

Corporate Finance/M&A - USA

Damages for breach of contractual obligation to negotiate in good faith

Contributed by **Ropes & Gray LLP**

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In *SIGA Technologies, Inc v PharmAthene, Inc* the Delaware Supreme Court affirmed that a contractual obligation to negotiate in good faith is enforceable. In that case SIGA Technologies and PharmAthene had negotiated a "nonbinding" licence agreement term sheet. After the negotiation of the term sheet, PharmAthene provided SIGA Technologies with a bridge loan and the parties subsequently negotiated and executed a merger agreement. Both the bridge loan and the merger agreement contemplated that the parties would "negotiate in good faith with the intention of executing" a licence agreement should the merger fail. The merger ultimately did fail, and in its May 2013 decision the Delaware Supreme Court affirmed the Delaware Chancery Court's conclusion that SIGA Technologies had breached its contractual obligation to negotiate a licence agreement in good faith after a failed merger (for further details please see "[Duty to negotiate in good faith gets enforced](#)").

On January 15 2015 the Delaware Chancery Court held that SIGA Technologies was liable to PharmAthene for a total of \$195 million, consisting of expectation damages of \$113 million, plus pre-judgment interest, legal fees, costs and expenses. The court further ordered that the remaining claims and counterclaims made by SIGA Technologies and PharmAthene be dismissed with prejudice, including claims by PharmAthene for specific performance related to the licence agreement and term sheet.⁽¹⁾ The resolution of this case serves as a reminder of the magnitude of the damages that can result from an agreement to negotiate in good faith set forth in a letter of intent.

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Endnotes

(1) *PharmAthene v SIGA Techs, Inc*, CA 2627-VCP (Del Ch January 15 2015).

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