

## DELAWARE LITIGATION ALERT

### **SUPREME COURT AFFIRMS LIABILITY OF SIGA TECHNOLOGIES TO PHARMATHENE BASED ON FAILURE TO NEGOTIATE IN GOOD FAITH**

The Delaware Supreme Court recently ruled in the case of *SIGA Technologies, Inc. v. PharmAthene, Inc.*, Del. Supr., No. 314, 2012 (May 24, 2013), that a mere agreement to negotiate in good faith in accordance with a term sheet can be an enforceable obligation. Delaware's high court explained that such a breach can make one subject to expectation damages if the record supports a finding that an agreement would have been reached but for the defendant's bad faith negotiations. This aspect of the trial court's 117-page decision was upheld, but Delaware's high court reversed and remanded the damages award to reconsider damages in light of this opinion.

One Takeaway from this Supreme Court Opinion: The detailed facts must be tethered to any lesson or principle of law taken from this opinion, but at least one ineluctable result of this ruling is that any attorney or businessperson who sends a term sheet to another party in the context of having a duty to negotiate in good faith, must read this opinion in order to determine whether liability will attach as a result of refusing to finalize a definitive agreement in a manner that may be construed, based on this opinion, to be the result of a lack of good faith.

#### **Brief Background**

SIGA and PharmAthene were negotiating simultaneously for a license agreement and a merger agreement, with the goal that if the merger was not consummated that at least a license would result. After trial, the Court of Chancery found that the term sheet contained the essential terms for the license and that if a merger was not consummated, a final and formal license agreement would be entered into.

Key fact: The parties signed a merger agreement which provided that if the merger were terminated, the parties agreed to negotiate in good faith a definitive license agreement based on the term sheet. (Notably, at the bottom of the two-page term sheet was a "footer" that stated: "non binding terms". In the context of the other overwhelming facts, that footer was not determinative.)

#### **Bullet Points on Legal Principles from Opinion**

- Delaware's high court discussed choice of law principles but determined that it was not necessary to decide the issue because New York and Delaware law were not meaningfully different on the relevant issues. Nonetheless, the court discussed the reasoning that can be employed when two related, and somewhat overlapping contracts, have two different choice of law provisions.
- In the context of proposing terms substantially different than the term sheet, the court described "bad faith" as:

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

- The elements of a promissory estoppel claim were recited and then the court reasoned that such a claim does not apply to this case because a fully enforceable contract governs the promise at issue—that is, the merger agreement with its provision to negotiate in good faith.
- Two types of “agreements to negotiate in good faith” are referred to by the court as “Type I” and “Type II.” Type II agreements do not guarantee the parties will reach agreement on a final contract due to good faith differences that may arise, but a Type II agreement: “does, however, bar a party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement”.
- Damages: The Delaware Supreme Court announces new law in this opinion: When the parties have a Type II agreement to negotiate in good faith, and the record supports the trial court’s finding that the parties would have reached an agreement but for the defendant’s bad faith negotiations, the plaintiff is “entitled to recover contract expectation damages.” Expectation damages presuppose that “the plaintiff can prove damages with reasonable certainty.” Because this is the first time the Delaware Supreme Court clarified this issue of damages, it reversed and remanded for Chancery to reconsider the award of damages in light of this opinion.
- Attorneys’ Fees: The Court of Chancery awarded fees based on both the bad faith exception to the American Rule as well as a fee-shifting provision in the Bridge Loan Agreement between the parties. The high court affirmed the award of attorneys’ fees based on the fee-shifting provision and a finding that the fees requested were reasonable.
- The high court did not address the bad faith basis for awarding fees except to note in footnote 109 that the Court of Chancery has inherent equitable authority to award fees—separate from the award of costs pursuant to 10 Del. C. Section 5106 (citing *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 2013 WL 1914714 at \*12 (Del. May 9, 2013)).
- The Supreme Court also remanded for the Court of Chancery to reconsider the award of expert fees so as to tailor them to the bases of liability on which PharmAthene prevailed.

*The Delaware Litigation Alert is intended to keep readers current on matters affecting businesses and is not intended to be legal advice. If you have any questions about this alert please contact **Francis G.X. Pileggi** at 302.655.3667 or at [fpileggi@eckertseamans.com](mailto:fpileggi@eckertseamans.com).*

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