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IN THE

Supreme Court of the State of Delaware

BIOVERIS CORPORATION, Plaintiff Below, Appellant, v. MESO SCALE DIAGNOSTICS, LLC., MESO SCALE TECHNOLOGIES, LLC., Defendants Below, Appellees.	**No. 339, 2018** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 8692-VCMR

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns whether the Court of Chancery erred in holding that laches barred Appellant BioVeris Corporation's ("BioVeris") claim where BioVeris filed a breach of contract suit more than three years after an alleged breach and clear repudiation.

In 2004, Meso Scale Technologies, LLC. and Meso Scale Diagnostics, LLC. (together, "Meso") agreed to buy BioVeris's share of the parties' joint venture for a Purchase Price consisting of three components. This litigation concerns the portion of the Purchase Price associated with Meso's share of rent for the use of common facilities from 2004 to 2005 – an amount the parties were supposed to agree upon. There is no dispute that Meso paid more than $9 million toward the Purchase Price from 2005 to 2010. There is also no dispute that the parties never agreed on the amount of rent Meso owed.

In May 2010, Meso told BioVeris it was making its final payment. When BioVeris sued Meso in June 2013 seeking more, Meso moved for summary judgment on the ground of laches. Alternatively, Meso argued that BioVeris's claim was subject to a contractual remedy that required BioVeris to act within one year of accrual. Finally, Meso argued that the parties released the disputed rent in a 2008 agreement.

The Court of Chancery held that laches barred BioVeris's claim because Meso's actions in May 2010 constituted a total breach. Meso's final payment was facially deficient (according to BioVeris's view of Meso's payment obligations) and Meso's accompanying letter clearly said that no further payments would be

made. The Court of Chancery also held that there were no circumstances – extraordinary or otherwise – that excused BioVeris's untimely suit. The Court did not decide whether (i) the claim was barred by the one-year contractual remedy; (ii) BioVeris released the disputed rent; or (iii) the underlying agreement was an installment contract.

SUMMARY OF ARGUMENT

1. *Denied.* The Court of Chancery correctly held that laches bars BioVeris's suit. Meso made an allegedly short payment toward the Purchase Price and informed BioVeris that it would make no further payments. The Court of Chancery found that Meso's repudiation of any future obligations was "positive, unequivocal, and unconditional," Op. 27 (Exhibit A to BioVeris Brief), and noted that BioVeris "understood the 2010 Letter was a repudiation." *Id.* Under long-settled authority, the combination of alleged non-performance and repudiation constitute a total breach, triggering a single three-year limitations period in which to file suit.

The Court of Chancery correctly held that a total breach starts the applicable limitations period as to the entire contract, without regard to whether it is an installment contract. Where it is evident that the parties fundamentally disagree about how to interpret their contract, and one party has ceased performance as a result, there is no useful purpose in allowing separate suits for each alleged non-payment. "Non-performance plus the repudiation constitute one and only one cause of action." Op. 24 (quoting 10 CORBIN ON CONTRACTS § 53.12).

2. *Denied.* The Court of Chancery also correctly held that Restatement (Second) of Contracts Section 243(3) does not apply here. That section applies only when the non-breaching party has fully performed all of its contractual obligations. BioVeris has not. Rather, the contract remains bilateral because "BioVeris concedes . . . the parties never came to an agreement on the Pro Rata Rent Share reconciliation as required by the Settlement Agreement." Op. 28. The

mutual obligation to agree on a precise amount of rent owed was central to BioVeris's eventual claim. Without agreement, the parties were destined to disagree about the ultimate Purchase Price.

3. *Denied.* Finally, the Court of Chancery correctly held that no unusual or extraordinary circumstances excused BioVeris's untimely suit. "BioVeris merely sent two letters before the statute of limitations expired," Op. 33, pre-suit efforts that do not amount to extraordinary circumstances. With regard to BioVeris's claim that it timely invoked tolling under the parties' Joint Venture Agreement ("JVA"), the court correctly held that the later-in-time 2004 Settlement Agreement ("Settlement Agreement") had a clear forum selection clause requiring BioVeris to sue in Delaware courts. Because BioVeris's eventual complaint alleged only a breach of the Settlement Agreement, and not a breach of the JVA, the tolling provision from the JVA is inapplicable. Op. 33-34.

STATEMENT OF FACTS

A. 1995-2004: The Joint Venture and Settlement Agreements

1. In 1995, Meso and IGEN International ("IGEN") formed a joint venture called Meso Scale Diagnostics, LLC. ("MSD") to research, develop, and commercialize a detection technology known as electrochemiluminescence ("ECL"), pursuant to a Joint Venture Agreement ("JVA"). A63-84. From the beginning, MSD shared space with IGEN at facilities in Gaithersburg, Maryland.

By 2001, the joint venture had shown promise, and the parties amended the JVA to reflect developments since 1995. In the Amendment, the companies formalized their space sharing: MSD signed subleases and agreed to pay rent based on actual usage. IGEN also demonstrated its commitment to the joint venture by providing Meso with "reasonable access to" and use of shared equipment and facilities for as long as the leases remained in place. B2-3 ("2001 Letter Agreement"). Finally, the 2001 JVA Amendment provided Meso with a mechanism to buy out IGEN's share of the joint venture. In 2003, as part of a billion-dollar settlement of an unrelated intellectual property dispute, Roche Diagnostics ("Roche") purchased a new ECL license from IGEN, and IGEN transferred its operating business and intellectual property – including its interest in the MSD joint venture – to the newly formed public company, BioVeris. *See Meso*

Scale Diagnostics, LLC v. Roche Diagnostics GmbH, 62 A.3d 62, 68, 71-72 (Del. Ch. 2013).

On April 29, 2004, Meso informed BioVeris that it intended to buy out BioVeris's interest in the joint venture. A182-85. Weeks later, BioVeris launched a lawsuit against MSD, alleging corporate waste in an apparent attempt to keep its grip on the joint venture. A191-97. The litigation backfired, and BioVeris promptly settled by agreeing to facilitate the buyout. Among other things, the Settlement Agreement provided Meso with enhanced buyout rights, $3 million in cash, and seller financing (including a $2 million credit) to aid Meso's acquisition of the entire joint venture. A274-75, ¶¶ 15-16.

2. In the Settlement Agreement, Meso agreed to pay BioVeris a "Purchase Price" for BioVeris's share of the joint venture. The Purchase Price included three components as opposed to a single defined price: (1) the "fair market value" of BioVeris's interest in the joint venture (later agreed to be $9.9 million); (2) the Pro Rata Rent Share, or "Rent Share" (an amount never agreed upon); and (3) the appraisal costs ($85,000). A275-76, ¶¶ 17, 21. Meso agreed to pay BioVeris 5% of its "Net Sales" on a quarterly basis until the Purchase Price was "paid in full." A276, ¶ 22; A108-09, § 8.5.3(b). The contract defined the "Completion Date" as the "date upon which the BioVeris Interests are transferred" to Meso, A270, ¶ 3(c), which occurred on December 13, 2004.

The "Pro Rata Rent Share" is the portion of the Purchase Price at issue in this litigation. The Rent Share was intended to reflect Meso's portion of the space that it shared with BioVeris from March 2004 through August 2005. A275, ¶ 17. Because some of that period was in the future as of the Settlement Agreement and included variable costs, the parties agreed that, "on or before the Completion Date," they "shall in good faith agree upon an estimate of the aggregate Pro Rata Rent Share." *Id.* The contract further provided that the parties would "reconcile the actual accrued Pro Rata Rent Share . . . against the agreed upon estimate of the accrued Pro Rata Rent Share . . . and make any necessary adjustments to the Purchase Price . . . arising from such reconciliations" within 30 days of December 31, 2004, March 31, 2005, and August 31, 2005. *Id.*

Further, the "parties agreed to a [two-fold] dispute resolution scheme for any disputes arising out of the Settlement Agreement." Op. 8. First, the Settlement Agreement created a License Audit procedure as the "exclusive remedy . . . for resolving disputes as to the appropriate amount of [Meso's] payments" toward the Purchase Price. A276-78, ¶¶ 23-24. The Settlement Agreement provided that BioVeris could not initiate a License Audit to dispute Meso's Purchase Price payments more than one year after the disputed payment was made and such audits were limited to one per year. A278, ¶ 23(f). Second, the Settlement Agreement stated that all other disputes "arising out of or relating in any way to this

Agreement" must be litigated in Delaware courts. A280, ¶ 34. Finally, the parties agreed that the Settlement Agreement represented "the entire agreement among the parties with respect to the subject matter hereof, and supersedes all prior or contemporaneous oral or written agreements, understandings or representations," A282, ¶ 45.

B. 2005-2006: The Rent Reconciliation Process

1. The parties never agreed on a final amount of Rent Share. Op. 9 ("The parties do not dispute that they never finished the reconciliation process required by Section 17 of the Settlement Agreement."); *see also* Op. 28. In November 2004, BioVeris told Meso it estimated the Rent Share to be approximately $2.3 million. A371. Contrary to BioVeris's claim (at 7) that both parties "agreed" on the estimate, Meso promptly disagreed with BioVeris's $2.3 million figure and identified numerous material issues. B32. Despite the lack of an agreed-upon estimate for the Rent Share "on or before the Completion Date," A275, ¶ 17, BioVeris went ahead with the closing and transferred its interest.

Extensive negotiations ensued on the proper amount of Meso's share of the rent, although many of the details have been lost to fading memories of events long past. In the end, the parties never reached agreement on the Rent Share itself, much less a reconciliation of the estimate – as BioVeris's Rule 30(b)(6) witness, former BioVeris President Tom Adkins, testified. [redacted]

[redacted]

2. [redacted]

3. [redacted]

[redacted]

Moreover, Meso negotiated with BioVeris (and then Roche after it acquired BioVeris, as described below) about releasing the still-unresolved Rent Share in 2006 and 2007. [redacted] Ultimately, the parties were unable to come to a resolution that encompassed the parties' intellectual property disputes.

C. 2007-2008: Roche Buys BioVeris and Releases the Rent Share

In June 2007, Roche bought BioVeris for $600 million. Upon closing, Roche started shutting down BioVeris's operations, laying off its employees, and preparing to leave Maryland altogether. B173, Tr. 12:16-24. Roche, however, realized that it needed to extract itself from BioVeris's long-term leases and obligations to supply space and equipment to Meso.

In early 2008, Roche started a new round of negotiations with Meso, focusing on BioVeris's real estate entanglements with Meso. B106-27. Roche floated a deal to Meso: (1) Roche would sell Meso the shared assets on the cheap; (2) Roche would pay Meso to assume and take over BioVeris's leases; and (3) the parties would mutually release one another from any and all past claims relating to "real property." B128.

The parties accomplished all these objectives with their December 4, 2008 Asset Sale and Lease Assumption Agreement ("ASLAA"). A767-894. Meso purchased BioVeris's unwanted assets and assumed BioVeris's leases of five Maryland facilities, with BioVeris paying Meso $3.5 million. *See* A768, §§ 2.1-2.2. BioVeris and Meso also mutually and reciprocally released one another from:

> "***any and all claims, demands, rights and causes of action of whatever kind and nature***, . . . known or unknown . . . which [the party] ***has or may hereafter acquire*** based on any act, occurrence or omission prior to the Closing . . . ***with respect to any and all obligations of the parties . . . in respect of real property*** . . . ."

A772-73, §§ 7.1-7.2 (emphases added).

D. 2010: Meso Pays the Purchase Price in Full

1. From 2005 to May 2010, Meso made quarterly payments toward the Purchase Price. Meso first drew down the $2 million prepayment credit provided by BioVeris's seller financing. Beginning in 2007, Meso wired quarterly Purchase Price payments – equal to 5% of Meso quarterly Net Sales – to BioVeris along with a contractually required letter report. *See* A1018-26. Each quarterly letter listed Meso's total Net Sales for the quarter, as well as the Purchase Price payment (5% of Net Sales) and separate royalty payment (3% of Net Sales). *See id.*

On May 28, 2010, Meso paid the Purchase Price in full with its final payment of $430,670. In a letter accompanying the payment, Meso told BioVeris that the payment "represents the remaining balance due on the Purchase Price (including accrued interest)." A974. As the Court of Chancery found, Meso's alleged "breach was apparent on the face of the accompanying letter" because the May 2010 payment represented less than half of 5% of Meso's quarterly Net Sales – which would have been $872,629, not $430,670 – and was far lower than Meso's payments from preceding quarters.[1] Op. 25; B131 (November 2009 payment of $910,346); B133 (February 2010 payment of $930,949).

[1] Meso's $430,670 Purchase Price payment was also less than the 3% royalty payment, which was $523,578. The letter listed both side-by-side. A974.

As to future payments, Meso's letter "made clear that Meso would be sending no further payments, which BioVeris believed, and still believes, it was owed." Op. 27. "BioVeris's internal documents show[ed] that BioVeris understood the 2010 Letter was a repudiation of the Settlement Agreement." *Id.* For example, [redacted] Indeed, BioVeris understood immediately that "MSD is claiming they have paid the note in full" and referred the issue to Roche's legal team at Foley & Lardner, LLP. B136.

2. BioVeris did nothing for nearly three years after receiving the May 28, 2010 allegedly short payment and letter. Meso continued to send BioVeris quarterly payment letters, reporting and remitting the 3% royalty but "ma[king] no further payments towards the Purchase Price." Op. 10. BioVeris made no inquiries about the purportedly missing Purchase Price payments. *See* B180, Tr. 36:18-37:15.[2]

[2] [redacted]

E. 2013-2017: This Lawsuit and Procedural History

1. After years of silence and in the midst of unrelated litigation between Meso and Roche, BioVeris wrote a letter to Meso on April 30, 2013, demanding additional payment on the Purchase Price. A1018-19. On May 28, 2013, BioVeris sent another letter purporting to "open[ ] the 20-day period of negotiations pursuant to Section 7.2 of the Joint Venture Agreement."[3] A1022. Meso denied owing more and explained that BioVeris was wrong to reference the dispute resolution provisions of the JVA because the later-in-time Settlement Agreement provided the operative dispute-resolution mechanisms. A1024; *accord* Op. 34 ("Section 7.2 of the JVA does not apply to these claims.").

Three years and one month after accepting Meso's allegedly short payment, BioVeris filed this action in the Court of Chancery. The complaint alleged a single cause of action "aris[ing] out of Meso's breach of . . . the 'Settlement Agreement.'" A1048 & 1052, ¶¶ 1, 23-24. The complaint did not allege a breach of the JVA.

[redacted]

[3] Section 7.2 of the Joint Venture Agreement provided, in relevant part, that "any dispute arising out of, or related to this Agreement . . . or the breach, termination or validity hereof" could be referred to binding arbitration if it "cannot be resolved by the representatives of the parties within twenty (20) days." A105, § 7.2.

2. Following discovery, Meso moved for summary judgment on two grounds: (1) BioVeris's claim is untimely; and (2) BioVeris cannot prevail on the merits because it released Meso from paying the Rent Share – an "obligation . . . in respect of real property" – in the 2008 ASLAA.[4]

3. On November 2, 2017, the Court of Chancery granted Meso's motion for summary judgment, holding that BioVeris's claims were barred by laches. In particular, the Court of Chancery held that Meso's allegedly short payment and repudiation in May 2010 constituted a "total breach" under well-established doctrine, which triggered a single three-year statute of limitations that expired prior to the filing of BioVeris's suit (regardless of whether the contract is labeled an "installment" contract). Op. 19-27. The Court of Chancery also rejected BioVeris's argument that the Settlement Agreement was a unilateral contract governed by Restatement (Second) of Contracts Section 243(3), because it was "uncontested that the parties never completed the Pro Rata Rent Share reconciliation process" and the contract thus remained bilateral. Op. 27-29.

Moreover, the Court of Chancery rejected BioVeris's argument that, under *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 177 (Del. 2011), "exceptional

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[4] The Court of Chancery also did not reach Meso's argument that BioVeris's claim was governed by the one-year License Audit procedure under Paragraphs 23 and 24 of the Settlement Agreement, because the Court found "BioVeris's claim is barred by laches even under the more generous three-year statute of limitations for breach of contract claims." Op. 17 n.68.

circumstances" excused the untimeliness of this lawsuit. The Court found that BioVeris did nothing more than "sen[d] two letters before the statute of limitations expired." Op. 33. Nor did BioVeris's invocation of the arbitration clause in Section 7.2 of the JVA justify its untimely suit, because the reference to JVA arbitration "obviously disregard[ed] the parties' forum selection clause in the Settlement Agreement," and "[a] party cannot rely on a suit knowingly filed in the wrong forum as a basis for avoiding the application of laches," Op. 33-34. Because BioVeris's suit was time-barred, the Court of Chancery did not decide whether BioVeris released the Rent Share in the 2008 ASLAA. *See* Op. 12 n.45.

After supplemental briefing and argument, the Court of Chancery also concluded that BioVeris could not invoke two remedies set forth in the JVA because it had not pled an independent breach of the JVA.[5] June 5 Order, ¶ 4 (Exhibit B to BioVeris Brief). Rather, BioVeris's sole cause of action, which arose under the Settlement Agreement, was time-barred. *Id.*, ¶ 5. Upon entering final judgment for Meso, the court also granted Meso's motion for attorneys' fees and costs, as provided under Paragraph 45 of the Settlement Agreement. *See* Exhibits C and D to BioVeris Brief.

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[5] JVA Section 8.5.6 provides that, in the event Meso defaulted on the Purchase Price, BioVeris would be entitled to a 15% payment penalty and a seat on Meso's board of directors until the default was cured. A114-15, § 8.5.6.

ARGUMENT

I. The Court of Chancery Correctly Held That BioVeris's Claims Are Untimely

A. Question Presented

Whether the Court of Chancery correctly held that Meso's alleged total breach – a combination of alleged non-performance and clear repudiation of any further obligation – triggered the three-year statute of limitations as to BioVeris's single cause of action for payment under the Settlement Agreement.

B. Scope of Review

"This Court reviews the interpretation and application of legal precepts, such as the statute of limitations and the doctrine of laches, *de novo*." *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013). This Court also "review[s] the Court of Chancery's contract interpretation *de novo*." *Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 557 (Del. 2017). This Court will not review questions or arguments not raised to the trial court. *See, e.g.*, *Shawe v. Elting*, 157 A.3d 152, 162-63, 168-69 (Del. 2017) (en banc) ("[O]ur Court requires that arguments be considered in the first instance by the trial court before appellate review."); *accord* Del. Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review.").

C. Merits of Argument

The Court of Chancery correctly held that BioVeris's sole cause of action for payment of the Purchase Price accrued on May 28, 2010, three years and one month before this action was filed. Meso's alleged non-performance combined with repudiation amounted to a "total breach" of the Settlement Agreement. A total breach provides the non-breaching party a single cause of action, which accrues at the time of the alleged breach. BioVeris's arguments to the contrary miss the mark because they either ignore the principles of total breach altogether or argue for an exception to that rule that has no basis in law or the facts.

BioVeris also wrongly claims that it fully performed its obligations under the Settlement Agreement, such that Restatement (Second) of Contracts section 243(3) should govern this case. The Settlement Agreement imposed bilateral obligations on the parties to agree on an estimate and then reconcile the Rent Share that BioVeris now seeks to recover. BioVeris concedes that neither the agreed estimate nor the reconciliation ever occurred. Instead, it posits a new construction of the Agreement whereby the mere passage of time would extinguish the parties' mutual obligations. That argument has been waived, has no support in the contract, and runs counter to the parties' actual course of conduct.

1. The Court of Chancery Correctly Held That a Total Breach Triggers the Statute of Limitations as to the Entire Contract

a. The Combination of Non-Performance and Repudiation Constitutes a Total Breach

A contract may be breached by non-performance, repudiation, or both, and a breach may be either "total" or "partial." RESTATEMENT (SECOND) OF CONTRACTS § 236 & cmts. a-b. This is a case about total breach. Meso's purported breach of the Settlement Agreement included *both* alleged non-performance *and* repudiation, which means the "breach *must* be treated as total." 10 CORBIN ON CONTRACTS § 53.4 (emphasis added); *see* RESTATEMENT (SECOND) OF CONTRACTS § 243 cmt. b (where repudiation is accompanied by non-performance, "the injured party cannot avoid . . . having a claim for damages for total breach"). When a breach is total, "the injured party has one entire cause of action," which accrues upon breach, to recover on all of the injured party's remaining rights to performance. 10 CORBIN ON CONTRACTS § 53.4; *accord Medek v Medek*, 2009 WL 2005365, at *13 (Del. Ch. July 1, 2009); RESTATEMENT (SECOND) OF CONTRACTS § 236.

This principle of total breach has been widely recognized for decades. The drafters of the Restatement codified this principle nearly 40 years ago, *see* RESTATEMENT (SECOND) OF CONTRACTS § 243(2), and it has been recognized in other jurisdictions for even longer, *see, e.g.*, *Fox v. Dehn*, 116 Cal. Rptr. 786, 790 (1974). It has also been adopted by federal courts of appeals for the Third and

Ninth Circuit, *see R.C. Beeson, Inc. v. Coca Cola Co.*, 337 F. App'x 241, 244-45 (3d Cir. 2009); *Minidoka Irrigation Dist. v. U.S. Dept. of Interior*, 406 F.3d 567, 573 (9th Cir. 2005), as well as the highest courts in Colorado, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, Oregon, and Washington. *See, e.g., Pavone v. Kirke*, 807 N.W.2d 828, 837-38 (Iowa 2011) (non-performance plus repudiation "created a single cause of action"); *Metromedia Co. v. Hartz Mountain Assocs.*, 655 A.2d 1379, 1381 (N.J. 1995); *Colwell v. Eising*, 827 P.2d 1005, 1009-10 (Wash. 1992) (en banc); *Schneiker v. Gordon*, 732 P.2d 603, 611 (Colo. 1987) (en banc) (holding that where sub-lessees "not only had abandoned the premises but also had returned the keys and had failed to pay installments of rent that had come due," their actions "amount[ed] to a total breach of the sublease"); *Kulm v. Coast to Coast Stores*, 461 P.2d 526, 527 (Or. 1969) (en banc); *Hoyt v. Horst*, 201 A.2d 118, 123-24 (N.H. 1964); *Kalkhoff v. Nelson*, 62 N.W. 332, 333 (Minn. 1895); *Jewett v. Brooks*, 134 Mass. 505, 506 (1883) (Holmes, J.).[6]

[6] *See also, e.g., Hassebrock v. Ceja Corp.*, 29 N.E.3d 412, 422-23 (Ill. App. Ct. 2015); *In re Chemtura Corp.*, 448 B.R. 635, 663 (Bankr. S.D.N.Y. 2011) (California law); *Loral Corp. v. Goodyear Tire & Rubber Co.*, 1996 WL 38830, at *8 (S.D.N.Y. Feb. 1, 1996) (New York law); *Conn. Indem. Co. v. Markman*, 1993 WL 304056, at *4 (E.D. Pa. Aug. 6, 1993) (Pennsylvania law); *G.W. Andersen Constr. Co. v. Mars Sales*, 210 Cal. Rptr. 409, 417 (Cal. App. 1985).

Leading commentators on contract law have explained the rationale for this widely accepted principle. Professor Corbin explains that, although a non-breaching party "may elect to regard" partial non-performance as a partial breach, "[h]e generally has no such election . . . in case the wrongdoer has repudiated the contract, expressing his intention to perform no further." 10 CORBIN ON CONTRACTS § 53.4; *see also id.* § 53.12 ("The non-performance plus the repudiation constitute one and only one cause of action.").[7] Professor Williston likewise explains that, although a "strictly anticipatory breach" leaves open "at least a theoretical possibility" of performance, "after a material present breach, any attempted withdrawal [of the repudiation] by the wrongdoer would be ineffectual," and thus it "is not logically defensible" in that circumstance to allow an injured party to "elect not to call a breach something that is a breach" in order to avoid the running of the statute of limitations. 31 WILLISTON ON CONTRACTS § 79.19. In other words, a non-breaching party has no option to treat repudiation as an empty threat if it is accompanied by an actual, present breach.

b. Meso's Actions Indisputably Constituted a Total Breach

The Court of Chancery correctly held that Meso's allegedly short payment and repudiation constituted a total breach, which triggered the limitations period

[7] Other jurisdictions have followed Professor Corbin's guidance on the topic of total breach. *See, e.g., Metromedia*, 655 A.2d at 1381; *Segall v. Hurwitz*, 339 N.W.2d 333, 343 (Wis. Ct. App. 1983).

for BioVeris's "one and only one cause of action." [8] 10 CORBIN ON CONTRACTS § 53.12.

First, on May 28, 2010, Meso paid BioVeris less than it claims it was owed. There is no doubt that Meso's May 2010 payment was less than the 5% of MSD's Net Sales that BioVeris claims it was owed under the Settlement Agreement. This "was apparent on the face of the accompanying letter." Op. 25. BioVeris conceded in the Court of Chancery that the payment constituted obvious non-performance because it was less than half the amount BioVeris says it should have been paid, *see* A1189, and BioVeris makes that same concession before this Court, *see* BioVeris Br. 9 (May 28, 2010 payment "was less than 5% of its sales").

Second, on May 28, 2010, Meso also repudiated any further payment obligations under the Settlement Agreement by telling BioVeris that its payment "represent[ed] the remaining balance due on the Purchase Price (including accrued interest)." A974. That statement left nothing to misinterpretation – as the record fully confirmed. *See supra* p. 12. The Court of Chancery correctly concluded that Meso's May 2010 letter was a "positive, unequivocal, and unconditional" repudiation, Op. 27, a finding that BioVeris does not challenge on appeal.

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[8] Both parties agree that the limitations period applicable to BioVeris's claims is three years "from the accruing of the cause of such action," pursuant to 10 *Del. C.* § 8106(a). A contract cause of action accrues under Section 8106 at the time of the alleged breach. *See, e.g.*, *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004); *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005).

c. The Principles of Total Breach Apply to All Contracts, Including Installment Contracts

Moreover, the Court of Chancery correctly held that there is no exception to the total-breach rule for "installment contract[s]." *See* Op. 20; *accord, e.g.*, *R.C. Beeson*, 337 F. App'x at 245; *Minidoka Irrigation*, 406 F.3d at 573; *Hoyt*, 201 A.2d at 124; *Metromedia*, 655 A.2d at 1381; 10 CORBIN ON CONTRACTS § 53.12; RESTATEMENT (SECOND) OF CONTRACTS § 243 cmt. b. The rationale for applying the rule of total breach to installment contracts, both generally and on the specific facts of this case, is at least three-fold.

First, as the Third Circuit observed in *R.C. Beeson*, if a non-breaching party faced with a total breach were allowed to seek piecemeal recovery on an open-ended "installment" contract, "the statute of limitations would be robbed of meaning." 337 F. App'x at 245; *see also, e.g.*, *Lang v. Aetna Life Ins. Co.*, 196 F.3d 1102, 1105 (10th Cir. 1999) (rejecting application of accrual rule that "would undermine the overriding purpose of a statute of limitation"). That perverse consequence of BioVeris's proposed rule is clear here, where Meso's obligation to make payments "shall continue until the entire amount of the Purchase Price and all accrued interest shall have been paid in full." A109, § 8.5.3. Because Meso's payment obligation has no endpoint other than "pa[yment] in full" – of an amount

that was never agreed upon – BioVeris's logic would create a new (partial) breach of the Settlement Agreement each quarter into perpetuity.[9]

Second, the combination of a present breach and a repudiation send a clear message that the contract is at an end, and the non-breaching party has no reasonable expectation of receiving any further performance installments. *See, e.g.*, Arthur Rosett, *Partial, Qualified, and Equivocal Repudiation of Contract*, 81 COLUM. L. REV. 93, 102 (1981) ("present breach indicates that the renunciatory talk is not just talk," and "the repudiation of future performance is a clear indication that . . . the aggrieved party will never get what he bargained for from the other side"). In that circumstance, it would be wasteful and contrary to the principle of damages mitigation to allow a non-breaching party to continue performance (and continue to incur consequential damages) while seeking damages for partial breach in serial litigation over years or decades. *See, e.g., Katz v. Exclusive Auto Leasing, Inc.*, 282 A.2d 866, 868 (Del. 1971) (acknowledging "the rule requiring the injured party to minimize his losses"); 10 CORBIN ON

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[9] BioVeris asserts (at 10) – without citation or support in the contractual language – that "all installments for the Purchase Price would have come due by late 2011," if Meso had been making payments during that time period "[b]ased on MSD's revenues since 2010." But, of course, the parties could not have known, at the time, when 5% of Meso's future Net Sales would reach the amount BioVeris now contends to be the Purchase Price plus interest. And after May 2010, Meso did not make any such payments. Under the plain terms of the contract, there is no date-certain. Each purportedly unpaid installment rolled into the next quarter "until the entire amount of the Purchase Price and all accrued interest shall have been paid in full." A109, § 8.5.3.

CONTRACTS § 53.14 (in total breach scenario, "generally the most satisfactory remedy, both for the parties and for the public, is a single judgment for money damages").

Third, BioVeris's proposed piecemeal accrual rule serves no useful purpose when, as BioVeris argues here, the cause of non-payment is a fundamental disagreement about what the contract requires. As Professor Corbin explains, even when a party's performance obligations are divisible, "[i]t is the *repudiation* that is total and indivisible, affecting all [performance obligations] alike and frustrating the main objective of the whole." 10 CORBIN ON CONTRACTS § 54.8; *accord* E. Allan Farnsworth, CONTRACTS § 8.22 (3d ed. 1999). Courts have followed this rationale in holding that "causes of action based on contract interpretation, as opposed to situations devoid of any interpretive questions such as nonpayment of installments, should be deemed to accrue on the date on which plaintiff becomes or should become aware of the parties[']differing interpretations." *Air Transp. Ass'n of Am. v. Lenkin*, 711 F. Supp. 25, 28 (D.D.C. 1989); *accord Norwest Bank Minn. N.A. v. FDIC*, 312 F.3d 447, 453-54 (D.C. Cir. 2002) ("dispute over the interpretation of the contract" triggers total breach); *Dinerstein v. Paul Revere Life Ins. Co.*, 173 F.3d 826, 828-29 (11th Cir. 1999) (total breach where "the issue is

not whether the total amount due under a particular installment was fully paid, but rather whether it was owed in the first place").[10]

Here, a fundamental disagreement about the interpretation of the agreement arose on May 28, 2010. Indeed, in the Chancery Court, BioVeris cast this case as a "dispute[] about the total amount of the Purchase Price" that turns on "legal concepts." B161-62. BioVeris had no choice but to take that position: If, consistent with BioVeris's installment contract theory, this case was simply about an improper quarterly payment – i.e., a "dispute as to the appropriate amount of [Meso's] payments" toward the Purchase Price, A276-78, ¶¶ 23-24 – then the exclusive procedure for resolving the dispute would be a prescribed License Audit, for which the one-year deadline had indisputably expired, *see supra* p. 7.

d. BioVeris's Arguments Focus Only on Partial Non-Performance Alone or Repudiation Alone and Are Therefore Misguided

BioVeris ignores these well-settled principles of total breach and refuses to grapple with the effect of combining partial non-performance with repudiation.

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[10] BioVeris cites (at 15, 28) *Keefe Co. v. Americable Int'l, Inc.*, 755 A.2d 469 (D.C. 2000), but that case is inapposite. There, the D.C. Court of Appeals was answering a certified question that assumed the plaintiff had already fully performed its obligations under the contract, making it unilateral and thus subject to Restatement 243(3). *See id.* at 476-77; *see also id.* at 476 (recognizing total breach rule may apply to "actions based on contract interpretation."). Similarly, *Jensen v. Janesville Sand & Gravel Co.*, 415 N.W.2d 559 (Wis. Ct. App. 1987), recognized the validity of the total breach principle, *see id.* at 562 (quoting *Segall*, 339 N.W. 2d at 343), but found it did not apply on the facts presented because the contract at issue was unilateral under Restatement 243(3).

Instead, BioVeris deals with each of the two facets in isolation. *See, e.g.*, BioVeris Br. 18-19 ("debtor's failure to make an installment payment, *without more*, . . . constitute a default as to all the remaining obligations under the Agreement") (emphasis added) (quoting *Worrel v. Farmers Bank of State of Del.*, 430 A.2d 469, 474 n.14 (Del. 1981)); *id.* at 20-21 ("a non-breaching party may elect, or not, to treat a repudiation [standing alone] as a breach") (citing *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009)). In doing so, BioVeris conflates total breach with anticipatory repudiation or breach by partial non-performance. Asking the wrong question unsurprisingly leads BioVeris to the incorrect answer.

When a breach is by partial non-performance *alone*, the non-breaching party may have the option to treat the breach as either partial or total in certain circumstances. *See, e.g.*, *Worrel*, 430 A.2d at 469; RESTATEMENT (SECOND) OF CONTRACTS § 243(1); 10 CORBIN ON CONTRACTS § 53.12. Likewise, when a breach is by anticipatory repudiation *alone*, the non-breaching party has the option of ignoring the repudiation until performance comes due or immediately treating the repudiation as a total breach, unless the repudiation is retracted. *See, e.g.*, *W. Willow-Bay*, 2009 WL 458779, at *5; RESTATEMENT (SECOND) OF CONTRACTS § 253. The reasons for flexibility in those circumstances are straightforward. A non-breaching party is not required to assume that partial non-performance now

will turn into total non-performance later. 10 CORBIN ON CONTRACTS § 53.12. Similarly, in the case of anticipatory repudiation alone, the repudiator may change her mind before performance is due. *W. Willow-Bay*, 2009 WL 458779, at *5.

Those principles have no application to this case, which involves *both* partial non-performance *and* repudiation. Thus, BioVeris misplaces reliance on cases like *Worrel* and *West Willow-Bay*, which involved only partial non-performance or anticipatory repudiation alone. In *Worrel*, for example, a borrower missed several car payments (36 equal monthly payments of $156.08), leading to a repossession action by the bank. 430 A.2d at 473. Thus, that case involved a standard consumer loan, unexplained missed payments, and no repudiation whatsoever – not (as here) an alleged present breach accompanied by unequivocal repudiation of future performance.

BioVeris likewise misplaces reliance on *Walpole v. Walls*, 2003 WL 22931330 (Del. Com. Pl. July 8, 2003), an unreported decision in which the defendant agreed to make payments on the plaintiff's second mortgage. *Id.* at *1. Years into the deal, the defendant "advised the Plaintiff that he would no longer make any payments on the Plaintiff's second mortgage," but then proceeded to make them anyway for several months. *See id.* As the Court of Chancery correctly explained, *Walpole* involved an anticipatory repudiation that was "effectively retracted" by subsequent performance, thereby rendering the

defendant's later failures to pay not a total breach but rather "a breach of an installment contract by non-performance" only. Op. 22-23. BioVeris elides this distinction by arguing (at 19-20) that *Walpole* "involved a repudiation in the installment contract context," and contending that "[t]he *Walpole* court did not . . . treat the April payment as a retraction of the repudiation." But regardless how the *Walpole* decision "treat[ed]" the defendant's post-repudiation performance, performing on a contract after saying you won't is a retraction as a matter of law and renders the total breach rule inapplicable. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 256 cmt. b; 10 CORBIN ON CONTRACTS § 54.23.[11]

BioVeris also wrongly contends (at 20) that an "installment accrual rule" should supersede the total breach principle because a non-breaching party should always "control" when its claim accrues.[12] But a plaintiff's "control" over accrual

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[11] *Walpole* inexplicably relied upon *Manley v. Associates in Obstetrics & Gynecology, P.A.*, 2001 WL 946489 (Del. Super. Ct. July 27, 2001), which involved an *unretracted* anticipatory repudiation that turned into non-performance only *after* suit had been filed. *See id.* at *6. Why the *Walpole* court thought *Manley* was apposite and muddled the sequence of the defendant's anticipatory repudiation, performance, and non-performance, *see Walpole,* 2003 WL 22931330, at *2, are mysteries this Court need not try to solve.

[12] BioVeris's arguments (at 17-18, 22-23) about the presence or absence of an acceleration clause are a red herring. An acceleration clause is not the sole mechanism for triggering a single cause of action, as the total breach cases discussed above demonstrate. Moreover, the License Audit was the exclusive remedy for all disputes about the amount of a quarterly payment. Any such dispute had to be brought within one year of the dispute and no more than one time per year. A278, § 23(f). That provision contradicts BioVeris's assertion that it could

is the exception, not the rule. As discussed *supra* pp. 21-22, a contract claim generally accrues when the contract is breached, even though the non-breaching party rarely has any "control" over when or how a breach occurs (which is one reason why statutes of limitations are generous in length). Indeed, a contract claim accrues at the time of breach "even if the plaintiff is ignorant of the cause of action." *Wal-Mart*, 860 A.2d at 319; *accord Pulieri v. Boardwalk Props., LLC*, 2015 WL 691449, at *11 (Del. Ch. Feb. 18, 2015). Nor does BioVeris propose any reason to elevate plaintiff control over all other considerations, including "the public policy purposes served by statutes of limitations." *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *6 (Del. Ch. July 11, 2011).

2. The Settlement Agreement Remained Bilateral Throughout the Limitations Period

BioVeris also tries to escape the effect of Meso's total breach by contending (at 23-31) that "the Settlement Agreement had become unilateral" at the time of Meso's purported breach in May 2010 because BioVeris had already fully performed all of its contractual obligations. BioVeris is wrong. The Court of Chancery correctly held that "[b]ecause the parties still have not fulfilled their duty to reconcile the Pro Rata Rent Share, the Settlement Agreement is still executory and does not fall under the exception in Section 243(3)." Op. 28-29. BioVeris's

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elect to bring a claim each quarter for each missed payment until the total Purchase Price was paid in full.

newly raised contention that its reconciliation obligations disappeared in October 2005 is waived and in any event contradicted by the text of the Settlement Agreement and the parties' course of conduct.

"A unilateral contract results from an exchange of a promise for an act, while a bilateral contract results from an exchange of promises." 1 WILLISTON ON CONTRACTS § 1:17; *accord In re Estate of Hunter*, 1994 WL 273947, at *5 (Del. Ch. June 10, 1994). In other words, a unilateral contract is one under which there is only one promisor, and "only one party is bound." 1 WILLISTON ON CONTRACTS § 1:17. Assuming BioVeris's view that the Rent Share had not been released in 2008, *see supra* pp. 11-12, the Settlement Agreement remained bilateral throughout the limitations period because it remained an interrelated "exchange of promises" between Meso and BioVeris. Most notably, the Settlement Agreement requires both Meso and BioVeris to perform by (1) agreeing in good faith upon "an estimate of the aggregate Pro Rata Rent Share" from March 2004 to August 2005; and (2) reconciling "the actual accrued Pro Rata Rent Share . . . against the agreed upon estimate . . . and make any necessary adjustments to the Purchase Price." A275, ¶ 17. BioVeris conceded (and the record is clear) that neither of those obligations has been fulfilled. Op. 28; *see supra* p. 8. Indeed, BioVeris's former President and Rule 30(b)(6) witness acknowledged that the parties never finalized

the Rent Share and that BioVeris's disputed estimate from November 2004 could have been off by at least $100,000 (or more). *See supra* p. 9.

BioVeris now contends (at 29-30), for the first time on appeal, that "the reconciliation was required to be completed no later than September 30, 2005," and that "[i]f the reconciliation was not complete by September 30, 2005, whichever party contended that the estimate caused it damage" needed to sue in order to prevent the estimate from becoming binding. BioVeris never argued for this unfounded construction of the Settlement Agreement in the proceedings below, so it is waived and cannot be presented for the first time on appeal.[13] *See, Shawe*, 157 A.3d at 162-63, 168-69; Del. Sup. Ct. R. 8.

Even if this Court were to consider BioVeris's construction of the Settlement Agreement, it should be rejected for at least three independent reasons. *First*, the argument ignores the conceded fact that the parties never agreed on an estimate of the rent owed. Having an agreed-upon estimate in the first place is obviously a predicate to any reconciliation of that agreed-upon estimate. A275, ¶ 17.

Second, BioVeris's interpretation has no textual support in the contract. The Settlement Agreement does *not* provide that the obligation to reconcile the Rent

[13] BioVeris's counsel asserted at oral argument that BioVeris's estimate would be used absent a mutual reconciliation, B198, Tr. 68:14-17, but the Court of Chancery correctly observed that "BioVeris offer[ed] no authority or facts to support this assertion," Op. 28. Further, BioVeris never argued, as it does now, that the reconciliation obligation was extinguished as a matter of contract interpretation.

Share disappears if the parties do not reconcile by September 30, 2005. Nor does the Settlement Agreement support BioVeris's contention (at 30) that BioVeris's disputed rent estimate controls if reconciliation does not occur by that date. BioVeris simply invites this Court to author those provisions. *See e.g.*, *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 898 (Del. 2015) (courts "should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it"). Meso and BioVeris were represented by counsel and specifically bargained for a merger clause that *prevents* the imposition of implied terms to which the parties did not agree in the contract. A282, ¶ 45.

Third, the parties' contemporaneous course of conduct belies BioVeris's current arguments. *See, e.g.*, *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). BioVeris transferred its interest to Meso on December 13, 2004, the Completion Date, even though the parties disagreed on the rent estimate – effectively disregarding that portion of Paragraph 17. Moreover, neither party took the position in 2005 or 2006 that the estimate and reconciliation obligations were extinguished on September 30, 2005 if still incomplete. Long after that date, the parties continued trying to agree on an estimate for the Rent Share. *See supra* p. 9 [redacted]

[redacted] And BioVeris and Meso expressly negotiated releasing the Rent Share well into 2007. *Id.*

3. The Question Whether the Settlement Agreement is an Installment Contract is Not Before This Court

BioVeris contends (at 15-16) that there is "ample evidence" to support its argument that the Settlement Agreement is an installment contract – a fundamental predicate for all of its other arguments.[14] The Court of Chancery, however, expressly declined to decide that question, noting that it was "ardently contest[ed]." *See* Op. 19. As described above, *see supra* p. 15, the installment question is ancillary because the total breach doctrine applies to both installment and non-installment contracts. In any event, even assuming the installment contract question needs to be decided at all (and it does not), this Court should permit the Court of Chancery to decide that question in the first instance. *See, e.g.*, *Sierra Club Citizens Coal., Inc. v. Tidewater Envtl. Servs., Inc.*, 51 A.3d 463, 468 (Del. 2012) (where Superior Court "did not reach [an] issue," this Court "decline[d] to resolve it without the benefit of the Superior Court's opinion on the issue").[15]

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[14] BioVeris does not ask this Court to decide the installment contract question. *See* BioVeris Br. 13, 32 (questions presented).

[15] The Court of Chancery also did not reach Meso's second summary judgment argument: the 2008 ASLAA – in which the parties mutually released

II. No Exceptional Circumstances Justify BioVeris's Untimely Lawsuit

A. Question Presented

Whether the Court of Chancery correctly held that there are no "exceptional circumstances," under *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 177 (Del. 2011), that justify BioVeris's untimely lawsuit.

B. Scope of Review

The *O'Brien* test presents a mixed question of law and fact based upon the totality of the circumstances. In this context, the standards of review are "well established." *Poliak v. Keyser*, 65 A.2d 617 (Table), 2013 WL 1897638, at *2 (Del. 2013). Findings based on the record "are subject to the deferential 'clearly erroneous' standard of review," which applies "not only to historical facts that are based upon credibility determinations but also [those] based on physical or documentary evidence or inferences from other facts." *Id.* This Court then reviews the Court of Chancery's legal conclusions *de novo*. *Id.*

C. Merits of Argument

Because BioVeris filed this lawsuit *after* the three-year limitations period expired, it must prove this is the rare instance where "unusual conditions or extraordinary circumstances" excuse failure to file a timely lawsuit. *Levey*, 76 A.3d at 770. "Few cases" will meet this test, *O'Brien*, 26 A.3d at 178, and

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one another from any and all past obligations "in respect of real property" – released Meso from its obligation to pay the 2004-2005 Rent Share. *See supra* p. 16 (describing ASLAA); Op. 12 n.45 (not reaching release argument).

BioVeris cannot come close to making that showing. *None* of the five *O'Brien* factors favors excusing BioVeris's untimely suit.

1. BioVeris's Last-Minute Demand Letters Do Not Demonstrate Diligent Pursuit of its Claim

a. Meso delivered its final Purchase Price payment on May 28, 2010. BioVeris had full knowledge of its payment dispute with Meso, yet it sat silent for nearly three years. *See supra* p. 13. BioVeris did not initiate a License Audit – the "exclusive remedy of the parties for resolving disputes as to the appropriate amount of payments" toward the Purchase Price – within the required one-year timeframe.[16] A278, ¶ 24. Nor did it file suit within Delaware's three-year statute of limitations.

Despite its dilatory conduct, BioVeris now claims that based upon two letters it sent to Meso – on April 30, 2013 and May 28, 2013 – it should be allowed to proceed with its untimely lawsuit. The Court of Chancery correctly concluded, however, BioVeris's letters "do not show BioVeris was pursuing the claim before the statute of limitations expired" under the first *O'Brien* factor. Op. 33; *see O'Brien*, 26 A.3d at 178.

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[16] Although the parties disagree about whether BioVeris was *required* to invoke the License Audit, BioVeris believed the May 2010 payment was inadequate and there is no dispute it *could* have invoked that procedure to clear up the dispute. B183 (Tr. 50:19-22).

b. In *O'Brien*, the plaintiff in an indemnification action litigated his claims for more than *six years* in both arbitration and Florida court (before his adversary went bankrupt, derailing his suit). *See* 26 A.3d at 176. The Court found that extraordinary circumstances justified the late-filed Delaware action, particularly as the plaintiff encountered delays that were beyond his control (including an appeal in the Florida action) and because "he had [no] reason to suspect" his former employer would go bankrupt and thus necessitate a separate suit. *Id.* at 179.

Two years after *O'Brien*, this Court again found "extraordinary circumstances" in *Levey*. The plaintiff there litigated his claim in the Southern District of New York, in an action brought by the defendants, and also "asserted his claim" in a subsequent letter – both years before the limitations period expired. 76 A.3d at 771. Notably, the plaintiff only wound up in Delaware court after the federal court compelled arbitration – after which the arbitration forum "surprisingly [] disclaimed jurisdiction over his case." *Id.* (plaintiff's delay was "attributable, at least in part," to actions and rulings "*distinct from any inaction by Levey.*") (emphasis added)).

c. This case is far different than *O'Brien* and *Levey* – as BioVeris admits (at 37) ("this case does not present the same type of facts as *O'Brien*"). Unlike those cases, BioVeris did not litigate its claim in another forum before filing this

action in Delaware court; rather, it "merely sent two letters before the statute of limitations expired." Op. 33. Nor is BioVeris's delay attributable to an unexpected development beyond BioVeris's control. Nothing prevented BioVeris from filing a timely suit. Indeed, discovery showed that BioVeris contemplated bringing a timely lawsuit but simply chose not to. *Compare supra* pp. 13-14 & n.2 *with Daugherty v. Highland Capital Mgmt., L.P.*, 2018 WL 3217738, at *10 (Del. Ch. June 29, 2018) (no extraordinary circumstances where the plaintiff "had full control of his claims . . . throughout the entire period" yet "chose to wait" beyond the statute of limitations); *Gavin v. Club Holdings, LLC*, 2016 WL 1298964, at *6-7 (D. Del. Mar. 31, 2016) (plaintiff must show that "extraordinary *external* obstacles" "prevented timely filing.") (emphasis added).

The fact that one of BioVeris's pre-suit letters (sent on the day the statute of limitations expired) invoked the JVA arbitration clause does not change the analysis. As explained below, *see infra* pp. 41-42, the JVA arbitration provision is inapposite as a matter of law. And, in any case, BioVeris's letter did not preclude it from filing a timely lawsuit.[17]

[17] Indeed, JVA Section 7.2 allows for tolling "until the dispute is resolved under this provision," meaning "final and binding arbitration conducted in Washington, D.C." A105-06. Section 7.2 says nothing about tolling in any other forum. The contract therefore provides no basis for BioVeris's attempt to use *arbitration* tolling as equitable basis to revive an otherwise-untimely action in Chancery Court.

BioVeris does not cite a single case holding that a couple of demand letters are enough to excuse an untimely filing under *O'Brien*. Indeed, courts in Delaware and elsewhere have rejected the argument that run-of-the-mill pre-suit correspondence can prolong the statute of limitations. *See, e.g., VLIW Tech., LLC v. Hewlett-Packard Co.*, 2005 WL 1089027, at *13 (Del. Ch. May 4, 2005) (holding that the "parties were engaged in negotiations to avoid the suit is not a proper ground for tolling the statute of limitations," because that finding "would obviously undermine the public policy behind the statute of limitations"); *accord Eluv Holdings v. Dotomi, LLC*, 2013 WL 1200273, at *9-10 (Del. Ch. Mar. 26, 2013).

2. A Single *O'Brien* Factor is Not Sufficient to Establish Extraordinary Circumstances

Even if BioVeris's last-minute letters could be construed as the pursuit of its claims under the first *O'Brien* factor, that would still not justify a finding of extraordinary circumstances without more. As this Court has explained, "few cases" will meet the *O'Brien* test. 26 A.3d at 178. And in *Levey*, this Court found extraordinary circumstances only after concluding that *four of the five* factors weighed in favor of permitting an otherwise untimely suit to proceed. 76 A.3d at 770-71 (delay in filing was "attributable to a legal determination in another jurisdiction" and the defendants "were aware of, and participated in, prior

proceedings" on the issue); *see also Daugherty*, 2018 WL 3217738, at *10 (two of five *O'Brien* factors not sufficient).

Here, BioVeris does not even attempt to argue that three of the five *O'Brien* factors weigh in its favor. *See* BioVeris Br. 33, 37. BioVeris's delay in filing was not "attributable to a legal determination in another jurisdiction" (factor #3). There were no prior proceedings (factor #4). And BioVeris's delay cannot be "attributable to a material and unforeseeable change in the parties' personal or financial circumstances," (factor #2), as it has been at all relevant times a wholly owned subsidiary of the multinational giant Roche.

As to the fifth *O'Brien* factor, BioVeris argues (at 37) that the parties have a "bona fide dispute," *Levey*, 76 A.3d at 770, because (according to BioVeris) its claim is "meritorious" and it "will prevail if the statute of limitations does not bar the claim." But every plaintiff thinks it will win. That belief, standing alone, cannot be a sufficient basis to ignore the statute of limitations. And here, the merits of the dispute are hotly contested. Meso has argued from the start that it did not owe the Rent Share because BioVeris released Meso from any and all past obligations "in respect of *real property*" in the 2008 ASLAA. In essence, BioVeris filed an untimely suit for a debt it released five years earlier – an issue the Court of Chancery did not reach because BioVeris's claim is time-barred. Op. 12 n.45.

3. The JVA Arbitration Provision is Irrelevant as a Matter of Law and Cannot Justify BioVeris's Untimely Lawsuit

BioVeris's invocation of the JVA arbitration provision does not change the analysis. BioVeris's May 28, 2013 letter purported to "open[ ] the 20-day period of negotiations pursuant to Section 7.2 of the Joint Venture Agreement." A1022. But as the Court of Chancery correctly concluded, "Section 7.2 of the JVA does not apply to these claims." Op. 33-34.

a. BioVeris's lawsuit arises under the Settlement Agreement, not the JVA. A1048 & 1052, ¶¶ 1, 23-24 (alleging cause of action "aris[ing] out of Meso's breach of . . . the 'Settlement Agreement.'"); Op. 12 ("Plaintiff argues Defendants failed to pay the full Purchase Price *owed under the Settlement Agreement.*") (emphasis added). BioVeris does not allege that Meso breached the JVA.

Meso and BioVeris agreed to resolve disputes arising under the Settlement Agreement (such as the present dispute) in one of two ways. First, for "disputes as to the appropriate amount of payments under Section 8.5.3 of the JVA" (i.e., the Purchase Price), the parties agreed that a License Audit would be the "exclusive remedy." A278, ¶ 24. For all other disputes "arising out of or relating in any way to this Agreement or the Settlement," the parties agreed that the dispute "*shall*" be pursued in Delaware courts. A280-81, ¶ 34. There is no third option for arbitration. Thus, BioVeris's May 2013 letter invoking *JVA arbitration* for its

dispute about the *Settlement Agreement* "obviously disregard[ed] the parties' forum selection clause in the Settlement Agreement" and provides no basis for its time-barred lawsuit. Op. 33.

b. BioVeris notes (at 34) that it sought two remedies (a 15% payment penalty and seat on the Meso board of directors) under the JVA in its complaint, but that is irrelevant. A remedy is entirely different from a claim or cause of action. And BioVeris has not claimed that Meso breached the JVA. BioVeris's entire claim arises solely from the Settlement Agreement.[18] *See* June 5 Order, ¶¶ 4-5.

In any case, even if there was some conflict between the Settlement Agreement and JVA, the Settlement Agreement's dispute resolution procedures are exclusive and mandatory. The Court of Chancery correctly determined they control as the "later in time provision." *See* Op. 18 n.71 (citing case); *see also Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522 (2d Cir. 2011).

CONCLUSION

The decision of the Court of Chancery should be affirmed.

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[18] BioVeris's claim (at 36) that this action "might be still proceeding in arbitration" is wrong. Meso only agreed to stay BioVeris's arbitration action "should the Court of Chancery determine that it is without jurisdiction." A1057. That contingency never occurred. Meso has *never* agreed this case belongs in arbitration. It does not.

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CERTIFICATE OF SERVICE

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