene Candles, Inc.*, 2006 WL 330323, at *8-9 (S.D.N.Y. Feb. 14, 2006).

61 2006 WL 1875915, at *5 (Del. Ch. June 29, 2006).

the defendant to retain the supposed enrichment. In particular, the defendant in *Palese* acted within the bounds of their prescribed legal authority and in conformity with the governing statute and regulations, and thus with justification. According to SIGA, it also was fully justified in accepting and retaining assistance because it was acting within its legal rights in refusing to execute a license agreement containing terms that were expressly stated to be "Non Binding."

PharmAthene defends the adequacy of its unjust enrichment claim. The Complaint alleges that PharmAthene provided funds, information, advice, and management to SIGA for the development of SIGA-246; that as a result SIGA-246 achieved significant success thresholds and SIGA obtained third party financing; and that SIGA received all of the benefits of PharmAthene's assistance while PharmAthene received nothing. Therefore, PharmAthene contends that if the Court finds it does not have a remedy at law, the Complaint states a viable claim for unjust enrichment.

The parties agree the elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of a justification; and (5) the absence of a remedy at law.[62]

Here, the parties primarily dispute the fourth element, the absence of a justification. For many of the reasons previously discussed in connection with PharmAthene's other claims, I find that PharmAthene conceivably could show the

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[62] *See Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999); Pl.'s Ans. Br. at 31; DRB at 22.

absence of a justification for its impoverishment and the correlative enrichment of SIGA. Thus, I deny SIGA's motion to dismiss PharmAthene's unjust enrichment claim.

The cases SIGA cited in support of its motion are either inapposite or not persuasive. For example, in contrast to the situation in the *Palese* case, I cannot say with confidence at this early stage of the litigation that SIGA acted within the bounds of its rights and responsibilities in retaining the benefits of PharmAthene's contributions, while insisting on terms for a license agreement drastically less favorable to PharmAthene than the terms in the LATS. Ultimately, SIGA may succeed in proving its position, but that will require the Court to resolve a number of factual issues suggested by the Complaint. This case also differs from those cited by SIGA for the proposition that a person disappointed in the outcome of a failed contract negotiation is not entitled to recover costs it may have incurred in pursuing such negotiations.[63] The Complaint alleges PharmAthene contributed funds, information, advice, and management assistance that significantly furthered the success of SIGA-246. These contributions, which occurred in the context of an alleged collaboration between PharmAthene and SIGA, differ in kind from the expenses of failed negotiations and conceivably could support a claim for unjust enrichment. The facts of the *Songbird Jet Ltd. v. Amax, Inc.* case[64] SIGA relies on may be more analogous to this dispute. There, however, the court evaluated the plaintiff's

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63 *See Beekman*, 2006 WL 330323, at *8-9.

64 581 F. Supp. 912 (S.D.N.Y. 1984).

unjust enrichment claim on summary judgment with the benefit of an appropriately developed factual record. This case has not reached that stage.

III. CONCLUSION

For the reasons stated, SIGA's motion to dismiss PharmAthene's Complaint is denied in all respects. The stay of discovery ordered on March 8, 2007 is hereby vacated.

IT IS SO ORDERED.