

Delaware Court Declines to Rule that Term Sheet did not Create Binding Obligations

Finds "Material Issue of Fact" Sufficient to Deny Summary Judgment Motion

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Last fall, *PharmAthene, Inc. v. SIGA Technologies, Inc.*, [\[1\]](#) the Delaware Court of Chancery denied summary judgment to a technology owner who claimed that an unsigned term sheet with a prospective licensee did not create an enforceable contract between the parties. Following the parties' sign-off on the term sheet, the technology "passed some important milestones," leading the technology owner to demand "much more favorable economic terms." Despite a legend to the effect that the unsigned term sheet reflected only non-binding terms, Vice Chancellor Parsons found "a material issue of fact as to whether the parties entered into a binding licensing agreement" that was sufficient to defeat the technology owner's summary judgment motion.

Background

In 2004, SIGA Technologies, Inc., "a biodefense company engaged in the development and commercialization of medical countermeasures against biological and chemical weapons," acquired the technology for an orally-administered antiviral smallpox treatment known as ST-246. Due to difficulties in developing and bringing ST-246 to market, SIGA approached another biodefense company, PharmAthene, Inc., to pursue a "collaboration regarding the development and commercialization of ST-246." In January 2006, the parties negotiated a term sheet for a licensing agreement, or "LATS," which was titled "SIGA/PharmAthene Partnership." The LATS was not signed by either party and expressly stated that it contained "Non Binding Terms."

As the parties' collaboration efforts proceeded, they began discussing the possibility of merging the two companies. Because PharmAthene's representatives "wanted to be sure that PharmAthene ended up with the product either through the license or through the merger," they pressed for an executed license agreement. SIGA's Chairman, objecting that this approach would result in "spending money on 'a bunch of lawyers to sit around to work on a License Agreement that will never be used,'" insisted instead that attaching the LATS to a letter of intent for a merger would be sufficient. In fact, he assured PharmAthene that "you're going to get the license or you're going to get a merger...."

In early March, the parties signed a letter of intent in which they "agreed to 'negotiate in good faith' and 'use their best efforts' to execute a definitive merger agreement." Annexed to this letter of intent was a Merger Term Sheet, which stated that if the merger did not come to fruition, the parties would "negotiate in good faith the terms of a definitive License Agreement in accordance with the terms set forth in the LATS." The Merger Term Sheet also stated that it "is non-binding and only an expression of interest and is subject in its entirety to the negotiation and execution of a definitive Merger Agreement." Later that month, PharmAthene made a bridge loan to SIGA that made similar reference to the LATS.

Then, in June, the parties signed a merger agreement. The merger agreement provided, among other things, that the parties would use their "best efforts to take such actions as may be necessary... to carry out and consummate the transactions" but, if the merger was not consummated "by September 30, 2006, either party could terminate the deal." It also provided that if no merger occurred before the agreement was terminated, the parties would "negotiate in good faith with the intention of executing a definitive License Agreement in accordance with" the LATS. As SIGA's Chairman had suggested, a copy of the LATS was attached as an exhibit to the merger agreement.

Pending completion of the merger, PharmAthene and SIGA continued to work together on the development of ST-246, which "began to achieve several significant success thresholds." Following public announcement of these positive results, SIGA's stock price "soared." As the September 30th termination date approached and the conditions to the merger were not satisfied, PharmAthene requested an extension. Rather than granting PharmAthene's request, on October 4th, SIGA sent a notice to PharmAthene terminating the merger agreement. PharmAthene attempted to negotiate a license agreement with SIGA in the following weeks, but SIGA was unresponsive.

Next, PharmAthene attempted to force the issue by sending an actual license agreement to SIGA, in execution form and "generally in accordance with the terms of the LATS." However, SIGA informed PharmAthene "that it did not consider the LATS binding" and that its terms "no longer were acceptable." Talks continued, but on December 12th, 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"

PharmAthene responded by filing suit against SIGA in the Court of Chancery, claiming breach of contract based on several theories. Following the Court's rejection of its motion to dismiss, SIGA moved for partial summary judgment, contending (among other things) that there was no enforceable obligation arising from or relating to the LATS.

The Court's Analysis

Vice Chancellor Parsons began his analysis by explaining that "where 'commercial parties draft a 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.'" Thus, in Delaware "the enforceability of a term sheet or memorandum of understanding typically involves two separate 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."

With respect to the first question, SIGA and PharmAthene both conceded that they intended the LATS to be a "binding agreement." The Court found that the record supported this concession. However, SIGA argued - and the Court seemingly agreed - "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.'"

Turning to the second question, SIGA argued "that when viewed objectively, the LATS does not constitute an enforcement licensing agreement because there are material terms missing and it does not, therefore, reflect agreement on all 'essential' terms." Vice Chancellor Parsons, citing earlier decisions, favored a more subjective approach, stating

that "the test for determining whether all essential terms have been agreed upon" is "[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...*"

Viewing the facts before him "in a light favorable to PharmAthene" - as required when ruling on a summary judgment motion - the Vice Chancellor opined that PharmAthene had presented evidence that would make it "reasonable, therefore, to conclude that the parties had reached agreement on all essential terms... and all that remained to be negotiated were certain boilerplate items." The Vice Chancellor noted that PharmAthene's position "do[es] not rest solely upon the LATS," but also on "[t]he fact that the LATS was attached to the... Merger Agreement... [which] together with the negotiating history alleged by PharmAthene... provide ample support for an inference that the parties believed the LATS contained all the essential elements of a licensing agreement."

SIGA attempted to negate this evidence with expert testimony that some terms which are "typically [found] in fully delineated sponsored development agreement[s]... are missing from this [LATS]." The Vice Chancellor discounted this testimony, explaining that this "does not mean that essential terms were omitted." While acknowledging that "SIGA may be able to prove that one or more provisions omitted from the LATS were essential to the parties' licensing agreement," the Vice Chancellor concluded 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." On this basis, the Vice Chancellor ruled that granting SIGA's motion for summary judgment on the issue of the enforceability of the LATS would be inappropriate.

Conclusion

While a trial on the merits may produce a different result, the Vice Chancellor's refusal to categorize the LATS - even though unsigned and legended to reflect that its terms were non-binding - as merely "an agreement to agree" is a reminder that parties negotiating a transaction must treat term sheets and other expressions of intent seriously. Under the right set of circumstances, neither party may be free to simply walk away from their term sheet when the economics are no longer favorable, particularly when evidence of their agreement and intent to be bound may be inferred from their actions and communications. In such a case, the key element will be whether the writing contains all the essential terms for the transaction under discussion, which should be a factor that the parties and their counsel can control.

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^[1] C.A. No. 2627-VCP (Del. Ch. Nov. 23, 2010).

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