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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: October 17, 2018 No. 339, 2018 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 8692-VCMR

APPELLANT'S REPLY BRIEF

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

The Court should reject Meso's attempt to change the Delaware installment rule to permit Meso to avoid its debt. Delaware law has long recognized that the analogous statute of limitations for a missed installment payment starts with each payment. That approach is particularly apt here because the parties' agreement did not give BioVeris the right to accelerate the debt. Adopting the Restatement approach would yield the same result, as Section 243(3) follows the traditional installment rule.

A. Under Longstanding Delaware Law, a Separate Limitations Period Started with Each Installment That Meso Failed To Pay

For purposes of this appeal, the Court is obliged to assume that Meso agreed to pay pursuant to an installment contract. Given that this issue was raised in Meso's motion for summary judgment (at A1115-18), and the record evidence showed unequivocally that Meso's obligations were pursuant to an installment contract (BioVeris Opening Br. at 5-6, 15-17), there really is not a genuine issue on this point. At a minimum, on this appeal from the grant of a summary judgment motion, BioVeris is entitled to all factual inferences in its favor—including that the contract is an installment contract. *Alexander Indus., Inc. v. Hill*, 211 A.2d 917

(Del. 1965). Meso does not really argue the point. (Br. at 34.) As explained below, because the contract is one for payments in installments, installment contract principles should govern.

1. Before This Case, No Delaware Case Has Adopted the Position Espoused by Meso

As BioVeris showed in its opening brief, since at least 1981, the rule in Delaware has been that claims for breach of an installment contract accrue for statute of limitations purposes as each installment payment comes due but is not paid. *Worrel v. Farmers Bank of Del.*, 430 A.2d 469, 476 (Del. 1981). By adopting a new "total breach" limitations rule for installment contracts, the Vice Chancellor upended the rule that has been in place nearly 40 years, which gives the non-breaching party at most the right, but not the obligation, to elect to treat a breach by non-performance or repudiation as an acceleration and breach of future installments. *See West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009); *Knutkowski v. Cross*, 2014 WL 5106095, at (Del. Ch. Oct. 13, 2014); *Walpole v. Walls*, 2003 WL 22931330 (Del. Ct. C.P. July 8, 2003). When Meso breached in 2010, there was no support in

Delaware for applying the new rule, and there is none today.[1] The Vice Chancellor should have applied Delaware's installment-contract principles, pursuant to which each breached installment triggers a discrete limitations period.

Meso recharacterizes the Delaware authorities to fit its preferred rule. Meso misreads *Walpole*, a decision following this Court's holding in *Worrel*, to contend that that case would not apply in the case of a breach followed by a repudiation. (Meso Br. at 28-30.) The *Walpole* court cited *Worrel* and concluded that "[t]he 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." *Walpole v. Walls*, 2003 WL 22931330, at *2. Thus—contrary to the reading urged by Meso—the *Walpole* court never treated the repudiation as withdrawn. Rather, the plaintiff had not exercised its option to declare the whole sum due, and the *Worrel* approach applied even when defendant breached ("stopped making payments") *and* repudiated ("indicated that he would make no further payments").

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[1] The only other Delaware case that cited Restatement (Second) of Contracts § 243, *Schlosser & Dennis, LLC v. Traders Alley, LLC*, 2017 WL 2894845, at *6 n.28 (Del. Super. Ct. July 6, 2017), did not address an installment contract or limitations.

2. Meso's Out-of-State Authorities Do Not Justify Departing from Settled Delaware Law

Meso's non-Delaware authorities do not warrant changing Delaware law. As discussed below, a number of Meso's cases do not involve installment contracts. Others do not address statutes of limitations. While a handful of jurisdictions have adopted Meso's approach in certain circumstances, for installment contracts the superior rule is that which Delaware has heretofore applied. Further, in almost all of those cases the non-breaching party had continuing obligations at the time of the breach, putting them within Restatement Section 243(2). Even if the Court were to apply the Restatement approach for limitations, Section 243(3) provides the relevant section because BioVeris had no remaining obligations. Under Section 243(3), when the only remaining obligations are those of the breaching party for the payment of money in installments, a plaintiff like BioVeris does not have a claim for total breach, and installment principles apply.

a. Meso's Non-Installment Contract Cases Do Not Support a "Total Breach" Approach to Installment Contracts

Many of the cases on which Meso relies (19-20 & n.6) for its total breach theory are not installment contract cases. In *Fox v. Dehn*, 116 Cal. Rptr. 786, 790 (Ct. App. 1974), the California Court of Appeal was willing to apply the total

breach rule *only because* it determined that the contract was not an installment contract so the installment-contract rule did not apply. *Fox*, 116 Cal. Rptr. at 790-91 (citing *Gold Mining & Water Co. v. Swinerton*, 142 P.2d 22 (1943)). The same distinction applies to a number of other cases cited by Meso.[2]

Installment contracts are different. As *Keefe Co. v. Americable Intern., Inc.*, 755 A.2d 469, 472-73 (D.C. App. 2000), explains:

> Indeed, so embedded is this concept of distinct installment obligations that there is doubt whether an obligee even has the option, absent an acceleration clause, to bring a single suit, seeking both past-due and future payments, based solely on the obligor having missed installments. There is some authority for the proposition that an obligee may bring such suit. . . . However, there is also authority to the contrary. . . . Further, even where the obligor expressly informs the obligee that no further payments will be made, most

[2] *See Pavone v. Kirke*, 807 N.W.2d 828 (Iowa 2011) (discussing casino development agreement); *Jewett v. Brooks*, 134 Mass. 505 (1883) (cultivation of farm shares under "entire" contract); *Conn. Indem. Co. v. Markman*, 1993 WL 304056 (E.D. Pa. Aug. 6, 1993) (rejecting claim of anticipatory breach of duty to indemnify litigation expenses); *G.W. Andersen Constr. Co. v. Mars Sales*, 210 Cal. Rptr. 409 (Cal. App. 1985) (breach of construction contract); *Loral Corp. v. Goodyear Tire & Rubber Co.*, 1996 WL 38830 (S.D.N.Y. Feb. 1, 1996) (relating to post-closing adjustment for pension payment and applying 243(2)); *Segall v. Hurwitz*, 339 N.W.2d 333 (Wis. Ct. App. 1983) (discussing violation of continuous obligation not to compete). *Segall* was later distinguished by *Jensen v. Janesville Sand & Gravel Co.*, 415 N.W.2d 559 (Wis. Ct. App. 1987) (Restatement (Second) of Contracts § 243(3) governed). *See infra* Part I.B.

> courts have declined to apply the doctrine of anticipatory repudiation.

Id. As set forth above, Delaware has followed the traditional installment contract approach for limitations. The foregoing cases cited by Meso, which apply to other kinds of contracts, do not counsel changing that approach, especially when, as here, the installment contract did not include an acceleration clause.

b. Most of Meso's Remaining Cases Do Not Address Accrual of Statutes of Limitations

Many of Meso's other cases have nothing to do with statutes of limitations. *See Schneiker v. Gordon*, 732 P.2d 603, 611 (Colo. 1987) (en banc) (analyzing measure of damages for breach of sublease); *Kulm v. Coast to Coast Stores*, 461 P.2d 526, 527 (Or. 1969) (en banc) (involving breach of contract to renew lease, addressing res judicata and requirement to bring single action); *Hoyt v. Horst*, 201 A.2d 118, 123-24 (N.H. 1964) (ruling plaintiff could collect future damages); *Kalkhoff v. Nelson*, 62 N.W. 332, 333 (Minn. 1895) (addressing right to collect future rent under insolvency laws after party disabled itself).

Meso's reliance on the *Hoyt* decision, in particular, highlights the distinction. Meso cites New Hampshire as one of the states that adopted a total breach rule. (Br. at 20 (citing *Hoyt v. Horst*, 201 A.2d 118, 123-24 (N.H. 1964)).)

However, a subsequent decision from the same court clarifies that *Hoyt's* reach did not extend to accrual for limitations purposes.

In *Hoyt*, the New Hampshire Supreme Court permitted the plaintiff to sue for total breach and collect future damages, rather than requiring the plaintiff to wait for all installments to come due. 201 A.2d at 123-24. After *Hoyt*, a trial court in New Hampshire recently dismissed a claim after a breach and repudiation occurred outside the limitations period. *Slania Enterprises, Inc. v. Appledore Medical Group, Inc.*, 186 A.3d 222, 227-28 (N.H. 2018). This May, the New Hampshire Supreme Court reversed. *Id.* Relative to limitations, the New Hampshire Supreme Court recognized that authorities were "divided" (citing the Vice Chancellor's decision here as one of the conflicting authorities). *Id.* The court explained that, even though *Hoyt* permitted a claim for future damages based upon a total breach, the court "has yet to address whether, if the non-breaching party elects not to sue within three years of the other party's anticipatory breach or repudiation, the non-breaching party's lawsuit is barred by the statute of limitations." *Id.* at 227-28.

The Corbin treatise, on which Meso places great reliance, similarly acknowledges that total breach principles might apply for some purposes but not for limitations, as well as the tension between jurisdictions following different

approaches. Corbin reconciles the total-breach cases with the installment-contract cases by explaining that the availability (or necessity) of a claim for total breach need not be linked to the commencement of a statute of limitations for an installment contract:

> While recognizing that the plaintiff could maintain only one action for breach of the contract, the bar of the statute might be held to operate only piecemeal from the various times when the separate performances under the contract became due. This is the result that is actually reached by the court in the case of ordinary installment contracts. After several successive installments have become due, no more than one action is maintainable for their collection; and yet the claim for their collection will be barred by the statute only one installment at a time. Judgment in the one action will be for such installments as remain unbarred.

10 John E. Murray Jr., Corbin on Contracts § 54.31; *see also id.* ("'Accrual of the cause of action' has not one eternal and exclusively correct meaning, ordained by God or by the legislature…. [F]or purposes of applying the statute of limitations the analogy of installment debts can be followed ….").

Thus, even adoption of a total breach rule does not require a change in statute of limitations rules for installment contracts. A court might permit a claim for future damages under an installment contract, or even require that claims for all installments be brought in a single action, without automatically triggering the statute of limitations for all installments upon a total breach.

c. This Court Should Not Follow the Handful of Courts That Have Adopted Meso's Exception to the Installment Contract Accrual Rule

While Meso identifies a few installment contract cases applying the "total breach" rule for limitations purposes, there exists a division of authority on the question. *See Slania Enterprises*, 186 A.3d at 227-28 ("This case raises issues of first impression regarding the interplay of the installment contract rule, a party's election of contractual remedies, and anticipatory repudiation or anticipatory breach. . . . [J]urisdictions are divided on how these issues affect when the statute of limitations accrues."). A number of the cases Meso cites follow Restatement § 243(2) and involve situations in which, unlike here, the non-breaching party still owed performance obligations at the time of the breach.[3] Here the Vice Chancellor

[3] *Minidoka Irrigation Dist. v. Dep't of Interior*, 406 F.3d 567, 573 (9th Cir. 2005) (citing Restatement section 243(2) and involving ongoing sale of power); *In re Chemtura Corp.*, 448 B.R. 635, 663 (Bankr. S.D.N.Y. 2011) (citing section 243(2) and predicting California law regarding bilateral cogeneration agreement); *see also Colwell v. Eising*, 827 P.2d 1005, 1009-10 (Wash. 1992) (en banc) (relying on other Restatement sections in case involving continuing bilateral agreement); *Hassebrock v. Ceja Corp.*, 29 N.E.3d 412, 422-23 (Ill. App. Ct. 2015) (involving alleged venture agreement). As discussed in Part I.B., *infra*, under the Restatement approach, Section 243(3) would apply here and would prevent BioVeris from claiming total breach.

followed New Jersey precedent on the issue,[4] but, for the reasons below, Delaware law should not adopt that approach.

Meso's reasons for departing from the rule in this state are unavailing. Meso first urges that the installment accrual approach extends the statute of limitations indefinitely. (Br. at 23-24 & n.9.) It does not. Here, as Meso made sales, it owed BioVeris quarterly payments. (A108-10, § 8.5.3; A269-75, ¶¶ 1, 17.) Meso's payment obligations as a function of its sales eventually equaled the Purchase Price. (*See, e.g.*, A972 (amortization projection).) BioVeris's claims accrued when unmade payments *would have come due* under the Settlement Agreement and the JVA. The last claim accrued when sufficient sales were made to pay off the debt, and the last statute of limitations would have run three years after that point. BioVeris still had an incentive not to sit on its rights: even under the installment approach, the May 28, 2010 missed payment is outside the analogous three-year limitations period. *See also infra* Part II. Meso's argument of a statute running into perpetuity has no merit.

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[4] *See R.C. Beeson, Inc. v. Coca Cola Co.*, 337 F. App'x 241, 244 (3d Cir. 2009). Meso (at 19-21) also cites *Metromedia Co. v. Hartz Mountain Assocs.*, 655 A.2d 1379, 1381 (N.J. 1995) (which recited Corbin's rule but applied the installment-contract rule).

Meso next argues that adopting its rule would relieve the non-breacher of continuing performance and thus encourage mitigation. (Br. at 24.) That reason has no application to this case, where BioVeris had no remaining performances. *See infra* Part I.B. (discussing Restatement (Second) of Contracts § 243(3)). Moreover, it would undermine the long-standing rule that a non-repudiating party has the option to await future performance. *See West Willow-Bay*, 2009 WL 458779, at *5.

Third, Meso's argument that its rule is well suited for situations where there is a dispute over a contract interpretation undercuts its own point. Unlike the cases on which Meso relies (at 25-26),[5] which also distinguished installment contracts from those before the courts, the basis for Meso's position that it had paid its debt was unknown to BioVeris until after it brought this suit. When in April 2013

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[5] *Norwest Bank Minn. N.A. v. FDIC*, 312 F.3d 447, 453-54 (D.C. Cir. 2002) (claim under federal statute, not contract, that a "single event" incorrectly quantified bank's deposit levels causing continuing damages, based in part on federal banking policy, and distinguishing installment contracts); *Dinerstein v. Paul Revere Life Ins. Co.*, 173 F.3d 826, 828-29 (11th Cir. 1999) (distinguishing installment contracts from insurance contracts like that before the court, and articulating that for the latter limitations accrue on a single date of breach; further, noting that insured was told the basis for the non-payment). *See Air Transp. Ass'n of Am. v. Lenkin*, 711 F. Supp. 25, 28 (D.D.C. 1989) (in landlord tenant case, distinguishing from normal installment contract principles and stating statute runs when non-breacher should know the parties' differing interpretations).

BioVeris sent a notice of default (A1018-19), Meso obliquely responded that it had paid what it owed (A1020). BioVeris reasonably took Meso's response to mean that the parties' records showed that different amounts had been paid. (A1022-23; B169 Tr. 75:13-25 (noting discrepancy in parties' balances).) When BioVeris asked for Meso's reconciliation, (A1022-23), Meso refused to provide any explanation. (A1024-25.)

The utility of the installment-contract rule would be severely limited if it did not apply when one party merely said that it believed it did not owe any more money, especially where, like here, Meso refused to explain why. Moreover, in all likelihood, if BioVeris had sued in 2010, Meso would have argued against recovery for "total breach" on the grounds of uncertainty about whether MSD would ever have sufficient sales to reach the total Purchase Price.

Whatever the merits of permitting a claim for future damages as to some contracts, the advantages of consistently applying a unified statute of limitations rule to installment contracts are plain. Corbin explains:

> There is no "infallible logic" that compels one application rather than another. It may seem unjust to bar a plaintiff's action merely because he patiently waits till the time fixed for performance, hoping that the obligor will repent and perform without litigation; and if it does seem so, for purposes of applying the statute of

> limitations the analogy of installment debts can be followed, imperfect though it may be for other purposes.

10 John E. Murray, Jr., Corbin on Contracts § 54.31.

This Court should maintain the straightforward installment rule for limitations purposes as set forth in *Worrel* and later applied in *Knutkowski* and *Walpole*. Forcing parties to bring a claim for total breach of installment contracts—something Delaware authorities have not done—is inconsistent with Delaware's approach to installment contracts and to repudiation. As explained in BioVeris's opening brief (20-21), Delaware law gives a non-repudiating party the option whether to declare total breach or not. The underlying reason for repudiation is to relieve the non-repudiating party of future performance, at the non-repudiating party's option. *West Willow-Bay*, 2009 WL 458779, at *5. The Court should apply a consistent statute of limitations rule to all installment contracts.

B. Adopting Restatement § 243 in Delaware Would Not Change the Result Here Because the Only Remaining Obligations Were Meso's for the Installment Payments

Meso does not dispute that, if this Court adopts Section 243(2) of the Restatement, the Court should also adopt Subsection 243(3). Under that provision, the traditional installment payment rule applies when, as here, the only remaining

obligations under the contract are for the payment of money in installments. Section 243(3) precludes an earlier claim for total breach in that context.

Meso incorrectly asserts that 243(3) is inapplicable because BioVeris had remaining duties of performance. Based on the language of the Agreement and the evidentiary record, the Vice Chancellor erred when she ruled that subsection 243(3) does not apply based on a purported continuing duty of BioVeris to reconcile the Purchase Price.

1. The Court of Chancery Erred in Finding That BioVeris Had "Remaining Duties of Performance" in 2010

As BioVeris explained in its opening brief, the Vice Chancellor applied Subsection 243(2), rather than Subsection 243(3), based on the erroneous finding that BioVeris had remaining duties as of and after May 2010. (Opening Br. at 27-31.) Meso purports to find such remaining duties in the pro rata rent share estimation and reconciliation provisions of Paragraph 17 of the Settlement Agreement. (Br. at 30-34.) Meso's argument fails because it depends upon a flawed reading of the Settlement Agreement, and it is, at best for Meso, a procedurally improper invitation to this Court to resolve disputed factual questions on a motion for summary judgment.

Meso's argument repeatedly conflates two distinct stages established in Paragraph 17. Under that provision, the parties were first to agree to an *estimate* of the projected Pro Rata Rent Share through August 2005. (A275, ¶ 17.) They then were to attempt to reconcile any differences to actual figures. (*Id.*)

Meso first contends inaccurately that the parties never agreed upon the *estimate* of the pro rata rent share to be added into the Purchase Price. (Br. at 31-32.) Contrary to Meso's position (Br. at 31), BioVeris never conceded this point. (A1177-80.) The record evidence on this point is overwhelmingly in BioVeris's favor. [redacted] (A454, A479; A677-78; A371-72; A389-91; A430-31; A641-42.) [redacted] (A677-78; A722-25; A730.) BioVeris's former CFO likewise testified that the parties must have reached an agreed-upon estimate of the Pro Rata Rent Share portion of the Purchase Price because their financials needed to align. (A1073 Tr. 93:7-22.) Meso cites no evidence that the *estimate* was not agreed. But even if there were such evidence, at most this would be a factual dispute incapable of being resolved

on summary judgment. *See Alexander Indus., Inc. v. Hill*, 211 A.2d 917 (Del. 1965).

Meso's evidence, and the Vice Chancellor's holding (Ex. A at 28-29), actually pertain to the second stage—*reconciliation*. (B192, Tr. 103:4-8; B191, Tr. 95:21:23; B189-90, Tr. 89:17-19, 93:16-22, 92:20-24.) Although the reconciliation was not completed, for the reasons explained below, that does not mean that BioVeris had any remaining duties of performance under the contract as of May 2010 when Meso began its serial breaches.

Paragraph 17 of the Settlement Agreement did not create a perpetual reconciliation obligation. To arrive at that construction, Meso must read the dates for performance out of the contract. It is thus Meso—not BioVeris—who invites this Court to author provisions. (Br. at 33 (citing *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 898 (Del. 2015)).) The text of the agreement is straightforward—the last of three reconciliations was to be completed within 30 days of August 31, 2005. (A275, ¶ 17.) Having reached a rent estimate, the parties had until September 30, 2005, and no later, to reconcile the estimate with the actual expenses. (*Id.*)

Meso is wrong when it contends that the estimate does not control if a reconciliation was not done. (Br. at 33.) That the estimate still controls is the only

reasonable construction of Paragraph 17, which provides that the Pro Rata Rent Share for February 2004 through August 2005 "shall be added into the Purchase Price", and then states that "any necessary adjustments to the Purchase Price" will be made based upon the reconciliation process. (A275.) The necessary implication of these passages is that the Purchase Price is first established based upon the estimate of the rent expense for the 18-month period, and then the *Purchase Price* is adjusted if the parties agree on a reconciliation thereafter.

Having agreed on an estimate, if Meso believed that a downward adjustment was appropriate and if BioVeris failed to agree to Meso's figure by September 30, 2005, Meso's recourse was to start a legal proceeding for breach of contract. Such a claim had to be brought within the three-year analogous limitations period, which expired well before Meso began breaching in 2010. Therefore, even if a right of action could be considered a "remaining dut[y] of performance" within the meaning of Section 243(3), there was none such surviving in 2010.

Meso's position not only ignores the contractual September 30, 2005 deadline to make the reconciliation but also rewards Meso for its intransigence in the reconciliation process and its refusal to negotiate reasonably. (A1080 Tr. 194:20-23; A1076 at 110:10-111:14.) A party cannot intentionally thwart a mutual reconciliation process and then use its own bad faith to argue that obligations

remain uncompleted. 13 *Williston on Contracts*, § 39:3 (4th ed. Westlaw May 2018 Supp.) (Under the doctrine of prevention, "a contracting party whose performance of its promise is prevented by the other party is not obligated to perform and is excused from any further offer of performance.").

The course of performance evidence is not in Meso's favor. (Meso Br. at 33.) Parties often continue to negotiate after a deadline for performance has passed, but the obligation does not thereby remain executory. Rather, one or the other, or both, of the parties has a right to invoke legal remedies to enforce. That neither party here elected to pursue enforcement does not equate to an ongoing duty to reconcile.

Moreover, the parties did not treat the reconciliation mechanism as a perpetual obligation. [redacted]

[redacted] At a minimum, this is yet another material factual dispute.

2. BioVeris Did Not Waive Its Argument on the Lack of a Remaining Performance Obligation

BioVeris did not waive its arguments about the reconciliation stage. (Br. at 32.) Its absence from BioVeris's summary judgment opposition brief reflects merely that Meso did not raise its "remaining duties of performance" argument in its opening brief. (A1084-1133.) BioVeris's summary judgment brief did, however, explain that the parties never envisioned a scenario where Meso could escape its obligation to pay the Pro Rata Rent Share by virtue of its refusal to participate in the reconciliation process. (A1181-82.) At the summary-judgment

6 [redacted]

argument, BioVeris's counsel addressed Meso's late-offered argument on purported remaining obligations and also stated BioVeris's position that, absent the reconciliation, the estimate controlled. (AR46-49, at 35:19-38:24; B198, at 68:8-17.) *See N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382-83 (Del. 2014) (point raised in oral argument below not waived).

Meso's waiver argument also ignores the consistent position of BioVeris that the parties adopted and consistently used the same Purchase Price estimate in their respective financial statements. (A1178-80; Opening Br. at 7-9, 28-30.) As described above, the record contains extensive evidence addressing the reconciliation effort; the language of paragraph 17 of the Settlement Agreement provides the evidentiary basis demonstrating the deadline for the reconciliation.

There was no waiver.

C. The License Audit Provisions Do Not Apply

The Vice Chancellor did not address Meso's one-year limitation on license audits yet Meso sprinkles a number of references to that argument throughout its brief. (*E.g.*, Br. at 7, 26, 29 n.12, 36 & n.16, 41.) As set forth in BioVeris's summary judgment response brief, that license audit applied only to confirm that Meso accurately reported the sales subject to the 5% quarterly payments and not to disputes of the type here. (A1176-77; A1215; A276-78, ¶ 26; A1067-68 Tr. 58:19-

59:4).) BioVeris submits that Meso's interpretation is wrong as a matter of law. In any case, it was not addressed below.

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

BioVeris's case fits the *O'Brien* factors for applying laches rather than an analogous statute of limitations. Meso's three principal points in its response are unavailing.

First, Meso misstates the standards of review as there are no credibility determinations or other factual findings on which the Vice Chancellor relied in denying the application of *O'Brien*. Rather, the Vice Chancellor committed reversible error when, despite adopting a new limitations rule for which she concluded Delaware law was silent, she gave no value or consideration to BioVeris's invocation of the JVA negotiation period, the application of the tolling provisions and the initial dual pursuit of litigation and arbitration. (Opening Br. at 32-37.) This Court should review that decision and the application of the legal principles *de novo*. *See SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000).

Second, this case presents unique issues under the first *O'Brien*'s factor and satisfies the rationale underlying the laches approach set forth in *O'Brien*. Even if May 28, 2013 represented the end of the limitations period, BioVeris did more than just send "last minute letters" as suggested by Meso. (Br. at 36-39.) After Meso sent its May 17, 2013 letter (A1020) feigning lack of knowledge as to why

BioVeris did not know what Meso had done, BioVeris invoked the dispute resolution process under the JVA. (A1022.) Meso challenges the applicability of the process but Meso does not dispute that the JVA contained a dispute resolution provision, that on May 28, 2013, BioVeris sent a letter requesting to start that dispute resolution process, that the JVA included a tolling provision applicable to the dispute resolution provision, and that BioVeris both filed its complaint in Chancery Court and served a nearly identical arbitration demand. (A1022; A104-06; A1027-47.) While the Court of Chancery determined (after the parties agreed to litigate in that court) that the Settlement Agreement's dispute resolution procedure rather than the JVA's arbitration procedure governed the claims, pursuing a claim through the dispute resolution process mandated by the JVA (even if ultimately the incorrect forum) should satisfy the first factor. *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 770-71 (Del. 2013).

Had the case proceeded in arbitration, arbitrators would have decided the arbitrability and timeliness of the dispute. *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."); *3850 & 3860 Colonial Blvd., LLC v. Griffin*, 2015 WL

1726722, at *3 (Del. Ch. Mar. 30, 2015) (earlier-in-time, broadly worded arbitration provision required that arbitrator determinate arbitrability of entire dispute in the first instance.). The Vice Chancellor erred in refusing to credit these circumstances when ruling on BioVeris's laches argument.

Finally, Meso all but admits that there was a bona fide dispute when it argues that "here, the merits of the dispute are hotly contested." (Br. at 40.) For the remaining factors, BioVeris stands on its opening brief. (Opening Br. at 32-38.) BioVeris's claim was timely, and Meso suffered no prejudice.

CONCLUSION

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

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