

**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.	)	

**ORDER**

IT IS HEREBY ORDERED, this 8th day of August, 2014, for the reasons stated in my August 8, 2014 Memorandum Opinion (the “Memorandum Opinion”) that:

1. Defined terms shall have the meanings set forth in the Memorandum Opinion and the Post-Trial Opinion unless otherwise specified herein.
2. Within ten days of this Order, Plaintiff, through its damages expert, National Economic Research Associates, Inc. (“NERA”), shall recalculate the present value of PharmAthene’s lost profits utilizing the same discounted future earnings method used in connection with the expert testimony of Jeffrey L. Baliban at trial in this litigation to account for the adjustments specified in the Memorandum Opinion.

A. More specifically, NERA shall use the “NERA Model – ST-246 Earnings Based on License Agreement Term Sheet (LATS) Basis 1 – Based on what was known as of December 20, 2006,” attached as Exhibit 6A (and described in the column on the left of Exhibit 6C) to the Baliban report dated November 20, 2009 (the “NERA Model”).

3. The adjustments that shall be made are as follows:

A. Decreasing the time frame captured by the NERA Model. The NERA Model spans from 2006 to 2017. The revised model shall incorporate the years 2006 to 2014.

B. Altering the timing of the first ST-246 sales. The NERA Model assumed the first ST-246 sales would occur in 2008. The revised model shall assume the first ST-246 sales occurred in 2010.<sup>1</sup>

C. Altering the quantity of initial ST-246 sales. The NERA Model assumed that in 2008, there would be SNS sales of 14,778,000 courses, DoD sales of 250,490 courses, and ROW sales of 14,778,800 courses. The revised model shall assume the following ST-246 sales levels in 2010:

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<sup>1</sup> The price of the quantities sold in 2010 will be \$100 per course. The price will increase 3% each year from 2010 to 2014. Therefore, the price per course will be \$103 in 2011, \$106.09 in 2012, and so forth.

- i. SNS: 14,778,000 courses
- ii. DoD: 125,245 courses
- iii. ROW: 0 courses

D. Altering the distribution of the ST-246 sales. The NERA Model assumed that all ST-246 sales, which were assumed to occur in 2008, 2012, and 2016, would be distributed evenly over a four year period (*i.e.*, one-fourth of the 2008 sales were allocated to each of 2008, 2009, 2010, and 2011). The revised model shall assume that all ST-246 sales, which are assumed to occur only in 2010, will be distributed evenly over a five year period (*i.e.*, one-fifth of the 2010 sales shall be allocated to each of 2010, 2011, 2012, 2013, and 2014.)

i. Therefore, the revised model shall have the following quantity levels for each year:

- a. 2006: 0 courses
- b. 2007: 0 courses
- c. 2008: 0 courses
- d. 2009: 0 courses
- e. 2010: 2,980,649 courses (consisting of 2,955,600 courses sold to the SNS and 25,049 courses sold to the DoD)
- f. 2011: 2,980,649 courses
- g. 2012: 2,980,649 courses

h. 2013: 2,980,649 courses

i. 2014: 2,980,649 courses

E. Altering the timing of when certain upfront and milestone payments are made.<sup>2</sup> The LATs included eight upfront or milestone payments totaling \$16 million that were accounted for in the NERA Model. The revised model shall account for those same upfront and milestone payments as follows:

i. Upfront (\$2 million): paid in 2006

ii. Deferred License Fee (\$2.5 million): paid in 2007

iii. Post-financing > \$15MM (\$1.5 million): paid in 2007

iv. NDA Approval (\$2,000,000): paid in 2007

v. > \$50 [million] USG Sales (\$3 million): payment year to

be determined based on revised sales calculations

vi. Sales in excess of \$200MM (\$2 million): payment year to

be determined based on revised sales calculations

vii. EMEA Approval (\$2 million): paid in 2009

viii. JA Approval (\$1 million): paid in 2009

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<sup>2</sup> Regardless of whether the other milestones actually have been achieved, I conclude it is appropriate to adopt Baliban's timing assumptions for purposes of calculating PharmAthene's expectation damages. I adopt this approach because I consider it more conservative.

G. Recalculating projected cost of goods sold (“COGS”). The NERA Model assumed that COGS would be equal to 14% of revenues. Because the adjustments to the quantities and timing of ST-246 sales will alter the level of revenues in a given year, the COGS must be recalculated in the revised model starting in 2010,<sup>3</sup> at the same 14% level, to account for these adjustments.

H. After recalculating PharmAthene’s lost profits as of December 20, 2006 based on the modifications discussed above,<sup>4</sup> NERA also will calculate the appropriate amount of prejudgment interest, which is to be calculated at the legal rate of interest, compounded quarterly, from December 20, 2006 until the date a judgment is entered in this litigation.<sup>5</sup>

4. Within the same ten day period, specified in Paragraph 2, NERA also shall deliver to counsel for both parties a copy of the new calculations and a functional copy of any financial models or spreadsheets (the “Backup Materials”) used to arrive at the revised calculations.

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<sup>3</sup> In the revised model, Research & Development (R&D) expenses also will begin with the first sales in 2010 at the \$2 million per year level that was used in the NERA Model, and continue at that level through 2014.

<sup>4</sup> The revised model shall continue to use 84% for the “probability of success” factor and 23.1% for the annual discount rate.

<sup>5</sup> This calculation shall reflect the various changes to the legal rate of interest during the relevant time frame, starting with the legal rate of 11.25% as of December 20, 2006.

5. SIGA shall serve on PharmAthene any objections to the revised calculations within ten days of receiving both the calculations and the Backup Materials. **The scope of these objections shall be limited to computational errors made by NERA.**

6. If SIGA has no objections to the revised calculations, within twenty days of receiving the revised calculations and the Backup Materials, PharmAthene shall submit, on notice, a form of final judgment and order consistent with the rulings in this Order and the Memorandum Opinion. In addition to the amount of damages that PharmAthene is entitled to, the final judgment and order shall reflect the following:

A. PharmAthene succeeded in proving its breach of contract claim asserted in Count V of the Complaint. In all other respects, PharmAthene failed to establish SIGA's liability. To the extent PharmAthene failed to prove its claims, those claims are dismissed with prejudice.

B. PharmAthene's claims or requests for specific performance or an equitable payment stream that is in accordance with the terms of the LATs are denied with prejudice on the grounds that PharmAthene is entitled only to a contractual remedy, and it has an adequate remedy at law in the form of lump-sum expectation damages.

C. PharmAthene is entitled to an award of 40% of the reasonable attorneys' fees and expenses that it incurred up through the post-trial argument that was held in this dispute.

i. PharmAthene also is entitled to an award of one-third of the reasonable attorneys' fees and expenses that it incurred throughout the remand proceedings.

D. PharmAthene is entitled to an award of: (i) 60% of the total expenses it incurred in connection with the pretrial and trial activities of Baliban and Dr. Peck; and (ii) an award of 40% of the total expenses it incurred in connection with the pretrial and trial activities of Edwards.

E. PharmAthene is entitled to an award of 10% of the total expenses it incurred in retaining and using the services of expert witnesses during the remand proceedings.

7. If SIGA has objections to the revised calculations, the parties shall make a good faith effort to resolve the dispute among themselves.

A. If the parties succeed in resolving their dispute, PharmAthene shall submit, on notice, a form of final judgment and order consistent with the rulings in this Order and the Memorandum Opinion and reflecting the parties' agreement within ten days of such a resolution, but in no event later

than thirty days after receipt of the revised calculations and Backup Materials.

B. If the parties cannot resolve their dispute, the parties shall submit within thirty days after receipt of the revised calculations and Backup Materials competing letters to the Court explaining the nature of the dispute and the basis for their respective positions. Each party's letter shall comply with Court of Chancery Rules 171(d)(2), (d)(3), and (d)(4) and shall not exceed ten pages.

8. If SIGA has objections to the form of the proposed final judgment and order, the parties shall make a good faith effort to resolve the dispute among themselves.

A. If the parties are able to resolve their dispute, PharmAthene shall submit, on notice, a form of final judgment and order consistent with the rulings in this Order and the Memorandum Opinion and reflecting the parties' agreement within ten days of such a resolution, but not more than 30 days after receipt of the revised calculations and Backup Materials.

B. If the parties cannot resolve their dispute, the parties shall submit within thirty days after receipt of the revised calculations and Backup Materials competing letters to the Court explaining the nature of the dispute and the basis for their respective positions. Each party's letter shall comply



with Court of Chancery Rules 171(d)(2), (d)(3), and (d)(4) and shall not exceed ten pages.

/s/ *Donald F. Parsons, Jr.*  
Vice Chancellor Donald F. Parsons, Jr.