IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Submitted: July 22, 2010
Decided: November 23, 2010

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PARSONS, Vice Chancellor.

This is the next stage in a long-running breach of contract case between PharmAthene, Inc. ("PharmAthene") and SIGA Technologies, Inc. ("SIGA"). The dispute between the parties arose over a licensing agreement term sheet (the "LATS") that they negotiated before entering into merger talks. The parties entered into a merger agreement term sheet to which they attached the LATS and stipulated that, if negotiations for a definitive merger agreement broke down, the parties would negotiate a licensing agreement in good faith in accordance with the terms of the LATS. Later, when the parties failed to finalize the merger agreement, they entered into negotiations for a licensing agreement. SIGA took the position that the LATS was not binding and merely constituted an agreement to agree. Accordingly, SIGA attempted to obtain much more favorable economic terms because SIGA's drug, the subject of the LATS, had passed some important milestones after the parties negotiated the LATS. By contrast, PharmAthene claimed that the LATS was binding and, while it was willing to make some moderate adjustments, argued that the framework of any licensing agreement and its principal terms had to be substantially similar to the LATS. Talks subsequently broke down and PharmAthene sued, alleging, among other things, that SIGA had breached its obligations under the LATS. SIGA has moved for a partial summary judgment declaring that the parties never entered into a binding licensing agreement and that PharmAthene cannot pursue the remedy of expectation damages because it would be too speculative.

For the reasons stated in this Memorandum Opinion, I conclude that PharmAthene has demonstrated that there is a material issue of fact as to whether the parties entered into a binding licensing agreement. PharmAthene also has shown that it is plausible that

upon a more complete record it may be able to demonstrate by clear and convincing evidence that the parties had agreed on all essential terms and, therefore, PharmAthene may be entitled to specific enforcement of the alleged licensing agreement. I further conclude that, although it is unlikely that PharmAthene will be able to prove its claim for expectation damages or to overcome the objections that such damages are simply too speculative in the context of this action, it would be premature to grant summary judgment on that issue. Rather, it should be considered in the context of all of the issues and a full record after trial. Therefore, I deny SIGA's motion for partial summary judgment in all respects.

I. BACKGROUND

A. The Parties

Plaintiff, PharmAthene, a Delaware corporation, has its principal place of business in Annapolis, Maryland, is a biodefense company engaged in the development and commercialization of medical countermeasures against biological and chemical weapons.

Defendant, SIGA, also a Delaware corporation, has its principal place of business in New York, New York. SIGA is a biodefense company concentrating on the discovery and development of oral antiviral and antibacterial drugs to treat, prevent, and complement vaccines for high-threat biowarfare agents.

B. Facts

In 2004, SIGA acquired the technology for a product now known as ST-246,[1] an orally administered antiviral drug for the treatment of smallpox.[2] At that time, the viability of ST-246, its potential uses, safety, and efficacy, and the possibility of its obtaining government approvals and being the subject of government supply contracts were all unknown. There was a possibility that, with cash, marketing, and technical knowledge, ST-246 might become an important weapon against smallpox and, therefore, extremely valuable. There was also the possibility that any money or effort invested in ST-246 would be for naught.

By late 2005, SIGA experienced some difficulties developing ST-246 and bringing it to market. Around this time, SIGA and PharmAthene discussed a possible collaboration.[3] Through an exchange of oral and written communications, SIGA and PharmAthene negotiated a framework agreement for their collaboration regarding the development and commercialization of ST-246.

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1 ST-246 is alternately referred to as "SIGA-246" and "246."

2 For the most part, unless otherwise indicated, the facts recited in this Memorandum Opinion are undisputed and, therefore, are not accompanied by citations to the evidentiary record. Where there is any doubt, appropriate citations are provided. For more background, see the January 16, 2008 Memorandum Opinion in which I denied SIGA's motion to dismiss, *Pharmathene, Inc. v. Siga Techs., Inc.*, 2008 WL 151855 (Del. Ch. Jan. 16, 2008).

3 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 twenty five pharmaceutical products.

1. The License Agreement Term Sheet

On January 17, 2006, while SIGA and PharmAthene were engaged in negotiations for a licensing agreement, Donald Drapkin, Chairman of SIGA's Board of Directors, called Eric Richman, a Vice President of business development and strategic planning at PharmAthene. In their conversation, Drapkin told Richman that the terms of PharmAthene's proposal for the licensing agreement term sheet were very close but that two changes were necessary "and if those changes are okay with [PharmAthene's] side, we have a final term sheet."[4] The two changes were made and Richman concluded that a deal had been reached: "My understanding is that at that point we were finished. Assuming we were okay with the two changes and our Board approved it, we had a deal. The terms were not going to change, those terms were the terms and that was – that was our deal."[5]

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" or LATS.[6] The LATS describes the

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4 Pl.'s Opp'n Mem. ("POM") App. Vol. 10 Ex. 126, Dep. of Eric Richman ("Richman Dep.") 64-65. Similarly, Defendant's opening and reply memoranda are referred to as "DOM" and "DRM," respectively.

5 *Id*. at 69.

6 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. Aff. of Sean M. Brennecke in Supp. of Mot. for Summ. J. ("Brennecke Aff.") Ex. F, the LATS.

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."[7] The LATS also sets forth terms relating to, 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

As the parties' collaboration continued, SIGA suggested to PharmAthene that the companies consider a merger. Before beginning merger talks, however, the PharmAthene Board of Directors wanted to be sure that PharmAthene "ended up with the product either through the license or through the merger."[8] According to PharmAthene, the discussions progressed as follows. In a negotiating session on February 22, 2006 at Drapkin's office, PharmAthene's representatives pushed for a definitive licensing agreement. Drapkin, however, objected to spending money on "a bunch of lawyers to sit around to work on a License Agreement that will never be used."[9] Rather, "what he suggested was to attach the Term Sheet [*i.e.*, the LATS] to the License Agreement [*i.e.* the Merger Term Sheet], and he dictated language to our attorney that would be as he said, just as good."[10] PharmAthene pushed back, seeking a definitive agreement, but

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7 LATS at 1.

8 Richman Dep. 114.

9 *Id*. at 163.

10 *Id*. 163-64.

Drapkin insisted nothing more was needed: "'We discussed the fact that we had to have a Term Sheet – excuse me, we had to have a license to 246 or a merger. And Donald [Drapkin] at this meeting guaranteed that we had an agreement.'"[11] Furthermore, at a March 3, 2006 meeting, again at Drapkin's office, Drapkin reiterated his comments regarding the enforceable nature of the LATS: "[D]on't worry you're going to get the license or you're going to get a merger . . . . You've got the Term Sheet, it's attached to the thing and this is as good as a definitive agreement."[12] Taking Drapkin at his word[13] that the parties already had agreed on the essential terms of a license agreement if the merger talks fell through, PharmAthene continued to negotiate a merger letter of intent.

On or about March 9, 2006, the parties signed a Letter of Intent ("LOI") with an annexed Merger Term Sheet ("MTS").[14] The LOI 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.[15] In the LOI, the parties agreed to "negotiate in good faith" and "use their best efforts" to execute a definitive merger agreement.

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11 POM App. Vol. 10 Ex. 127, Dep. of David Wright, President and CEO of PharmAthene, 103-04.

12 *Id*. at 143, 145.

13 Drapkin made statements on at least three occasions that PharmAthene contends led it to believe that an agreement had been concluded: In the January 17, 2010 telephone conversation Drapkin had with Richman mentioned *supra* and the February 22 and March 3, 2010 meetings.

14 *See* Brennecke Aff. Ex. I, the LOI and MTS.

15 LOI at 1.

The MTS 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 MTS, 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.[16] The MTS also provides that, with the exception of the Fiduciary Out, Expenses, and Exclusivity sections, 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."[17]

3. The Bridge Loan Agreement

In March 2006, SIGA required capital and PharmAthene agreed to provide it. 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."[18] PharmAthene contends that it made the bridge loan in reliance on the parties' agreements for a continuing relationship

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16 MTS at 4.

17 *Id.* at 6.

18 Brennecke Aff. Ex. J, the Bridge Loan Agreement, § 2.6.

with respect to ST-246, whether the relationship ultimately took the form of a merger under a merger agreement or a license agreement in accordance with the LATS.

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.[19]

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."[20]

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[19] *Id.* § 2.3.

[20] *Id.* § 7.11 (emphasis omitted).

PharmAthene adduced evidence that in addition to providing financing to SIGA and pursuant to its contractual obligations to work cooperatively to develop, secure approval for, and market ST-246, it provided assistance to SIGA with regard to "regulatory activities, quality assurance, quality control, business development activities, government affairs and policy activities."[21] The evidence also supports a reasonable inference that PharmAthene provided such technical support and that it entered into the Bridge Loan Agreement to provide financial support only under the assumption that it would end up with control of ST-246. As Richman stated, "[m]y understanding is that there never would have been a bridge loan if there wasn't some mechanism in place that guaranteed PharmAthene rights to the product. Whether it was the License Agreement or the merger, it was one or the other."[22]

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 concluded that the depth, experience, and diversity of PharmAthene's management could assist in bringing ST-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

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21 Richman Dep. 89.

22 *Id*. at 215.

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.[23]

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."[24] Further, under § 12.4, the good faith and best efforts provisions of the Merger Agreement, set forth in §§ 12.3 and 13.3, survive its termination. Additionally, § 13.5 states that the Merger Agreement shall be governed by Delaware law. The Merger Agreement, however, also included a provision that if the transaction did not close by September 30, 2006, either party could terminate the deal.

5. Events following the Merger Agreement

After entering into the Merger Agreement, PharmAthene and SIGA continued to work together to develop ST-246 throughout the summer of 2006. In the meantime, ST-

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[23] Brennecke Aff. Ex. K, the Merger Agreement, § 12.3.

[24] *Id.* § 13.3.

246 began to achieve several significant success thresholds. For example, at or about this time, the parties learned the clinical trials of ST-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 ST-246, and fulfillment of its contractual undertakings greatly contributed to this success of ST-246. As the September 30, 2006 deadline approached, PharmAthene sent SIGA a letter requesting an extension, but SIGA never responded.

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, generally 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 ST-246 "completely prevents smallpox disease in [a] preliminary primate trial" even when administered after exposure.[25] SIGA's stock soared. The next day, SIGA informed PharmAthene that it had obtained an additional $9 million of capital in a private placement and wished to pay back the Bridge Loan.

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[25] POM App. Vol. 9 Ex. 96, Oct. 18, 2006 SIGA Press Release.

As 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."[26] 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.

On November 21, 2006, SIGA forwarded to PharmAthene a 102-page document, entitled "Limited Liability Company Agreement" (the "Draft LLC Agreement"). According to PharmAthene, this document completely ignored the LATS. For example, SIGA proposed the following changes from the LATS to the Draft LLC Agreement: the upfront payment from PharmAthene to SIGA required for a license of ST-246 increased from $6 million to $100 million; the milestone payments increased from $10 million to $235 million; and the royalty percentage to be owed to SIGA doubled. After reviewing the Draft LLC Agreement, PharmAthene disputed SIGA's claim that the LATS was not binding, but offered to continue to negotiate in good faith a license agreement consistent with the terms set forth in the LATS[27] and to consider additional terms consistent with the LATS.

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[26] POM App. Vol. 4 Ex. 69, E-mail from Nicholas Coch to Elliot Olstein.

[27] In this regard, PharmAthene offered to make at least one significant change to the LATS. While, in its view, it was not obligated to consider any changes to the LATS, PharmAthene expressed a willingness to consider a 50/50 profit split instead of a royalty. Richman Dep. 285-87.

On December 12, 2006, SIGA advised PharmAthene that 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.

C. 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 that 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 16, 2008, I denied SIGA's motion 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.

PharmAthene filed an Amended Complaint on May 5, 2009. SIGA filed an Answer to the Amended Complaint and Counterclaim on October 21, 2009. On March 19, 2010, SIGA moved for partial summary judgment pursuant to Rule 56(c) seeking to dismiss Counts One through Four of the Amended Complaint and to preclude recovery by PharmAthene of any expectation damages it claims to have suffered. This Memorandum Opinion constitutes the Court's ruling on that motion.

II. ANALYSIS

A. Standard For Summary Judgment

Summary judgment may be granted where the moving party demonstrates that there is no genuine issue of material fact in dispute and that it is entitled to judgment as a matter of law.[28] In the context of a summary judgment motion, "[a] fact is material if it might affect the outcome of the suit under the governing law," but "it is not enough that the nonmoving party put forward a mere scintilla of evidence; there must be enough evidence that a rational finder of fact could find some material fact that would favor the nonmoving party in a determinative way drawing all inferences in favor of the nonmoving party."[29] I also note, however, that the Court maintains the discretion to deny summary judgment if "a more thorough development of the record would clarify the law or its application."[30]

B. Is SIGA Entitled to Summary Judgment on PharmAthene's Breach of Contract Claim?

1. Is the LATS enforceable as a contract?

In order for a contract to be binding under Delaware law, the contracting parties must have agreed on all essential terms.[31] Moreover, where "commercial parties draft a

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28 Ct. Ch. R. 56(c); *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845, at *4 (Del. Ch. Aug. 14, 2009).

29 *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009).

30 *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. Oct. 14, 2005).

31 *Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super. Feb. 20, 2009); *see also Intellisource Gp., Inc. v. Williams*, 1999 WL 615114, at *4 (D. Del. Aug. 11,

term sheet that is intended to serve as a template for a formal contract, the law of this state, in general, prevents the enforcement of the term sheet as a contract if it is subject to future negotiations because it is, by definition, a mere agreement to agree."[32]

a. For purposes of SIGA's motion, I assume the parties intended the LATS to be binding

Counts One through Four of the Amended Complaint are premised on the notion that the parties came to agreement on an enforceable licensing agreement. A dispute over the enforceability of a term sheet or memorandum of understanding typically involves two questions: (1) whether the parties intended to be bound by the document; and (2) whether the document contains all the essential terms of an agreement.[33] SIGA has admitted for purposes of its motion for summary judgment only that the parties intended the LATS as it was attached to the MTS, the Merger Agreement, and the Bridge Loan Agreement to be a binding agreement.[34] Moreover, the evidence submitted by

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1999) ("there can be no contract when an essential term is missing"). Various cases refer to "material terms" rather than "essential terms." *See, e.g., Int'l Equity Capital Growth Fund, L.P. v. Clegg*, 1997 WL 208955, at *9 n.3 (Del. Ch. Apr. 22, 1997) ("Delaware law . . . require[s] the parties to have reached agreement on all material terms before an 'agreement to agree' will be enforced."); *Ramone v. Lang*, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006). For purposes of this opinion, I will treat the standard as requiring agreement on all essential terms and assume that "essential" and "material" are synonymous.

32 *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *14 (Del. Ch. Jan. 24, 2005).

33 *See, e.g.*, *Hindes v. Wilm. Poetry Soc'y*, 138 A.2d 501, 502-04 (Del. Ch. 1958); *SDK Invs., Inc. v. Ott*, 1996 WL 69402, at *7, 11 (E.D. Pa. Feb. 15, 1996).

34 Transcript of July 22, 2010 hearing on SIGA's motion for partial summary judgment ("Tr.") at 5, 13.

PharmAthene in opposition to SIGA's motion supports a reasonable inference that the negotiators for the parties subjectively believed that the LATS reflected their agreement on all essential terms of a license agreement, if it became necessary to proceed by way of a license rather than a merger. Therefore, I start with the premise that both parties intended to be bound by the LATS and that they believed it dealt with all essential terms. SIGA argues, however, that whether "the parties intended to be bound to certain terms or to a purported agreement is not in any way determinative as to whether the alleged agreement nonetheless is unenforceable because it lacks essential terms."[35]

In support of its position, SIGA relies on cases that have held that even if a court finds (or the parties admit) that the parties intended to be bound by an agreement, a court still may find such an agreement to be unenforceable because it lacks essential terms.[36] In *SDK*, for example, the defendant "[did] not deny that he intended to be bound by the terms of the May 26 Letter Agreement." Nevertheless, the court concluded that the agreement was unenforceable because the parties had not reached agreement on all essential terms. In particular, the parties' letter agreement stated that "the parties agree to purchase equity in the new corporation on 'mutually agreeable' terms," which the court deemed merely an agreement to agree.[37] The facts of this case, however, are less clear cut and required a more nuanced analysis.

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35 DRM 10.

36 *See SDK Invs., Inc. v. Ott*, 1996 WL 69402, at *7, 11; *Hindes*, 138 A.2d at 502-04.

37 *SDK*, 1996 WL 69402, at *7.

b. Does the LATS contain all essential terms?

SIGA argues that when viewed objectively, the LATS does not constitute an enforceable licensing agreement because there are material terms missing and it does not, therefore, reflect agreement on all "essential" terms. In *Loppert v. WindsorTech, Inc.*,[38] Chancellor Chandler stated the test for determining whether all essential terms have been agreed upon as follows:

> [W]hether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms *that the parties themselves regarded as essential* and thus that the agreement concluded the negotiations . . . .[39]

In *Loppert*, the court had to decide whether the parties, David Loppert and WindsorTech, Inc., had reached a binding settlement agreement. WindsorTech's counsel made a settlement proposal and Loppert's counsel said it was acceptable except for a provision regarding the size and exercise price of a stock options grant. Counsel for both sides negotiated this point further and eventually reached agreement. Loppert's counsel said "we have a deal" to which WindsorTech's counsel said "good-i'll [sic] let the company know."[40] The question presented to the court was whether the terms of the parties' apparent oral agreement constituted an agreement on all essential terms.

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38 865 A.2d 1282 (Del. Ch. 2004).

39 *Loppert*, 865 A.2d 1282 (citing *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986)).

40 *Id*. at 1285.

Using the test delineated above, the court found that a reasonable negotiator would not interpret the parties' dialogue in a manner other than as creating an enforceable agreement, even though the parties had not agreed on particular draft language, including certain "boilerplate" terms.[41] The *Loppert* case, therefore, supports PharmAthene's position that parties can enter into an enforceable agreement, even if certain details are subject to future negotiations, so long as the parties have agreed on all essential terms.

Another case that applies the same test as *Loppert* is *Parker-Hannifin Corp. v. Schlegel Electronic Materials, Inc.*[42] The dispute in *Parker* arose out of settlement negotiations between Parker-Hannifin and Schlegel Materials over alleged patent infringements. The parties had come to agreement on all but two critical issues: Schlegel's concerns about potential future litigation and monetary compensation.[43] Parker made what the court found to be a settlement offer as to these terms, which Schlegel then accepted.[44] Parker took further actions consistent with an agreement having been reached, such as sending an e-mail confirmation of Schlegel's oral acceptance. Later, however, Parker reversed field and denied the existence of an enforceable agreement because its letter proposal did not contain certain allegedly essential terms, such as the territorial scope of the license and representations and

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41 *Id*. at 1289.

42 589 F. Supp. 2d 457 (D. Del. 2008).

43 *Id*. at 463.

44 *Id*.

warranties.[45] But, the court rejected Parker's argument that these were "essential" terms because either they were not included in Parker's initial draft of the licensing or settlement agreement or, when rejected by Schlegel on the first review, were not re-suggested by Parker.[46] The court found that if these items had been so important, Parker would have raised them at an earlier stage of negotiations.

Similar to the facts in *Parker*, PharmAthene has produced evidence, namely, the testimony of Richman, which, viewed in a light favorable to PharmAthene, shows that only two terms of the LATS remained to be negotiated in January 2006.[47] As in *Parker*, Drapkin appears to have made an offer, which PharmAthene then accepted. It would be reasonable, therefore, to conclude that the parties had reached agreement on all essential terms as of late January 2006 and all that remained to be negotiated were certain boilerplate items.

Admittedly, the fact that the LATS was not signed and contains a legend on each page stating "Non Binding Terms," supports a contrary inference that the LATS was not intended to be binding in January 2006 and did not contain all the essential terms of an agreement. PharmAthene's claims, however, do not rest solely upon the LATS as a freestanding document as it existed in or around January 2006. The fact that the LATS was attached to the MTS, the Merger Agreement, and the Bridge Loan Agreement,

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45 *Id*.

46 *Id*.

47 Richman Dep. 64-65.

together with the negotiating history alleged by PharmAthene in terms of the communications between one or more of its representatives and Drapkin provide ample support for an inference that the parties believed the LATS contained all the essential elements of a licensing agreement.

Under the *Loppert* test as applied in that case and in *Parker*, PharmAthene has a plausible claim that both parties believed their negotiations had resulted in an agreement as to all essential terms. PharmAthene has presented evidence, perhaps most notably the statements alleged to have been made by Drapkin discussed *supra*, from which a reasonable negotiator plausibly could conclude that the negotiations had resolved all essential terms.

By contrast, SIGA argues that both expert testimony and case law establish that the LATS lacked several essential terms because certain provisions omitted from the LATS are objectively material. For example, SIGA relies on the testimony of its licensing expert, Norman A. Jacobs, who opined that "there are significant open and material terms missing from the January 26 Term Sheet."[48] The essential terms missing according to Jacobs include: (1) minimum annual funding obligations by PharmAthene for research and development, clinical work, and post-approval sales and marketing; (2) the structure, authority, and composition of committees, including the R&D committee and any committees needed to oversee regulatory, clinical, and other commercial issues essential to the drug's success; (3) financial incentives and penalties for the

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[48] Brennecke Aff. Ex. Y, Expert Report of Norman A. Jacobs, ¶ 5.9.

commercialization program; (4) ownership and licensing of new technology; (5) dispute resolution; and (6) designation of governing law.[49]

SIGA primarily relies on the testimony of Jacobs, but also references the testimony of PharmAthene's licensing expert, Mark G. Edwards, who acknowledged that "[t]here are terms that one typically finds in fully delineated sponsored development agreement[s] that are missing from this [LATS]," including provisions concerning governing law, dispute resolution mechanisms, right to license, and a number of more functional definitions.[50] Edwards' acknowledgement that the term sheet may be less robust than a fully integrated agreement, however, does not mean that essential terms were omitted. Indeed, Edwards effectively opined that the LATS contains sufficient details to constitute a binding agreement. Referring to his review of publicly available information regarding a number of licensing term sheets, Edwards stated:

> Three such instances with similar levels of detail as the LATS are available in the appendix to this report. It is my opinion that the content of the LATS is normal and customary for a

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[49] SIGA argues in the alternative that the so-called licensing agreement was intended to be a partnership agreement. If viewed as a partnership agreement, SIGA argues that the LATS similarly fails because it does not include a number of material business and financial provisions defining the structure of a partnership, including: (1) assets or funds to be contributed to the partnership by each partner; (2) valuation of SIGA technology to be contributed; (3) initial ownership percentages for each partner; (4) the partnership's management structure; and (5) the conditions for and consequences of termination or dissolution of the partnership. *Id*. Because genuine issues of material fact exist as to whether the parties intended to enter into a partnership agreement, as opposed to a licensing agreement, these aspects of SIGA's argument cannot be decided on summary judgment.

[50] Brennecke Aff. Ex. Z, Dep. of Mark G. Edwards, at 265-66.

> material agreement between two parties in the biotechnology and pharmaceutical industries.[51]

Thus, there is conflicting expert testimony on this issue that presents either a question of fact or a mixed question of fact and law.

Finally, SIGA cites cases that hold certain provisions to be material, such that their omission would render a putative agreement unenforceable. According to SIGA, therefore, some of the terms omitted from the LATS are essential terms as a matter of law.[52] For example, SIGA relies on *L-7 Designs*, in which the court held that "annual guaranteed minimum royalties . . . and the amount to be spent on marketing support" were material terms.[53] *L-7 Designs* and other cases cited by SIGA support the proposition that the omission of certain terms *may* render a licensing agreement unenforceable based on the particular facts and circumstances of a given case. I do not read those cases, however, as holding that the referenced terms are essential to *every* licensing agreement. Ultimately, SIGA may be able to prove that one or more of the provisions omitted from the LATS were essential to the parties' licensing agreement. Nevertheless, I find that it also is plausible that PharmAthene will be able to prove at trial that the LATS does reflect an agreement on all essential terms.

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51 POM App. Vol. 5 Ex. 80, Edwards' Expert Report, at 17 n.11.

52 *See, e.g.*, *L-7 Designs, Inc. v. Old Navy, LLC*, 2010 WL 157494 (S.D.N.Y. Jan. 21, 2010); *Liberto v. D.F. Stauffer Biscuit Co.*, 441 F.3d 318, 324 (5th Cir. 2006) (purported agreement held unenforceable because it lacked all essential terms of a license agreement including "the grounds for its renewal or termination").

53 *L-7 Designs*, 2010 WL 157494, at *7.

C. Is the LATS Sufficiently Definite to Warrant the Remedy of Specific Performance?

SIGA also seeks partial summary judgment as to Count One to the extent it seeks specific performance. SIGA argues that specific performance is inappropriate here because the parties did not enter an enforceable agreement with terms definite enough to allow the Court to devise a clearly articulated specific performance order. As SIGA notes, "[u]nder Delaware law, a party seeking the equitable remedy of specific performance must prove the existence and terms of an enforceable contract by clear and convincing evidence."[54] Where essential terms are lacking, "a court is not permitted to insert its own judgment and terms" as "it is a fundamental principle of equity that the remedy of specific performance will only be granted as to an agreement which is clear and definite and as to which there is no need to ask the court to supply essential terms."[55]

As with the issue of whether the LATS constituted a binding and enforceable contract, discussed *supra* Part II.B.1.b, the question of whether the remedy of specific performance is available to PharmAthene also turns on whether the LATS contained all essential elements. Moreover, to obtain specific performance, PharmAthene must prove the existence of an agreement on all essential terms by the higher standard of clear and convincing evidence. Nevertheless, I am not convinced that PharmAthene will be

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54 *See Min. Invco of RSA No. 7, Inc. v. Midwest Wireless Hldgs.*, 902 A. 2d 786, 793 (Del. Ch. 2006).

55 *Liquor Exch., Inc. v. Tsaganos*, 2004 WL 2694912, at *2 (Del. Ch. Nov. 16, 2004).

unable, as a matter of law, to prove that it reached agreement with SIGA on all essential terms of a licensing agreement that is sufficiently definite to be specifically enforced.

This conclusion is supported by the well-accepted maxim of this Court's equity jurisdiction that equity will not suffer a wrong without a remedy.[56] PharmAthene has adduced sufficient facts to support one or more of its claims that SIGA breached its agreement with PharmAthene as it related to the contemplated licensing agreement. Yet, even if PharmAthene prevails on the merits of those claims, it will be challenging, due to the nature of the business involved here, to formulate an appropriate remedy. In these circumstances, I consider it prudent and in the interest of justice to defer deciding the issue of specific performance until the legal and factual record has been fully developed at trial.[57] Therefore, I deny SIGA's motion for partial summary judgment as to Count One.

D. Are Estimates of Expectation Damages Too Speculative?

1. Can PharmAthene meet the threshold of reasonable certainty?

Under Delaware law, a plaintiff can only recover those damages which can be proven with reasonable certainty.[58] Moreover, "[n]o recovery can be had for loss of

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56 *Agostino v. Hicks*, 2004 WL 443987, at *7 (Del. Ch. Mar. 11, 2004).

57 *See Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. Oct. 14, 2005).

58 *See, e.g.*, *Chemipal Ltd. v. Slim-Fast Nutritional Foods Int'l, Inc.*, 350 F. Supp. 2d 582, 597 (D. Del. 2004) ("It is clear that, in order to recover profits lost by defendant's breach of contract, the plaintiff must lay a basis for a reasonable estimate of his loss. . . . Speculative damages are not recoverable").

profits which are determined to be uncertain, contingent, conjectural or speculative."[59] Delaware courts also have noted how difficult it is to accurately predict damages related to a new business with an unproven technology.[60] Lastly, damages "are to be measured as of the time of the breach."[61]

The primary damages theory advanced by PharmAthene is based on its expectation damages, which is the amount of money it would take to put the promisee, PharmAthene, in the same position it would occupy if the promisor had performed the contract.[62] SIGA contends that expectation damages are too speculative in the context of this case. It argues that future profits for new pharmaceuticals, in general, are speculative because of the risky nature of the drug development process.[63] SIGA further asserts that estimates of any expectation damages suffered by PharmAthene with respect to ST-246 are particularly unreliable because they involve a number of unique uncertainties relating to the approval process and potential market size for this drug.[64]

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59 *Callahan v. Rafail*, 2001 WL 283012, at *1 (Del. Super. Mar. 16, 2001).

60 *Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2004 WL 1192602, at *4-5 (Del. Ch. May 28, 2004).

61 *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003); *Scully v. US Wats, Inc.*, 238 F.2d 497, 512 (3d Cir. 2001) (noting "general breach of contract rule" that damages are measured as of the "date of breach").

62 *See Duncan v. Theratx*, 775 A.2d 1019, 1022 (Del. 2001).

63 DRM 21.

64 SIGA also contends that there are a number of potential flaws with the Basis I estimate of PharmAthene's expectation damages by PharmAthene's damages expert, Jeffrey Baliban, that make it unreasonably speculative. Among others,

Addressing complex issues like this on a piecemeal basis is often problematic. As SIGA's motion only requests *partial* summary judgment, there will be a trial whether or not I grant the motion. In addition, whether or not I grant the damages aspect of SIGA's motion, the liability phase of the trial is unlikely to be any different. Count V of the Complaint, for example, is not subject to SIGA's motion; it seeks damages for breach of SIGA's contractual duty "to negotiate in good faith towards the execution of 'a definitive license agreement in accordance with the terms set forth' in the [LATS]." With the possible exception of the expert testimony on the nature of the terms omitted from the LATS, the evidence relevant to Count V is likely to be virtually identical as to that relevant to Counts One through Four. The only portion of the trial that might be shortened to any appreciable extent by granting summary judgment relates to damages, but I expect at least some of the information and evidence regarding expectation damages to continue to be relevant in any case. This action is scheduled for an eight-day trial in early January 2011. I would not expect the trial time to be reduced by much more than a

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SIGA raises a number of legitimate concerns with Baliban's analysis such as: (1) although the Biomedical Advanced Research and Development Authority ("BARDA") is empowered to acquire drugs prior to FDA approval, the legislation creating BARDA was less than a day old and a request for proposal for procurement of a smallpox antiviral was still years away when the legislation was enacted; (2) predictive models for regulatory success are difficult to come by for ST-246 both because there are no other treatments for smallpox to compare it to and very few drugs have been approved under the Animal Efficacy Rule; and (3) Baliban's analysis relies in large part upon SIGA's own estimates, which may be impermissible.

single day if this Court granted partial summary judgment in SIGA's favor on expectation damages.

At the same time, the amount at stake in this litigation arguably reaches into the hundreds of millions of dollars, if not higher. If I were to grant SIGA's motion for summary judgment as to expectation damages, the Court would be beset at trial with needless and wasteful arguments about the relevance and admissibility of the damages evidence.[65] In this regard, I note that PharmAthene credibly alleges that it bargained for and obtained an agreement under which it would control the ST-246 product no matter whether the parties merged or executed a licensing agreement. If I were to accept SIGA's arguments that expectation damages are unrecoverable here as a matter of law, SIGA would seek to limit PharmAthene to its reliance damages (*i.e.*, reimbursement for its out-of-pocket expenses—two to three orders of magnitude less than expectation damages).

A similar situation exists as to PharmAthene's unjust enrichment claim (Count Seven). Because ST-246 has not yet come to market, and thus has generated no revenue, PharmAthene will have difficulty quantifying the amount of any monetary benefit it claims SIGA obtained improperly. The evidence plausibly indicates, however, that ST-246 is likely to be an extremely valuable drug product with a huge market. Yet, under SIGA's apparent divide and conquer strategy, it hopes to exclude most, if not all, evidence of market potential through its motion for partial summary judgment on

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[65] Tr. at 16-17.

expectation damages and relegate PharmAthene to a relatively insignificant monetary award, even if PharmAthene succeeds in proving its claims under Counts Five through Seven of the Complaint. In that case, PharmAthene might prove that it effectively bargained for and obtained an agreement under which it reasonably would have expected to control the ST-246 product, but still receive no rights in the product or any meaningful monetary substitute, while SIGA enjoys all the upside associated with the potential benefits of commercially exploiting ST-246 in the future.

When all of the evidence is in and the arguments are completed, SIGA's position may be vindicated. Until then, I consider it important that the Court have available to it all potentially relevant evidence on the question of an appropriate remedy, which may include some form of expectation damages or related relief.

While SIGA has referred to a number of cases that hold expectation damages in the context of drug development to be speculative, none is from Delaware.[66] To some degree, therefore, this is an unsettled area of Delaware law. In addition, the drug product at issue here is rather unique. ST-246 may be used to treat smallpox in the context of a bioterrorist incident. For that reason, it is subject to different rules than most drug products and may be sold to the United States government, for example, even before it has received FDA approval. Therefore, although PharmAthene must overcome

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[66] *See, e.g.*, *Alphamed Pharms. Corp. v. Arriva Pharms., Inc.*, 432 F. Supp.2d 1319, 1323 n.3, 1346 n.43 (S.D. Fla. 2006); *Pharmanetics, Inc. v. Aventis Pharms., Inc.*, 2005 WL 6000369, at *12-13 (E.D.N.C. May 4, 2005); *Aronowitz v. Health-Chem Corp.*, 513 F.3d 1229, 1239 (11th Cir. 2008).

significant hurdles to prove expectation damages with reasonable certainty, I am not convinced that these challenges are insurmountable. This Court has discretion to deny summary judgment if "more thorough development of the record would clarify the law or its application."[67] Based on that principle and the evidence presented to date, I find that summary judgment is not warranted on the issue of expectation damages.

2. Can damages be based on information not knowable as of the time of the breach?

It is well-settled under Delaware law that expectation damages are to be measured as of the date of the breach.[68] SIGA contends, therefore, that any information relating to events that occurred after its alleged breach in 2006 should be inadmissible. In response, PharmAthene disputes that proposition and argues that, under some circumstances, courts have allowed the admission of ex post evidence for purposes of calculating damages.[69]

The case law suggests that courts must be circumspect about considering events that occurred after an alleged breach for purposes of calculating expectation damages. Nevertheless, in limited circumstances, it is appropriate to do so. Based on the record created in connection with SIGA's motion for partial summary judgment, I conclude that PharmAthene may be able to show that post-breach information is relevant to

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67 *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. Oct. 14, 2005).

68 *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003).

69 *Comrie*, 837 A.2d at 17 ("the court may consider events that took place after [the date of the breach] to aid in its determination of the proper expectations as of the date of breach").

determining an appropriate damages award or other form of relief.[70] Moreover, as previously noted, based on the likely difficulties of fashioning a potential remedy in this case, the Court is better served by retaining the flexibility to consider all potentially relevant evidence, including evidence regarding what has occurred since the alleged breach.

E. Is PharmAthene Entitled to a Patent Measure of Damages?

Lastly, PharmAthene argues that if it had received an exclusive license for ST-246 in accordance with the LATS, it also would have acquired the rights to the patents covering ST-246. PharmAthene, therefore, suggests that the Court could award PharmAthene royalties and a profit split as provided for in SIGA's Draft LLC Agreement.

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[70] Baliban's Basis II estimate of the damages suffered by PharmAthene is based on information known to the parties as of November 2009, approximately three years after the alleged breach. The additional information known to the parties by 2009, which Baliban's analysis relies upon, includes various milestones reached in the development of ST-246 as well as further definitive information provided by the U.S. government relating to the acquisition of a smallpox antiviral. Indeed, SIGA's argument that estimates of expectation damages suffered by PharmAthene are of a speculative nature is bolstered by the exceedingly large variation of about $600 million between Baliban's initial Basis II estimates and his supplemental Basis II estimates, which relied on data known to the parties as of April 15, 2010. Notwithstanding SIGA's contention that all events which occurred after its alleged breach in 2006 are inadmissible per se, many of the factors that applied to my preliminary review of Baliban's Basis I damages estimate also apply to his Basis II estimate as well. The regulatory approval process and the prospects of a government purchase remain clouded, but I do not consider it advisable to attempt to exclude all post-breach evidence pertaining to damages by way of a summary judgment motion, especially in a case such as this which will be tried to the Court and not a jury. *See* Brennecke Aff. Ex. X, Baliban's Report.

A patent measure of damages, however, is inappropriate in this breach of contract action. Such a remedy is prescribed by statute in 35 U.S.C. § 284,[71] which applies only in patent infringement cases. As this is not a patent infringement case, I see no basis to award any form of patent damages, including a reasonable royalty.

III. CONCLUSION

For the reasons stated, SIGA's motion for partial summary judgment is denied in its entirety.

IT IS SO ORDERED.

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[71] Section 284 provides: "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court." 35 U.S.C. § 284.