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Case No. 2627-VCP

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: October 12, 2011
Decided: December 16, 2011

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PARSONS, Vice Chancellor.

In an Opinion dated September 22, 2011 (the "September 22 Opinion"), I held that Defendant, SIGA, is liable (1) for breaching an express contractual obligation to negotiate in good faith a license agreement for a biodefense pharmaceutical known as ST-246 and (2) under the doctrine of promissory estoppel.[1] In terms of relief, I denied Plaintiff, PharmAthene's, requests for specific performance of the LATS, the term sheet on which the final license agreement was to be based, or for a lump sum award of expectation damages. Instead, I awarded, among other remedies, an "equitable payment stream" in the vein of a constructive trust or equitable lien as follows: "once SIGA earns $40 million in net profits or margin from net sales of ST-246, PharmAthene shall be entitled to 50% of all net profits from such sales thereafter for a period from entry of this judgment until the expiration of ten years following the first commercial sale of any product derived from ST–246."[2] As a court of equity, I concluded that this remedy reasonably compensates PharmAthene for its lost expectancy (*i.e.*, what PharmAthene would have received had a license agreement been negotiated in good faith),[3] was necessary to provide "such relief as justice and good conscience may require,"[4] and was

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1 *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 4390726, at *2 (Del. Ch. Sept. 22, 2011) [hereinafter September 22 Opinion]. Defined terms in the September 22 Opinion are used in the same way and with the same designations in this Memorandum Opinion.

2 *Id.* at *42.

3 *Id.* at *39.

4 *Id.* at *34 (quoting *Lichens Co. v. Standard Commercial Tobacco Co.*, 40 A.2d 447, 452 (Del. Ch. 1944)).

consistent with my "broad discretion to form an appropriate remedy for a particular wrong."[5]

On October 4, SIGA moved under Court of Chancery Rule 59(f) for reargument as to the "unprecedented remedy"[6] ordered in the September 22 Opinion.[7] Specifically, SIGA contends I misapplied the law and misunderstood material facts in awarding PharmAthene an equitable lien on a share of future profits derived from ST-246. As to the law, SIGA argues: (1) that PharmAthene did not request or brief this remedy and, therefore, I was without authority to grant it; and (2) that the equitable remedy ordered is inconsistent with the legal requirement that damages be proven with reasonable certainty. As to the facts, SIGA claims I misapprehended the record in prescribing the terms of the equitable payment stream ordered because there is insufficient evidence to conclude that either party would have agreed to a license agreement providing only for a one-time payment from PharmAthene to SIGA of $40 million in exchange for a 50/50 profit split without other payments. Additionally, SIGA maintains that there is no basis in law or fact for restructuring an "actual" payment of $40 million as a credit against the first $40

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5 *Id.* (quoting *Whittington v. Dragon Gp. LLC*, 2011 WL 1457455, at *15 (Del. Ch. Apr. 15, 2011)).

6 Def.'s Mot. for Reargument ("Def.'s Mot.") 1.

7 Although Rule 59(f) requires a party to move for reargument "within 5 days after the filing of the Court's opinion or the receipt of the Court's decision," SIGA moved on September 27 to extend that five-day deadline pursuant to Rule 6(b). The Court granted an extension until October 4.

million of net profits as the equitable payment stream prescribes.[8] For the reasons stated in this Memorandum Opinion, I deny SIGA's Motion.

I. DISCUSSION

A. Standard

The standard applicable to a motion for reargument is well-settled. To obtain reargument, the moving party "bear[s] a heavy burden . . . [to] demonstrate[] that the court's decision 'rested on a misunderstanding of a material fact or a misapplication of law.'"[9] A misapprehension of the facts or the law must be both material and outcome determinative of the earlier litigation for the movant to prevail.[10] Moreover, "[r]eargument under Court of Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion."[11] Additionally, motions for reargument must be denied when a party merely restates its prior arguments.[12]

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8 Def.'s Mot. 11.

9 *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000) (quoting *Arnold v. Soc'y for Sav. Bancorp*, 1995 WL 408769, at *1 (Del. Ch. June 30, 1995)).

10 *Aizupitis v. Atkins*, 2010 WL 318264, at *1 (Del. Ch. Jan. 27, 2010); *Medek v. Medek*, 2009 WL 2225994, at *1 (Del. Ch. July 27, 2009); *Serv. Corp. of Westover Hills v. Guzzetta*, 2008 WL 5459249, at *1 (Del. Ch. Dec. 22, 2008).

11 *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007); *Nevins v. Bryan*, 2006 WL 205064, at *3 (Del. Ch. Jan. 20, 2006).

12 *Guzzetta*, 2008 WL 5459249, at *1; *Reserves Dev. LLC*, 2007 WL 4644708, at *1; *Nevins*, 2006 WL 205064, at *3.

B. Did the Court Misapply the Law?

SIGA's first ground for reargument is that PharmAthene did not request or brief a profit participation. SIGA contends that PharmAthene therefore waived any right to receive a profit participation and that "due process and fairness concerns preclude the Court's *sua sponte* imposition of this remedy . . . ."[13] Although PharmAthene could have articulated its request for an equitable payment stream with greater precision, it actually did make such a request. Indeed, I stated this conclusion explicitly in a footnote to the September 22 Opinion:

> PharmAthene's description of its so-called "equitable payment stream" is not entirely consistent. By requesting a payment stream "economically equivalent to the lump sum damages amount determined by Baliban," PharmAthene seems to request, in effect, an annuity with a net present value equal to Baliban's estimate of its expectation damages. [Pl.'s Post–T. Op. Br. 65.] Nevertheless, PharmAthene argues that its requested relief would mirror SIGA's return on sales of ST-246 and, thus, "mitigate any uncertainties around the future sales of ST-246 . . . ." *Id.* at 66. Based on this latter argument, I understand PharmAthene's use of the phrase "equitable payment stream" to mean an on-going profit participation in future sales, if any, of ST-246.[14]

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[13] Def.'s Mot. 4.

[14] September 22 Opinion, 2011 WL 4390726, at *29 n.167. SIGA further attempts to manufacture a difference between PharmAthene's request for a payment stream on "sales," as requested in its briefs, and a participation in "profits," as awarded in the September 22 Opinion, because the Court previously determined that it would not award a patent infringement measure of damages in this case. Def.'s Mot. 3. During the summary judgment phase of this case, PharmAthene advocated for a patent measure of damages, arguably supported by federal case law, that would impose a reasonable royalty for SIGA's alleged "breach" of the patents covering

In any event, the cases SIGA cites in its Motion regarding waiver of arguments not properly raised provide no basis for constraining this Court's "discretion to tailor remedies to suit the situation as it exists."[15] The general rule, correctly stated by SIGA, that a party waives any argument it fails properly to raise shows deference to fundamental fairness and the common sense notion that, to defend a claim or oppose a defense, the adverse party deserves sufficient notice of the claim or defense in the first instance.[16] Thus, in *Adams v. Calvarese Farms Maintenance Corp.*,[17] a plaintiff received no relief for claims asserted in its complaint but ultimately not addressed at trial, and in *Emerald*

ST-246. Pl.'s Br. in Opp'n to Def.'s Mot. for Partial Summ. J. 64. In that regard, PharmAthene suggested the Court could award as such a royalty the one-sided terms of the Draft LLC Agreement *against* SIGA and in favor of PharmAthene. *Id.* The Court rejected that contention and ruled that a patent measure of damages, statutory in nature and applicable only to patent infringement cases, is inappropriate in a contract case. *SIGA II*, 2010 WL 4813553, at *13 (Del. Ch. Nov. 23, 2010). In the September 22 Opinion, however, the Court held that PharmAthene's request for an equitable payment stream was more akin to the imposition of an equitable lien and, therefore, different because, "unlike a 'reasonable royalty' under the patent laws, the equitable remedy of an equitable lien is independent of and does not rely on federal patent law doctrine." 2011 WL 4390726, at *39. Accordingly, this Court's ruling on summary judgment did not foreclose the possibility that it might award the relief provided for in the September 22 Opinion.

15 *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *3 (Del. Ch. May 11, 2001) (quoting *Andersen v. Bucalo*, 1984 WL 8205, at *4 (Del. Ch. Mar. 14, 1984)).

16 *See Riggs Nat'l Bank v. Boyd*, 2000 WL 303308, at *3 (Del. Super. Feb. 23, 2000) (citing *Campbell v. Walker*, 76 A. 475, 476 (Del. 1910)).

17 2010 WL 3944961, at *21 (Del. Ch. Sept. 17, 2010).

Partners v. Berlin,[18] the court refused to consider an affirmative defense raised for the first time on remand after appeal. That reasoning, however, has less force in the context of the Court's power to award a remedy. Once the question becomes the *form* of relief, as opposed to the *right* to relief, "the powers of the Court [of Chancery] are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action."[19] To that end, this Court frequently has relied on its own remedial discretion to fashion a different remedy than what the parties may have requested when the circumstances so require.[20]

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[18] 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003).

[19] *Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964).

[20] *See McGovern v. Gen. Hldg., Inc.*, 2006 WL 1468850, at *24 (Del. Ch. May 18, 2006) ("The Supreme Court has emphasized the capacious remedial discretion of this court to address inequity. Using that discretion, I conclude that none of the parties has advanced a completely acceptable remedy."); *Walker v. Res. Dev. Co.*, 791 A.2d 799, 811 (Del. Ch. 2000) ("These failures [to prove damages] do not leave [plaintiff] without a remedy. . . . [The ability to trace wrongfully expropriated membership interest to shares in a new company] provides a framework on which to consider an award in equity—such as the imposition of a constructive trust on a portion of those shares."); *Andresen v. Bucalo*, 1984 WL 8205, at *5 (Del. Ch. Mar. 14, 1984) ("In seeking [additional briefing on remedies to protect innocent stockholders in derivative action], however, I am not limiting the Court to remedies that the parties may propose."); *cf. Berger v. Pubco Corp*., 976 A.2d 132, 139 (Del. 2009) ("We nonetheless identify and consider [remedies advocated by no party on a question of first impression], because to do otherwise would render our analysis truncated and incomplete.").

Nor does such an exercise of remedial discretion offend due process, as SIGA contends. Rather, the two cases SIGA cites to support that contention—*Beck & Panico Builders, Inc. v. Straitman*[21] and *Ramsey v. Ajax Distributors, Inc.*[22]—are readily distinguishable. In *Straitman*, the trial court effectively amended the plaintiff's complaint after trial to add unasserted claims and thereby deprived the defendant of sufficient notice of the evidence it needed to present at trial to defend itself.[23] In *Ramsey*, the court granted reargument after conceding that it might have acted "hastily" in dismissing a case for lack of subject matter jurisdiction (*i.e.*, denying the plaintiff his day in court) before affording the parties an opportunity to brief the question.[24] But, neither case stands for the proposition that a court of equity would offend due process by awarding a remedy alleged to have been briefed inadequately.

SIGA's second ground for seeking reargument is that the Court misapprehended the law in awarding an equitable remedy that fails to comport with the requirement at law that damages be proven with reasonable certainty. In the September 22 Opinion, the Court acknowledged that there apparently is not yet a consensus in Delaware or in other jurisdictions as to whether a breach of an express contractual obligation to negotiate in good faith is susceptible to a remedy at law of expectation damages, or limited to only

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21 2009 WL 5177160 (Del. Super. Nov. 23, 2009).

22 1975 WL 21608 (Del. Ch. Oct. 29, 1975).

23 2009 WL 5177160, at *5.

24 1975 WL 21608, at *1.

reliance damages.[25] Ultimately, however, the Court concluded that PharmAthene had not shown an entitlement to a specific amount of expectation damages because even a consummated license agreement for ST-246, which was not yet marketable, "would have contained the risk of receiving no profits" and, therefore, "such an award would be speculative."[26] Additionally, the Court concluded that the alternative of reliance damages would have been "basically *de minimis*" under the circumstances of this case and, therefore, inadequate.[27]

Although at law "no recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural or speculative,"[28] this Court still possesses authority to provide an equitable remedy where there is no adequate remedy at law.[29] Furthermore, this Court enjoys remedial flexibility to depart from strict application of the ordinary forms of relief where circumstances require.[30] Nevertheless, courts of equity

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25 2011 WL 4390726, at *31-34.

26 *Id.* at *33.

27 *Id.* at *35.

28 *Id.* at *31 (internal quotation marks and footnote omitted).

29 *See* 10 *Del. C.* § 342 (conferring jurisdiction, by negative implication, to determine matters lacking an adequate remedy at law); *Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964) ("Fundamentally, once a right to relief in Chancery has been determined to exist, the powers of the Court are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action.").

30 *See, e.g., HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 122 (Del. Ch. 1999) ("I have crafted a remedy tailored to the specific facts of this case . . . [']from the

should attempt to balance that flexibility by a measure of concomitant restraint to minimize uncertainty.[31]

In this case, the Court found that SIGA was in a precarious financial condition in late 2005 and entered into a Bridge Loan Agreement with PharmAthene, among other things, that enabled SIGA to continue development of ST-246. In exchange, PharmAthene bargained for, at the least, the right to faithful negotiations for a license of ST-246 in accordance with the terms of the LATS the parties previously had negotiated. SIGA, however, denied PharmAthene the benefit of its bargain by conducting those negotiations in bad faith and, thus, is liable for breach of contract and under the doctrine of promissory estoppel. After determining that PharmAthene lacked an adequate remedy at law, the Court directed its attention to equitable remedies, such as a constructive trust or equitable lien, and the possibility that they might be appropriate here. Thus, the Court structured its remedy analysis as follows: "the Court's task is, first, to derive a responsible estimate of 'what [PharmAthene] should have received if the [license

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panoply of equitable remedies' . . . ." (quoting *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 699 (Del. Ch. 1996))); *see also* 1 *Pomeroy's Equity Jurisprudence* § 109 (5th ed. 1941) ("Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use.").

[31] *See Greenhill Inv. Co. v. Tabet*, 1986 WL 412, at *7 (Del. Ch. Oct. 31, 1986) ("With the advantage of flexibility, however, comes the danger that the exceptional cases in which equitable relief is granted may come to destroy the utility of the general rule. Thus, the flexibility afforded by the equitable approach may come, at times, at the expense of commercial certainty, although the extent to which commercial certainty is sacrifi[ced] can, by judicial restraint, be minimized.").

agreement] had been consummated' (*i.e.*, to determine PharmAthene's expectancy interest) and, second, to provide a remedy that reasonably compensates PharmAthene for that lost expectancy."[32] The fact that the Court imposed an equitable remedy reasonably designed to compensate PharmAthene for its lost expectancy does not mean, however, that the Court misapprehended the law of remedies.[33] To the contrary, the Court found the underlying purposes of a constructive trust and equitable lien applicable to the circumstances of this case and endeavored to tailor those remedies to redress a wrong, prevent injustice, and award an appropriate remedy in the form of an equitable payment stream.[34] The Court did not misapprehend the law in so doing.

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32 September 22 Opinion, 2011 WL 4390726, at *39 (footnote omitted).

33 SIGA's further contention that the Court misapprehended the facts by unduly speculating as to the *value* of PharmAthene's lost expectancy in deciding the precise terms of the equitable payment stream it ordered is addressed in Part I.C, *infra*.

34 *See Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993) (purpose of a constructive trust is to redress a wrong rather than effect the intent of the parties); *Adams v. Jankouskas*, 452 A.2d 148, 152 & n.4 (Del. 1982) (quoting 1 *Pomeroy's Equity Jurisprudence* § 166, at 210-11 (5th ed. 1941)) (constructive trusts prevent injustice, even in the absence of an express contract, where one party obtains title to property in any unconscionable manner); *see also* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 12.07[d] at 12-104 (2010) ("The Court of Chancery, however, also may impress an equitable lien in the absence of an express agreement, out of a recognition of general equitable principles of right and justice to prevent unjust enrichment. The latter category of equitable lien is most frequently impressed where a plaintiff has advanced money for the purchase or improvement of property, title to which is held by another.").

C. Did the Court Misunderstand Material Facts?

SIGA's Motion does not suggest that the Court misapprehended any fact in holding SIGA liable for breach of its contractual obligation to negotiate in good faith or under the doctrine of promissory estoppel.[35] Rather, SIGA asserts that the Court misunderstood certain facts relevant to the relief it provided. As mentioned above, the Court adopted a two-step approach to determine the terms of the equitable payment stream it ordered: the Court, first, derived a responsible estimate of PharmAthene's lost expectancy caused by SIGA's failure to negotiate in good faith and, second, provided a remedy that reasonably compensates for that lost expectancy. Thus, the ultimate remedy depends on the Court's predicate determination that, but for SIGA's bad faith negotiations, the parties would have consummated a license agreement for ST-246 on terms no less favorable to PharmAthene than a one-time $40 million payment by PharmAthene to SIGA in exchange for a pure 50/50 split on all net profits derived from ST-246 for a period of at least ten years. SIGA asserts that reargument is necessary because the Court misapprehended the record in finding that either party would have agreed to a license agreement providing for a pure 50/50 profit split in exchange for a one-time payment of $40 million.[36]

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[35] Def.'s Mot. 2 n.1.

[36] SIGA's Motion does not address the ten-year term.

As the trier of fact, the Court evaluates testimony, weighs credibility, and determines what inferences to draw from the evidence adduced at trial.[37] In terms of an appropriate remedy for PharmAthene's lost expectancy, the evidence showed several things. First, at all stages of negotiation, the parties structured the prospective license agreement as some combination of payments from PharmAthene to SIGA and some form of revenue sharing between the parties, whether as royalties on sales or a 50/50 profit split, for PharmAthene's obtaining control of ST-246 and any related patents. Thus, in the September 22 Opinion, the Court inferred that this basic structure probably would not have changed had the parties negotiated in good faith.

Second, the Court credited the testimony of David Wright, PharmAthene's CEO, that PharmAthene was willing to consider deal terms that varied from those contained in the LATS.[38] In that regard, the Court found that "one such variation PharmAthene would have accepted is the use of a 50/50 profit split,"[39] even though the evidence on that point was conflicting. On the one hand, Eric Richman, PharmAthene's VP of Business Development and Strategies, testified that PharmAthene effectively offered a 50/50 profit split in lieu of royalty payments, and PharmAthene's counsel, Elliot Olstein, confirmed to SIGA in a letter dated November 30, 2006, that PharmAthene was "willing to consider" such a profit split. On the other hand, by early December, both parties had begun to dig

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37 *See Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002).

38 September 22 Opinion, 2011 WL 4390726, at *38 & n.227.

39 *Id.* at *38 (footnote omitted).

their heels in, and Olstein wrote to his counterpart at SIGA on December 6, 2006, that PharmAthene had not indicated that it was prepared to accept a 50/50 proposal, but continued to be "willing to consider" such an amendment to the LATS. Upon considering all the evidence, I concluded in the September 22 Opinion that, had the parties engaged in good faith negotations, PharmAthene would have accepted the use of a 50/50 profit split.[40] Nothing in SIGA's Motion indicates that I misapprehended any fact material to that conclusion.

Additionally, the Court inferred that PharmAthene would have agreed to increase the aggregate amount of payments to SIGA from the $16 million provided for in the LATS to $40 million. As to that inference, the Court credited Richman's testimony that PharmAthene was willing to consider increasing its aggregate payments[41] in response to SIGA's suggestion at the November 6, 2006 meeting that ST-246's interim success warranted "an up-front payment of 40 to $45 million or more . . . ."[42] Furthermore, ST-246's interim success corresponded to a roughly threefold increase in the parties' projections of the market for ST-246.[43] On those grounds, the Court inferred that

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40 *Id.* at *38 & n.228.

41 T. Tr. 214-15.

42 T. Tr. 2084 (Fasman). As discussed *infra*, the Court recognized the possibility for disagreement as to the meanings of the references to "upfront" and "aggregate" payments in this context, but found that any distinction between the two terms was immaterial for purposes of its remedies analysis.

43 Relying on JTX 123, SIGA argues that there is no record basis to find that PharmAthene's projections had increased. Def.'s Mot. 10. JTX 123 is an email

PharmAthene would have agreed to increase the aggregate amount of payments to SIGA by a corresponding multiple, from $16 million to $40 or $45 million.[44] Accordingly, SIGA also has failed to show that the Court misunderstood any material fact regarding the *amount* of payments that PharmAthene would have agreed to make to SIGA in exchange for a 50/50 profit split.

A third reason supporting the Court's conclusion was its determination that SIGA also would have been amenable to a 50/50 deal together with the equivalent of a $40 million additional payment, especially if, contrary to the LATS, it were to maintain control of ST-246 and the patent rights. To support that determination, the Court relied on an internal presentation prepared by SIGA's controller, Ayelet Dugary. That presentation, apparently prepared for the private use of those negotiating directly with PharmAthene, concluded that SIGA's past and future costs to develop ST-246 were likely to total just under $40 million, thus "supporting an up-front license fee of $40 million[] to buy into a 50% participation in future profits from the product."[45]

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dated November 14, 2006, forwarding PharmAthene's then-current revenue projections for ST-246. Two weeks *later*, on November 28, 2006, SIGA informed PharmAthene that those projections were stale and that SIGA now valued the drug at around $3 to $5 billion, as opposed to the $1 billion to $1.2 billion projections the parties had assumed when negotiating the LATS in December 2005. T. Tr. 228 (Richman); JTX 450. This evidence amply supports the inference that PharmAthene understood the market potential for ST-246 had changed because, among other things, SIGA had apprised PharmAthene of that fact.

[44] September 22 Opinion, 2011 WL 4390726, at *40 & n.237.

[45] JTX 437 Attach. at 2.

SIGA further contends in its Motion that there is no basis in the record to conclude that Dugary or Fasman employed the term "up-front license fee" to encompass the additional deferred license fee and milestone payments provided for in the LATS and, therefore, that SIGA would not have agreed to a license agreement providing for only a one-time payment of $40 million.[46] SIGA, therefore, disagrees with this Court's findings, but that provides no basis for reargument under Rule 59(f). In the September 22 Opinion, the Court recited the material facts and explained the inferences it drew from them, stating:

> Although Dugary used the term "up-front license fee," the weight of the evidence convinces me that she used that term loosely to include all the non-royalty payments mentioned in the LATS, *i.e.*, the upfront licensee fee, the deferred license fee, and milestone payments. In late 2005, when negotiations for the LATS first began, SIGA [with input from Dugary] estimated that it needed approximately $16 million to complete development of ST-246. After active negotiations, the LATS provided SIGA an aggregate of $16 million, apportioned between upfront license fees, deferred license fees, and milestone payments. Dugary's use of the language "past *and future*" ST-246 expenses shows that, by October 2006, SIGA had revised its estimated needs to complete development of ST-246. Just as the LATS fully provided for ST-246's then estimated development costs, the $40 million payment suggested by Dugary would be sufficient to cover all of ST-246's newly estimated development costs. Accordingly, it is reasonable to infer from the evidence that, as of October 2006, SIGA would have considered an aggregate payment of $40 million adequate to support a 50/50 split of future profits from ST-246.

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[46] Def.'s Mot. 9.

> Fasman's statement at the November 6 meeting with PharmAthene that the upfront payment would need to be increased to "$40 to $45 million or more" likely originated from Dugary's October 18 presentation. Had SIGA negotiated in good faith, it would have proposed a transaction consistent with Dugary's presentation: a lump sum payment in an amount sufficient to cover the revised development costs of ST-246, *i.e.*, $39.66 million or more, in exchange for a 50% profit participation without any further license, milestone, or royalty payments.[47]

Moreover, if the negotiations had proceeded in accordance with the LATS, as the Bridge Loan and Merger Agreements provided, PharmAthene presumably would have controlled the product and related patents. In fact, through its misconduct, SIGA alone controls those assets. In summary, while SIGA would have weighed the evidence and drawn the inferences differently if it were the trier of fact, it has not shown that the Court's September 22 Opinion was the product of either a misapplication of the law or a misunderstanding of a material fact.

D. Is There Any Basis in Law or Fact for the *Structure* of the Remedy?

Lastly, SIGA argues in its Motion that "there is no basis in law or fact for transforming an actual upfront payment by PharmAthene into a credit against the first $40 million in net profits to SIGA. Such an arrangement leaves PharmAthene without any risk or investment, which was never even contemplated by the parties, let alone agreed upon."[48] As a threshold matter, I note that SIGA made essentially this same

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[47] September 22 Opinion, 2011 WL 4390726, at *40-41 (footnote omitted).

[48] Def.'s Mot. 11.

argument in its post-trial brief.[49] On that basis alone, this aspect of its Motion for Reargument must be denied.[50] Moreover, it is entirely irrelevant that a PharmAthene representative arguably gave voice to this argument on an investor call *after* the September 22 Opinion was issued.[51] Reargument under Rule 59(f) is "only available to re-examine the existing record."[52]

In any event, the Court did address SIGA's argument in the September 22 Opinion. Referring to the equitable remedy imposed, the Court stated:

> The structure is reversed, but *SIGA's wrongdoing necessitates that*. Absent SIGA's failure to negotiate a license agreement in good faith, PharmAthene would have controlled the ST-246 patents and product. Yet, due to its misconduct, SIGA currently controls those items and will in the future. In these circumstances, as in the case of an equitable lien, it is appropriate to recognize PharmAthene's legitimate claim to share in the proceeds of ST-246.[53]

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49 Def.'s Post-T. Ans. Br. 69 ("[A] payment stream going from *SIGA to PharmAthene* is the complete opposite of the arrangement contemplated in the January Term Sheet, inexplicably placing PharmAthene in the role of licensor rather than licensee.")

50 *See Guzzetta*, 2008 WL 5459249, at *1 (Del. Ch. Dec. 22, 2008); *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007); *Nevins v. Bryan*, 2006 WL 205064, at *3 (Del. Ch. Jan. 20, 2006).

51 *See* Def.'s Mot. 11.

52 *Reserves Dev. LLC*, 2007 WL 4644708, at *1.

53 September 22 Opinion, 2011 WL 4390726, at *39 (emphasis added) (footnote omitted). In an accompanying footnote, the Court further explained that:

> For the reasons previously stated, PharmAthene is not entitled to a form of relief that would interfere with SIGA's control of ST-246 or the patents related to it. . . . Rather, the relief I am

In addition to the reversed direction of payments, the equitable payment stream differs from a license agreement by shifting some of the risks between the parties,[54] but this difference also derives from SIGA's continued control of the ST-246 patents. As PharmAthene's licensing expert opined, a licensee typically "bears the expected cost of development, manufacture and launch (*including payments made to the [licensor]*)" but, "[i]n return, . . . has control over the pace of development and expenditures required for commercialization."[55] That expert opinion supported the Court's determination that the equitable payment stream, though different in certain respects from a license agreement, was appropriate under the circumstances here because SIGA wrongfully deprived PharmAthene of its expectation of a major role in controlling the pace of the ST-246

> ordering will afford PharmAthene an interest in the *proceeds* from the sale of ST-246 products and, conceivably, the related patents. In this sense, SIGA may be correct that the structure of the transaction contemplated by the LATS has been reversed, but it has no equitable basis to complain about such a reversal. Under the LATS, PharmAthene would have enjoyed a significant degree of control over ST-246 and the related patents. Instead, that control, and the benefit likely to flow from it, will remain with SIGA.

Id. at *39 n.231.

54 That is, because a licensee often must incur upfront, sunk costs in the form of payments to the licensor, the licensee bears a risk of loss should the licensed product ultimately prove unprofitable. Here, by contrast, if ST-246 and its related patents fail to generate proceeds, PharmAthene will not suffer the loss of any such sunk costs.

55 JTX 489 ¶¶ 21-22 (emphasis added).

development and expenditures.[56] The Court, therefore, did not misunderstand any material fact in making that determination.

Thus, the legal and equitable basis for the structure of the equitable payment stream is the Court's authority to provide relief "as justice and good conscience may require"[57] and to remedy in equity what otherwise would amount to unjust enrichment.

II. CONCLUSION

For the reasons stated in this Memorandum Opinion, SIGA's Motion for Reargument is denied.

IT IS SO ORDERED.

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[56] *See* September 22 Opinion, 2011 WL 4390726, at *42 (citing JTX 489).

[57] *Lichens Co. v. Standard Commercial Tobacco Co.*, 40 A.2d 447, 452 (Del. Ch. 1944).