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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BIOVERIS CORPORATION, Appellant/ Plaintiff-Below, v. MESO SCALE DIAGNOSTICS, LLC. and MESO SCALE TECHNOLOGIES, LLC., Appellees/ Defendants-Below.	PUBLIC VERSION FILED ON: August 31, 2018 No. 339, 2018 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 8692-VCMR

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns the legal rules governing the statute of limitations for installment contracts. Plaintiff-below Appellant BioVeris Corporation ("BioVeris") and Defendant-below Appellee Meso Scale Technologies, LLC. ("MST") were joint venturers in Defendant-below Appellee Meso Scale Diagnostics, LLC. ("MSD", and together with MST, "Meso"). The parties entered into a settlement agreement in connection with the termination of the joint venture (the "Settlement Agreement"). The Settlement Agreement required Meso to make payments totaling $12,317,500 (the "Purchase Price") to BioVeris in installments.

About $3 million remains unpaid. Shortly before trial, the Court of Chancery dismissed BioVeris's claim to collect the balance owed. The Vice Chancellor held that, because Meso stated that its May 2010 payment reflected its final payment, and because BioVeris filed suit more than three years later, BioVeris was barred from recovering all later installments that would have come due within the analogous three-year limitations period. In doing so, the Vice Chancellor misapplied the statute of limitations as to installment contracts as well as the "unusual conditions or exceptional circumstances" test governing whether the statute of limitations or laches applies in the Court of Chancery.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by not following the rule for installment contracts reflected in *Worrel v. Farmers Bank of Delaware*, 430 A.2d 469, 476 (Del. 1981). Each failure to pay an installment under an installment contract is a discrete breach of contract, giving rise to a distinct claim, and commencing a separate limitations period. BioVeris's claim to recover installments due from and after August 2010 accrued within three years of suit and was timely.

2. The Court of Chancery erred by requiring assertion of a claim for total breach when a missed installment is accompanied by repudiation of the contract. That has not been the law of Delaware. If this Court adopts a total breach rule, it should adopt Restatement (Second) of Contracts Section 243(3), by which the Settlement Agreement was exempt from the total breach rule because it had become a unilateral contract for the payment of money in installments.

3. The Court of Chancery erred by not recognizing the legal significance of BioVeris's having timely invoked mandatory arbitration, under the parties' Joint Venture Agreement ("JVA"). BioVeris's timely pursuit of its claims under the JVA within the limitations period presents "unusual circumstances" under *IAC/InterActiveCorp. v. O'Brien*, 26 A.3d 174, 178 (Del. 2011), requiring application of a laches analysis, under which Meso cannot prevail.

STATEMENT OF FACTS

While the contentious history between the parties is long and complicated, the dispositive facts here are few and simple:

On August 12, 2004, the parties executed the Settlement Agreement, which is an installment contract. (A269)

On May 28, 2010, after BioVeris had performed all its obligations, Meso (inaccurately) declared that all amounts Meso owed under the Settlement Agreement had been paid when Meso made a short installment payment toward the Purchase Price. (A974)

On May 28, 2013, BioVeris formally initiated the dispute resolution process provided for in the JVA. (A1022)

On June 28, 2013, about a year and a half after the last installment payment had come due, BioVeris demanded arbitration under the JVA and simultaneously filed suit in the Court of Chancery. (A1027) Further background facts follow.

A. Termination of MSD Joint Venture

BioVeris's predecessor IGEN, Inc. (later IGEN International, Inc.) formed a joint venture with MST in 1995 pursuant to the JVA, which was amended in 2001. (A63 & A85) The joint venture, known as MSD, terminated after IGEN

transferred certain assets, including its 31% interest in MSD, to the newly-created BioVeris on February 13, 2004. (A165)

Under the amended JVA, MSD or MST (at their election) had the right to buy out IGEN's interests in MSD at an appraised value (the "Purchase Price") when the joint venture terminated. (A111-13 § 8.5.4(d).) [redacted] (A108-10 § 8.5.3(b).) On April 29, 2004, Meso invoked the buyout provisions in the JVA for BioVeris's 31% interest in MSD ("BioVeris Interests"). (A182)

During the term of the joint venture, IGEN contributed facility space to MSD. (A169) BioVeris (as IGEN's successor) had the right, when the joint venture terminated, to terminate the subleases for that space, on 18-months' notice. (*E.g.*, A140) During those 18 months, MSD would pay its pro rata share (based on square footage used) of all rents and expenses that BioVeris paid under the primary leases. (A140 ¶ 12.) Meso had the right, under the subleases, to roll the amount of that pro rata rent into the Purchase Price. (*Id.*) On February 29, 2004, BioVeris sent MSD termination notices for 11 MSD subleases and noted that MSD "shall be required to pay its Pro Rata Rent Share with respect to each of the subleased properties" through September 1, 2005. (A157 & A159)

B. The 2004 Settlement Agreement

In about May 2004, BioVeris discovered that Jacob Wohlstadter, President of MSD and principal shareholder of MST, had used MSD funds for personal expenditures (including luxury cars and real estate). (A198-201 ¶¶ 3-16; A189-90) BioVeris filed two lawsuits, alleging (among other things) misuse of MSD funds and failure to pay rent for the subleased space. (A191 & A240)

On August 12, 2004, BioVeris, MSD, MST, and Jacob Wohlstadter settled their disputes. The Settlement Agreement (A269) covered a number of issues, including that: 1) the parties agreed to the finer details of the valuation and buyout processes, which had begun in April; 2) Jacob Wohlstadter agreed to buy the luxury cars and real estate from MSD; and 3) the parties agreed to dismiss the pending litigation. (A269-74 ¶¶ 1-3, 6, 11, 13, 15) Meso also exercised its contractual right under the subleases to include the Pro Rata Rent Share for the 18-month period from March 2004 to August 2005 in the Purchase Price. (A275 ¶ 17) The Settlement Agreement provided that, "unless expressly modified," the terms of the JVA remained "in full force and effect." (A282 ¶ 45)

Both the JVA terms and the Settlement Agreement established the Purchase Price buyout as an installment agreement. (A108-10 § 8.5.3; A275, ¶ 17 & A306-16 Ex. H.) [redacted]

[redacted] (A316 (emphasis added); A350) [redacted] and in BioVeris's SEC filings.[2]

C. Establishment of the Purchase Price and Attempts To "True Up" the Purchase Price by Reconciliation

1. BioVeris and MSD Establish the Purchase Price

After executing the Settlement Agreement, Meso bought out the BioVeris Interests. [redacted] (A275 ¶ 17; A621-22)

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1 (*E.g.*, A418; A693; A748; A763; A904; A925)

2 (*See, e.g.*, A735 (6/14/06 BioVeris 10-K))

3 (A186; A264; A361)

The Pro Rata Rent Share, which covered rent from February 2004 through August 2005, included variable costs. Thus, the Settlement Agreement provided that the parties would "agree upon an estimate of the aggregate Pro Rata Rent Share ... through August 31, 2005." (A275 ¶ 17) Thereafter, the parties would "reconcile the actual accrued Pro Rata Rent Share ... against the agreed upon estimate ... and make any necessary adjustments to the Purchase Price ... arising from such reconciliations." (*Id.*)

BioVeris and Meso agreed on an estimate of the Pro Rata Rent Share amount: $2,337,243. (A371-72) That number included the actual rent expense for March 2004 to September 2004, and estimates for October 2004 through August 2005. (*Id.*; A1061-62 Tr. 49:14-51:11; A1070-71 Tr. 67:18-73:12)[4] Ample evidence shows that both BioVeris and MSD used $2.337 million as the estimated Pro Rata Rent Share and $12,317,500 as the Purchase Price.[5]

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[4] (*See also* A372; A389-91; A430-31; A641-42)

[5] (*E.g.*, A676; A677-78; A1072 Tr. 82:14-83:7; A1078 Tr. 170:23-172:16; A454, A479; A641-42; A422; A722-25; A730) Indeed, the BioVeris and MSD estimates needed to match, because until December 2004 BioVeris was required to report MSD's financials in BioVeris's audited consolidated financial statements. (A1073 Tr. 93:7-22)

2. The Reconciliation Process

Under Section 17 of the Settlement Agreement, BioVeris and Meso were to reconcile the estimated rent with actual rent expense three times: "as of and within 30 days after each of December 31, 2004, March 31, 2005 and August 31, 2005." (A275 ¶ 17) The Parties did not adjust the Purchase Price pursuant to any reconciliation by September 30, 2005 (the deadline for the last reconciliation), but neither invoked the dispute resolution provisions of the JVA or filed a lawsuit against the other claiming a breach of the Settlement Agreement for failure to reconcile the estimate to actual rent. In any event, the value of any potential "true ups" was small. [redacted] (A1073 Tr. 91:16-18)[6] [redacted] (*E.g.*, A722-25)

D. Meso Stops Making Installment Payments

In November 2008, Meso and BioVeris signed an agreement by which BioVeris sold certain equipment and assigned ongoing leases to MSD. That

[6] While Meso may dispute some of these facts, BioVeris submitted sufficient evidence of them to avoid summary judgment.

transaction closed in early 2009, and the agreement made no mention of the Settlement Agreement or the estimated $2.337 million Pro Rata Rent Share. (A767) Meso contended below that this agreement (A1124), referred to by the parties as the ASLAA, released its obligation to pay the portion of the Purchase Price equal to the 18 months of pro rata rent.

Meso apparently came up with this release theory around May 2010, on the eve of Meso suing BioVeris and its affiliates and parent company and alleging claims under an agreement not at issue here. [redacted] (*Compare* A972 *with* A977-79.) [redacted][7]

On May 28, 2010, MSD sent its quarterly report to BioVeris with a payment for that installment that was less than 5% of its sales and wrote that the payment "represents the remaining balance due on the Purchase Price (including accrued interest)." (A974) In August 2010 (the deadline for the report and payment for the

[7] [redacted]

second quarter of 2010), Meso for the first time did not make a payment on the Purchase Price. (*See* A982) Nor has it done so for any period since. (A1052 ¶ 19; *see, e.g.*, A983.) Based on MSD's revenues since 2010, all installments for the Purchase Price would have come due by late 2011.

E. BioVeris Pursues Its Claims

On April 30, 2013, BioVeris sent Meso notice of default for amounts due under the 2004 Settlement Agreement and demanded that Meso cure the default. (A1018-19) On May 17, 2013, Meso responded, claiming that the final amount had been paid in May 2010. (A1020-21) On May 28, 2013, BioVeris again wrote to Meso to request a full reconciliation of payments and invoked the 20-day period of negotiations under Section 7.2 of the JVA. (A1022) Initiating the dispute resolution process tolled applicable statutes of limitations for claims arising under the JVA. (A104-06 § 7.2.) On June 12, 2013, Meso's lawyer responded without providing the requested reconciliation or any explanation. (A1024)

On June 28, 2013 (within 60 days of the end of the negotiating period provided under Section 7.2), BioVeris demanded arbitration pursuant to the JVA (A1027), which requires that "any dispute arising out of, or related to" the JVA be resolved in AAA arbitration. (A104-06 § 7.2.) BioVeris simultaneously filed its identical Verified Complaint in the Court of Chancery. (A1048.) Both the

Complaint and the arbitration demand sought both damages for failure to pay the amounts due on the Purchase Price as well as BioVeris's rights under the JVA to appoint a member of the Meso board of managers and to increase the amount owed by 15%. The parties subsequently agreed that the matter proceed in litigation and stayed the arbitration. (A1057)

F. Decisions Below

The Court of Chancery granted Meso summary judgment and dismissed BioVeris's claim. The Vice Chancellor issued a November 2017 decision granting Meso partial summary judgment on BioVeris's claims for the balance of the Purchase Price and for attorney fees. *See* Nov. Opinion (attached hereto as Exhibit A). The court held that laches barred BioVeris's claims by analogy to the contract statute of limitations. *Id.* at 2. The Vice Chancellor did not address Meso's other arguments for summary judgment (*e.g.*, that a License Audit Provision precluded BioVeris's claims or that the 2008 agreement released part of the Purchase Price). *Id.* at 12 n.45 and 17 n.68. Instead, the Vice Chancellor focused on Meso's theory that there had been a total breach of the contract because Meso made only a partial payment in May 2010 while asserting that it had paid the Purchase Price in full. *Id.* at 19-20.

The Vice Chancellor initially reserved judgment on BioVeris's claimed relief under the JVA, namely the 15% penalty, the right to appoint a member of MSD's Board of Managers, and foreclosure of BioVeris's security interest. *Id.* at 35-36. After supplemental briefing, in June 2018 the court granted the remainder of Meso's motion, dismissing those claims as well. June 5 Order (attached hereto as Exhibit B). The Vice Chancellor held that the Complaint alleged only breach of the Settlement Agreement rather than breach of the JVA, and the JVA remedies were time-barred for reasons stated in the November opinion. *Id.* The Vice Chancellor further held that the statute of limitations prevented the court from determining whether Meso defaulted and, thus, whether BioVeris was entitled to foreclose its security interest. *Id.* The Court of Chancery awarded Meso attorney fees under the Settlement Agreement's fee shifting provision. June 5 Fee Order (attached hereto as Exhibit C). BioVeris appeals from the two decisions granting summary judgment (Exs. A and B) and the Fee Order (Exs. C and D).[8]

[8] BioVeris appeals from the Fee Order (as modified by Exhibit D) only insofar as it must be reversed if the summary judgment decisions are reversed.

ARGUMENT

I. BIOVERIS'S CLAIMS TO RECOVER INSTALLMENT PAYMENTS DUE AFTER JUNE 2010 WERE TIMELY.

A. Question Presented

Whether the Court of Chancery erred when it extended Delaware law by adopting a "total breach" rule for this installment contract rather than applying the rule that each non-payment under an installment contract is a separate breach with a distinct limitations period. (A1193-A1210)

B. Scope of Review

"[W]hether a complaint is barred by a statute of limitations is a question of law" that this Court reviews *de novo*. *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007). Moreover, the Court reviews summary judgment decisions *de novo*, considering the entire record. *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013). The Court views the facts in the light most favorable to the nonmoving party, *Alexander Indus., Inc. v. Hill*, 211 A.2d 917 (Del. 1965), which here is BioVeris.

C. Merits of the Argument

BioVeris's claims for payments due from and after August 2010 accrued within three years of suit and were, therefore, timely under the installment contract rule for statutes of limitations. In Delaware, as elsewhere, each failure to pay an

installment under an installment contract is a discrete breach of the contract, giving rise to a distinct claim, and triggering a separate limitations period. *E.g.*, *Worrel*, 430 A.2d 469. The Court of Chancery's contrary decision dismissing BioVeris's claims should be reversed.

All of Meso's installment payments except that on May 28, 2010 were due within three years before BioVeris sued. Meso's May 28th letter did not accelerate its serial breaches into a single claim for total breach because Delaware does not recognize a claim for total breach here based upon an anticipatory repudiation. And even if this Court were to declare that henceforth Delaware permits such a claim for total breach, the contract here had become a unilateral contract for the payment of money in installments, excepting it from the total breach rule.

1. BioVeris's Claims for Breach Accrued with Each Installment That Meso Failed To Pay.

With an installment contract, each non-payment is a separate breach, so "an action will lie for each installment as it falls due." 10 John E. Murray Jr., *Corbin on Contracts*, § 53.6 (Joseph M. Perillo, ed. 2015); *see Worrel*, 430 A.2d at 476. Accordingly, "the statute of limitations beg[ins] to run with respect to each installment only from the time it bec[omes] due." *Worrel*, 430 A.2d at 476 (citation and quotation marks omitted); *Knutkowski v. Cross*, 2014 WL 5106095, at *3 (Del. Ch. Oct. 13, 2014) ("the limitations period began to run upon each

discrete breach, on the date due"). Meso's agreement to pay the Purchase Price was an installment contract, and a new limitations period accrued for each missed payment.

a. Meso Agreed To Pay the Purchase Price Pursuant to an Installment Contract.

An installment contract is "one in which the agreed performance of at least one of the parties is to be rendered, not as a whole at one time and place, but piecemeal at different times or different places." 8 John E. Murray Jr., *Corbin on Contracts*, § 35.1 (Joseph M. Perillo, ed. 2015). The essence of an installment contract is that an obligation is paid in increments. *E.g.*, *id.*; *see also Worrel*, 430 A.2d at 471 n.4. Here, MSD and MST agreed to pay, in incremental periodic payments, the Purchase Price of $12.317 million (comprising the BioVeris buyout, Pro Rata Rent Share, and appraisers' fees). (A269-75 ¶¶ 1, 17) This fits squarely within the definition of an installment contract. The amounts of the installments need not be equal for there to be an installment contract.[9]

[9] *See, e.g.*, *SLMSoft.com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *2 (Del. Super. Ct. Apr. 2, 2003); *Keefe Co. v. Americable Int'l, Inc.*, 755 A.2d 469, 470 (D.C. 2000) (payment based on a percentage of the promisor's revenues); *Peterson v. Highland Music Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) (contract created "no fixed amount to be paid out over time … but rather a continuing obligation to pay a portion of the profits and royalties"). *Cf. Williams v. Levine*,

The Vice Chancellor did not address the parties' arguments about whether the Settlement Agreement was an installment contract, Ex. A at 19-20, but BioVeris provided the Court of Chancery ample evidence that the Settlement Agreement was one. [redacted] (A273 ¶ 13) [redacted] (A316 (emphasis added)) [redacted] (A350, A358) [redacted] (A418-19)[10]

1977 WL 185713, at *1 (Del. Super. Ct. Feb. 22, 1977) (statutory installment obligations where "the amount of the continuing installments is in controversy.").

10 [redacted]

BioVeris likewise referred to installment payments: A665 ("BioVeris will be paid the outstanding purchase price, plus interest, over time *in installments* equal to the sum of 5% of MSD net sales.") (emphasis added); A173; A155 (6/30/03 BioVeris 10-K); A365 ("In the event MSD or MST elects to purchase BioVeris's interest in MSD, BioVeris will only be entitled to receive the purchase price payable over

In short, the record contained much evidence that the agreement was an installment contract, and certainly enough evidence to resolve the issue in the non-moving party's favor at summary judgment.

b. Under Delaware Law, Each Missed Installment Is a Separate Breach Triggering a Distinct Limitations Period.

For installment contracts, each missed payment triggers a separate limitations period. *E.g.*, *Worrel*, 430 A.2d at 474-76. The Vice Chancellor believed that "Delaware law is silent" on the question whether there can be a "total breach" of an installment contract that triggers the statute of limitations for all remaining installments in the absence of an acceleration clause[11] or an election by the injured party to treat repudiation as breach. *See* Ex. A at 20. In light of that perceived silence, the Court of Chancery adopted the rule that a breach plus anticipatory repudiation of an installment contract is a total breach that permits the *breaching* party to accelerate the statute of limitations for all remaining installments. Ex. A at 19-20. The court further held that Meso's May 2010 statement that the partial payment represented its final payment created a total

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time *in installments*.") (emphasis added); A735 (Final Draft of 6/14/06 BioVeris 10-K).

[11] Here, there was no acceleration clause. (*See* A85 & A269)

breach and started the statute of limitations for the entire debt, including future installments not then due. *See id.*

The Vice Chancellor's decision is contrary to Delaware law,[12] and this Court should reject the rule that the court adopted. Delaware courts have rejected attempts to evade the installment accrual rule by invoking a single, total breach. In *Worrel*, the defendant agreed to pay for an automobile in 36 monthly installments. 430 A.2d at 471. The defendant made the initial payment, but failed to make any further payments. *Id.* The court found that a separate limitations period accrued as each payment was due—and rejected the defendant's argument that the claim for the entire unpaid balance accrued upon the first default. *Id.* at 474, 476. Only when the bank exercised its *contractual* right to accelerate the remainder of the loan installments did the loan become due in full. By contrast, BioVeris never accelerated the remaining installments owed by Meso. *See, e.g.*, A268-340 (no provision for acceleration); A114-16 § 8.5.6 (same); *Worrel*, 430 A.2d at 474 n.14 ("Other provisions of the Agreement support a construction that debtor's failure to

[12] The decision was apparently based in part on New Jersey law, which the court understood to be consistent with Delaware law *before* the Third Circuit adopted a total breach rule for installment contracts. Ex. A at 25 n.96 (citing *R.C. Beeson, Inc. v. Coca Cola Co.*, 337 F. App'x 241 (3d Cir. 2009)). *R.C. Beeson* provides no basis for similarly extending Delaware law.

make an installment payment does not, without more, accelerate the remaining installment obligations or constitute a default as to all the remaining obligations under the Agreement.").

Relying on *Worrel*, the Court of Chancery and other Delaware courts have also applied the general installment contract rule. *E.g.*, *Knutkowski*, 2014 WL 5106095, at *3 (six-year limitations period applicable to promissory notes accrued with respect to each payment as it became due, such that "failure to file an action for the first breach … within six years" did not bar recovery under the note); *Walpole v. Walls*, 2003 WL 22931330 (Del. Ct. C.P. July 8, 2003).

The Vice Chancellor discussed *Walpole v. Walls*, 2003 WL 22931330 (Del. Ct. C.P. July 8, 2003)—which involved a repudiation in the installment contract context—and the Vice Chancellor distinguished that case on grounds different from those applied by that court. In *Walpole*, the defendant made a mortgage payment on April 28, 1998, shortly after advising that he would not make any future payments. *Id.* at *2. Defendant argued that plaintiff's suit, filed on October 28, 2001, was barred as to all payments under Delaware's three-year statute of limitations. *Id.* The court rejected that argument, holding that "limitations on lawsuits for breach of installment payment contracts accrue with respect to each installment only from the time the installment becomes due, unless the obligee has

the option to declare the whole sum due and exercises that option …." *Id.* (citing *Worrel*, 430 A.2d at 476).

The *Walpole* court did not, as the Vice Chancellor did, treat the April payment as a retraction of the repudiation. Ex. A at 22 & n. 9 (citing *Carteret Bancorp, Inc. v. Home Grp., Inc.*, 1988 WL 3010, at *6 (Del. Ch. Jan. 13, 1988)). To the contrary, the court recognized that the defendant had "stopped making payments and indicated that he would make no further payments," yet the court applied the installment contract rule. *Walpole*, 2003 WL 22931330, at *2.

Under the Court of Chancery's approach in this case, the installment contract rule would apply when a party missed a payment without repudiation, but it would not apply if the party repudiated and stopped paying immediately. But the rule *would* again apply under the Court of Chancery's approach if a party repudiated but made one payment more before following through on its repudiation.

The problem with such an arbitrary rule is that it gives the *breaching party* the ability to shorten, unilaterally, the statute of limitations that would otherwise apply. That approach is inconsistent with Delaware law on repudiation, which in all other circumstances places control in the injured party's hands. In Delaware, as elsewhere, a non-breaching party may elect, or not, to treat a repudiation as a

breach. *See West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009) ("A party confronted with repudiation may respond by (i) electing to treat the contract as terminated by breach, (ii) by lobbying the repudiating party to perform, or (iii) by ignoring the repudiation. Although perhaps counterintuitive, whether repudiation amounts to a present breach is predicated on the promisee's response."); *see also id.* at *5 n.37 ("[T]he better view is that: 'a repudiation ripens into a breach prior to the time for performance only if the promisee 'elects to treat it as such,'" (quoting *Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002) itself quoting *Roehm v. Horst*, 178 U.S. 1, 13 (1900))).

Allowing the non-breaching party to elect whether to treat a repudiation as a present breach makes sense as a matter of policy. As explained in the prior case involving these same parties:

> "[T]he time of accrual ... depends on whether the injured party chooses to treat the … repudiation as a present breach." If the party "[e]lects to place the repudiator in breach before the performance date, the accrual date of the cause of action is accelerated from [the] time of performance to the date of such election." If, however, the injured party instead opts to await performance, the "cause of action accrues, and the statute of limitations commences to run, from the time fixed for performance rather than from the earlier date of repudiation." The rationale behind this rule is that the "failure to regard

> repudiation as final is advantageous to the wrongdoer, since he is thus given an enlarged opportunity of nullifying the effect of the repudiation … and therefore should not work prejudice to the injured party in the calculation of the period of the Statute of Limitations."

MSD v. Roche Diagnostics GmbH, 62 A.3d 62, 78-79 (Del. Ch. 2013) (citations omitted); *see also DaimlerChrysler Corp. v. Matthews*, 848 A.2d 577, 582 (Del. Ch. 2004) (Strine, V.C.) (describing "the general principle of contract law that '[w]here a contracting party repudiates a contract, the nonbreaching party is entitled to treat the contract as terminated, *i.e.*, as being at an end.'" (citation omitted)); *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 931 (Del. 2000) ("Under Delaware law, repudiation is an outright refusal by a party to perform a contract or its conditions entitling 'the other contracting party to treat the contract as rescinded.'" (quoting *Sheehan v. Hepburn*, 138 A.2d 810, 812 (Del. Ch. 1958)).

This approach applies in the installment-contract context when a contract permits acceleration. *Walpole*, 2003 WL 22931330, at *2 (citation omitted) ("The Plaintiff had the option to declare the whole sum due from the Defendant on his second mortgage when the Defendant stopped making payments and indicated that he would make no further payments. However, the Plaintiff did not exercise that option."). Under Delaware law before the decision below, a breach plus

repudiation gave some creditors the option to claim total breach of an installment contract; it did not obligate any creditor to do so. *See, e.g.*, *Worrel*, 430 A.2d at 476 (absent right to accelerate, cause of action accrues for each payment only when it becomes due). This Court should maintain creditors' expectations as to Delaware law and continue to apply the installment rule.

The Court should reject the rule adopted by the Vice Chancellor and instead should hold that a repudiation by the breaching party at time of breach does not—absent election by the injured party by exercising an acceleration clause or otherwise—cause the entire debt to become immediately due, starting the statute of limitations on all remaining payments. Here, BioVeris had no acceleration clause and did not elect to cause the debt to become immediately due. (*See*, *e.g.*, A268-340 (no provision for acceleration); A114-16 § 8.5.6 (same)) Therefore, the installment contract rule should apply.

2. Even if Delaware Adopts Restatement § 243, Meso's Breach and Repudiation Did Not Create a Single Limitations Period.

Even under Meso's *repudiation + partial breach = total breach* theory, BioVeris should prevail. If this Court chooses to adopt Restatement (Second) of Contracts Section 243, the Court should adopt Section 243 in its entirety, including Subsection 3, which would apply the traditional installment rule here.

Restatement Section 243(2), which provided a basis for Meso's argument and the Vice Chancellor's decision below, does not preclude BioVeris's claim. Under Restatement Section 243(2), a breach plus repudiation *automatically* changes the installment contract rule and *protects the creditor* by excusing the creditor of future performance when a debtor makes plain its intentions not to pay for that future performance. *Id.* However, Section 243(2)'s total breach rule has a specific exception that applies when the creditor has already performed and what remains is the payment of money by the breaching party. *See* Restatement Section 243(3). Here, Subsection (3) controls even if the Court adopts the new "total breach" rule because the Settlement Agreement had become unilateral.

Restatement 243(3) counters the "total breach" rule adopted by the Vice Chancellor. Under Subsection (3) there is no "total breach" when the plaintiff has fully performed and all that is left is for the obligor to make installment payments:

> (3) Where at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another, his breach by non-performance as to less than the whole, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach.

Restatement (Second) of Contracts § 243(3) (1981); *see also id.*, cmt. c. (describing the principle as "well established"). That is to say—contrary to the

non-repudiating party's usual right to treat repudiation as total breach—under the Restatement's approach, BioVeris actually could *not* accelerate the installments *even when repudiation and breach were both present*. In other words, the normal installment contract rule applies: absent a contractual right to accelerate, a party must wait for installments to come due before suing. Indeed, had BioVeris sued in June 2010, Meso no doubt would have cited § 243(3) and argued[13] that the action was premature for all but the May 2010 payment shortage.

The illustrations to Subsection (3), describing the circumstances in which the exception applies, are on all fours with this case:

> 4. A borrows $10,000 from B and promises to repay with interest in ten monthly installments. A unjustifiably fails to pay the first four installments. B has a claim against A merely for damages for partial breach for non-payment of the four unpaid installments. The result is the same even if A repudiates by telling B that he will not make the payments.

Id., cmt. d, Illus. 4; *see also id.*, Illus. 5; *Cumana Inv. S.A. v. Fluor Corp.*, 593 F. Supp. 310, 314 n.7 (D. Del. 1984) (under Delaware law and "the weight of authority," anticipatory breach "has no effect on a bilateral contract on which the non-breaching party has fully performed"); *see Ecto Dev. Corp. v. Andrew M.*

[13] Assuming, of course, that Meso did not insist on arbitrating the dispute. *See* Second Question Presented, *infra*.

Martin Co. NV. Inc., 2011 WL 4352549, at *6 (W.D. Mo. Sept. 16, 2011) (following § 243(3) and denying damages for future installment payments where plaintiff had fully performed); *Team Two, Inc. v. City of Des Moines*, 834 N.W.2d 82 (unpublished), 2013 WL 1749909 (Iowa Ct. App. 2013) (barring future damages because contract had become unilateral for payment of money).

Courts have explained that the rationale for allowing a total breach by breach and repudiation—to excuse pointless further performance by the plaintiff—does not apply where the plaintiff has fully performed. *OK Sales, Inc. v. Canadian Tool & Die, Ltd.*, 2009 WL 961791, at *9 (N.D. Okla. Mar. 31, 2009) ("to excuse performance by one party when the other party has declared its intent not to perform—is not necessary") (citing *Operators' Oil Co. v. Barbre*, 65 F.2d 857, 861 (10th Cir. 1933)). This rule makes sense as a matter of policy. Granting a right of action for all future installments also would effectively permit a party to accelerate a debt in the absence of a contractual right to do so. 10 John E. Murray Jr., *Corbin on Contracts*, § 54.5 (Joseph M. Perillo, ed. 2015). Accordingly, "[w]here the only duties remaining at the time of a breach are the duties of the breaching party to make unconditional installment payments, courts will not recognize an action for payments that are not yet due." *Id.* (citing Section 243(3)); *id.* §§ 54.8, 53.12 (while advocating against the exception in § 243(3), recognizing that it is "often

held" that repudiation of unilateral money installment obligations gives no right of action until installments are due).

The cases on which Meso relied below were inappropriate for Subsection (3) because the non-breaching parties had material ongoing obligations in those cases. One case even expressly applied Section 243(2). *See, e.g.*, *Minidoka Irrigation Dist. v. Dep't of Interior*, 406 F.3d 567, 575-76 (9th Cir. 2005) (applying Section 243(2) and federal common law to contract to credit to irrigation district profits from ongoing sale of power generated by project). Because Section 243(2) begins by noting the exception under Subsection (3) (*i.e.*, "Except as stated in Subsection (3) ...."), that court presumably would likewise apply Subsection (3) in an appropriate case.

When Meso sent its May 28, 2010 letter and payment (A974), BioVeris already had transferred the BioVeris Interests, dismissed its lawsuits, and made the subleased space available to MSD more than four years earlier. (*E.g.*, A269) By 2010, the only executory duty was that of Meso to pay the remaining portions of the Purchase Price in installments. Consequently, Meso's periodic monetary payments could not be accelerated by breach and repudiation. Here, neither the JVA nor the Settlement Agreement contained provisions permitting BioVeris to accelerate (A269; A114-16 § 8.5.6), and BioVeris can, therefore, pursue its action

for all payments due within the limitations period. *See Jensen v. Janesville Sand & Gravel Co.*, 415 N.W.2d 559 (Wis. Ct. App. 1987) (following § 243(3) and declining to find pension payments barred by limitations due to repudiation occurring earlier than the inception of the limitations period); *Keefe Co. v. Americable Intern., Inc.*, 755 A.2d 469 (D.C. App. 2000) (Plaintiff permitted to recover for payments missed within three years of the filing of the complaint for claim on which plaintiff's obligations had already been fully performed).

The Court of Chancery erred in finding that BioVeris had remaining executory obligations. The Vice Chancellor applied Subsection (2) rather than Subsection (3) because the Vice Chancellor concluded that the Settlement Agreement remained bilateral, and that BioVeris had remaining executory duties under the Settlement Agreement. Ex. A at 25-26, 28. However, the contractual construction that the Vice Chancellor gave the Settlement Agreement is wrong as a matter of law.

The Vice Chancellor concluded that BioVeris still had executory obligations because the Parties never completed the Pro Rata Rent Share reconciliation process required under the Settlement Agreement. Ex. A at 28. As a preliminary matter, the parties added the estimated Pro Rata Rent Share into the Purchase Price as required by the Settlement Agreement. [redacted]

[redacted] (*E.g.*, A1072 Tr. 82:14-83:7; A1078 170:23-172:16); A454, A479; A677-78.)[14] To the extent that the Settlement Agreement required that the Purchase Price be increased by the estimated pro rata rent share, that occurred—and in time for the parties to use the same numbers for their respective 2004 audited financial statements. (A1073 Tr. 93:7-22)[15] Absent agreement to revise the estimate, the total Purchase Price would not change.

Putting aside the *factual* question of what remained to be reconciled as of *September 2005*, the Vice Chancellor erred because BioVeris had no present duty to reconcile when Meso breached the contract *in May 2010*. The Settlement Agreement provided:

> The parties agree that the aggregate Pro Rata Rent Share ... shall be added into the Purchase Price .... [T]he parties shall in good faith agree upon an estimate of the aggregate Pro Rata Rent Share ... through August 31,

[14] (*See also* A371-72 [redacted] A1061-62 Tr. 49:14-51:11; A389-91; A430-31; A641-42; A722-25; A730)

[redacted] (*See* A509-25; A642; A422)

[15] To the extent that the parties failed to reach agreement on the final adjustments to the Purchase Price, and thus never adjusted the Purchase Price, it was not due to any lack of effort by BioVeris. (*Cf.* A1080 Tr. 194:20-23)

> 2005. The parties shall then 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 ... from such reconciliations. The parties will effect such reconciliations as of and within 30 days after each of December 31, 2004, March 31, 2005, and August 31, 2005.

(A275 ¶ 17.) Under the terms of the contract, the reconciliation was required to be completed no later than September 30, 2005. (*Id.*) That date had passed by more than 4 ½ years when Meso stopped paying. If the reconciliation was not complete by September 30, 2005, whichever party contended that the estimate caused it damage could claim that the other failed to agree to the correct reconciliation. (*See id.*) The statute of limitations to sue for breach for failure to reconcile and to adjust the estimate (if not reconciling was a breach) has long passed.

The Vice Chancellor suggested that this argument was without factual or legal support, Ex. A at 28, but the language of the Settlement Agreement provides the evidentiary support that refutes that conclusion. If anything, the Court of Chancery resolved a factual issue in Meso's favor. Paragraph 17 extended the reconciliation obligation only for thirty days after the last reconciliation date. (A275, ¶ 17) Therefore, by the terms of the contract that supposedly supplied the duty, there was in fact no present duty for either party with respect to

reconciliation, and the estimate (which had already been added to the Purchase Price) controlled.

The underlying rationale for the total breach rule of Subsection (2) does not fit with the facts here. After BioVeris had provided the rented space, dismissed its lawsuits, and transferred its interests, BioVeris had no performance remaining from which to be excused. Even if BioVeris had an ongoing duty to reconcile, despite the Settlement Agreement's language, such a duty itself would be so de minimis that Subsection (3) should control in any event.

As a matter of fact and law, BioVeris had no remaining duties under the Settlement Agreement. Therefore, even if the Court were to adopt Section 243, Subsection (3) would control and all installments due after June 28, 2010 (three years before the filing date) would remain within the limitations period.

II. THIS CASE PRESENTED UNUSUAL CONDITIONS AND EXCEPTIONAL CIRCUMSTANCES REQUIRING THE APPLICATION OF LACHES.

A. Question Presented

Whether the Court of Chancery erred in declining to apply a traditional laches analysis to the timeliness of BioVeris's claims. (A1210-15)

B. Scope of the Review

While laches issues normally present mixed questions of law and fact, the underlying facts pertinent to the laches issue raised here are undisputed; the application of the legal standard to those facts presents a question of law reviewed *de novo*. *See Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004); *see also Reid v. Spazio*, 970 A.2d 176, 180 (Del. 2009); *SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000).

C. Merits of the Argument

The Vice Chancellor erred in misapplying the legal rule governing whether laches or an analogous statute of limitations applies to this case. Ex. A at 29-35; *O'Brien*, 26 A.3d at 178; *Stewart v. Wilmington Trust SP Servs., Inc.*, 112 A.3d 271, 294 (Del. Ch. 2013). Even if BioVeris's claim for all missed payments accrued when Meso missed part of one installment payment, this case, given the dispute resolution and tolling provisions of the JVA, presents unusual conditions

and exceptional circumstances that require the application of laches to allow BioVeris's claim. The Vice Chancellor's refusal to credit BioVeris's invocation of the JVA negotiation period and tolling provisions requires reversal of the court's laches analysis.

O'Brien gives a number of non-exclusive factors for the Court of Chancery to consider when deciding whether to apply an analogous statute of limitations or laches. These factors include "1) whether the plaintiff had been pursuing his claim, through litigation or otherwise, before the statute of limitations expired; 2) whether the delay in filing suit was attributable to a material and unforeseeable change in the parties' personal or financial circumstances; 3) whether the delay in filing suit was attributable to a legal determination in another jurisdiction; 4) the extent to which the defendant was aware of, or participated in, any prior proceedings; and 5) whether, at the time this litigation was filed, there was a bona fide dispute as to the validity of the claim." 26 A.3d at 178. In considering these factors, the Vice Chancellor should not have disregarded the steps BioVeris took pursuant to the dispute resolution and tolling provisions of the JVA.

BioVeris was pursuing its claim before the limitations period expired within the meaning of the first *O'Brien* factor. *See Perlman v. Vox Media, Inc.*, 2015 WL 5724838 (Del. Ch. Sept. 30, 2015). BioVeris sent Meso a notice of default in April

2013, giving Meso an opportunity to cure the default. (A1018-19) Meso responded on May 17, 2013, claiming that the final amount was paid in May 2010 and that BioVeris could not pursue further payment because the License Audit provided in Section 23 of the 2004 Settlement Agreement required audits to be made within one year of the alleged short payment. (A1020-21) BioVeris formally invoked the JVA §7.2 process on May 28, exactly three years from when Meso sent the letter with its last payment.

The Vice Chancellor held that correspondence did not reflect sufficient pursuit of the claim (Ex. A at 33), but that ignored the interrelatedness of the Settlement Agreement and the JVA claims and remedies, and the tolling provisions in the JVA. The Settlement Agreement keeps "in full force and effect" the JVA "[u]nless expressly modified" in the Settlement Agreement. (A282 ¶ 45) In both the arbitration demand and the Complaint, BioVeris sought not only to collect the remaining amounts owed for the Purchase Price but also to enforce the JVA provisions entitling BioVeris to a 15% increase in payment for default, foreclosure on its security interest on the membership interest in MSD, and appointment of a BioVeris representative to the MSD board. (A1027)

The May 28, 2013 letter tolled the limitations period governing "any dispute arising out of, or related to" the Joint Venture Agreement, as amended. (A104-06

§ 7.2) In the event of such a dispute, either party could invoke a 20-day period of negotiations by the parties' representatives. (*Id.*) Failing a resolution, either party could refer the dispute to arbitration. (*Id.*) Invoking the 20-day negotiating period tolled any statute of limitations, as long as arbitration was demanded within 60 days:

> The statute(s) of limitations applicable to any dispute shall be tolled upon initiation of the dispute resolution procedures under this provision and shall remain tolled until the dispute is resolved under this provision. However, tolling shall cease if the aggrieved party does not file a demand for arbitration of the dispute with the AAA within sixty (60) calendar days after good faith negotiations have been terminated in writing by either party.

(A106)

BioVeris initiated the process on April 30, 2013 and expressly invoked it on May 28, 2013 (A1018 & A1022)—exactly three years after Meso contends a single cause of action accrued. In the prior 2010–2014 Court of Chancery litigation between these same parties, Meso insisted that certain claims needed to be arbitrated and the litigation was greatly complicated by the need to pursue both arbitration and litigation. *See MSD v. Roche*, 62 A.3d at 74. Given Meso's conduct in trying to force the previous litigation into arbitration, BioVeris was more than reasonable to pursue the JVA dispute resolution procedure here.

This action, too, might be still proceeding in arbitration, except that the parties agreed to stay the arbitration and to proceed with their dispute in this forum, subject to a tolling agreement on the arbitration. (A1057) Section 7.2 of the JVA contains a broadly worded arbitration provision that applies to "any dispute arising out of, or related to" the JVA and expressly refers to the American Arbitration Association's rules. (JVA § 7.2.) *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) ("[A]rbitrators decide arbitrability … in those cases where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability.").

In *3850 & 3860 Colonial Blvd., LLC v. Griffin*, 2015 WL 1726722 (Del. Ch. Mar. 30, 2015), the Court of Chancery held that an earlier-in-time, broadly worded arbitration provision that appeared to conflict with a later-in-time forum selection clause required that arbitrator determinate arbitrability of entire dispute in the first instance. *Id.* at *3 ("It is the nature of the *Willie Gary* analysis that where the 'new contract' does not expressly (or necessarily) supersede the 'old contract' for past events, the question of substantive arbitrability—even when there may be a leaning toward viewing litigation as the forum the parties agreed to—still is for the arbitrator."). In other words, regardless of whether an arbitrator ultimately would

have decided that the claims under the Settlement Agreement should have proceeded in arbitration on the merits (or not), the JVA's dispute resolution provision tolled all of the claims.

Furthermore, a bona fide dispute existed as to the validity of BioVeris's claims. *See O'Brien*, 26 A.3d at 178. That is to say, BioVeris's claim is meritorious, and BioVeris will prevail if the statute of limitations does not bar the claim. *Levey*, 76 A.3d at 771-72. The Settlement Agreement, by its terms, includes the Pro Rata Rent Share in the Purchase Price. (A275 ¶ 17) Meso does not dispute that it has not paid the full $12,317,500, nor does it dispute that it occupied the space for the relevant time periods. But Meso justifies its May 2010 re-writing of its debt by reference to a release in the unrelated 2008 agreement.

While this case does not present the same type of facts as *O'Brien* on the second, third, and fourth factors, the thrust of those factors is laches-related equitable considerations of notice and undue delay. The conduct before May 28, 2013 shows that Meso suffered no prejudice. After receiving the April 30 demand, Meso pretended that it did not understand BioVeris's confusion, even though it was Meso that secretly wrote off the portion of the Purchase Price equal to the original Pro Rata Rent Share. (A1020-21) BioVeris was not intentionally delaying and waiting in the weeds while Meso forgot about this claim. These parties are all

too familiar with each other. BioVeris pursued its claim within the limitations period even for the first installment, and sued within three years of all other installments—only a year and a half after the last installment came due. BioVeris should not be penalized for following the dispute resolution provisions of the JVA and failing to anticipate how the Court of Chancery would change the law with respect to long-established accrual rules for installment contracts.

Meso suffered no prejudice as a result of BioVeris's invoking the JVA's dispute resolution provisions before filing suit and demanding arbitration. *Cf. Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2011 WL 2623991, at *14 (Del. Ch. July 1, 2011) (laches bars the claims of a plaintiff that has exhibited unreasonable delay that works to the detriment of the defendant). For the same reason that BioVeris's approach was reasonable, Meso's expectations could not have been upset. How could Meso be prejudiced when a reasonable creditor would have expected the installment contract rule to apply when BioVeris filed suit? At best for Meso, Delaware law was "silent" (Ex. A at 20) on the particular nuance of the installment contract statute of limitations rule at issue in this case. Meso could not have reasonably relied on what the Court of Chancery called Delaware's silence on the issue to assume that Meso was in the clear for any installment payment due after May 2010.

The facts here present the unusual circumstances justifying application of laches to permit BioVeris' claim to proceed. Laches requires both undue delay and prejudice. Meso can show neither. The Court of Chancery should not have dismissed the JVA's dispute resolution and tolling provisions when the court applied the *O'Brien* standards. Under a laches analysis, the case was timely. BioVeris was pursuing its claim promptly, especially considering the then-clear state of the law regarding installment contracts and what was at least ambiguity about whether the JVA dispute resolution procedure applied. Meso has identified no harm it has suffered from the timing of this lawsuit that merely seeks to make it pay the rent portion of the Purchase Price for the facilities it used. Given the litigation history, the interplay between the documents, the prompt invocation of the dispute resolution procedure after Meso rejected BioVeris's claim in mid-May 2013, and the subsequent filing of the litigation, BioVeris's claims should survive the laches analysis. The case was timely filed.

CONCLUSION

Appellant respectfully submits that this Court should reverse the decisions of the Court of Chancery.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I caused a copy of the foregoing **Public Version of Appellant's Opening Brief** to be served upon the following counsel by File & Serve*Xpress*:

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