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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BIOQUEST VENTURE LEASING COMPANY A, N.V., Plaintiff and Respondent, v. VIVORX AUTOIMMUNE, INC., et al., Defendants and Appellants.	B201454 (Los Angeles County Super. Ct. No. SC084416)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Terry Friedman, Judge. Judgment reversed and remanded with directions. Order vacated.

Glaser, Weil, Fink, Jacobs & Shapiro, Patricia L. Glaser, Caroline H. Mankey; Greines, Martin, Stein & Richland, Kent L. Richland, Alan Diamond, Jeffrey E. Raskin and Sheila A. Wirkus for Defendants and Appellants.

Duane Morris, Heather U. Guerena, Paul J. Killion, Matthew A. Taylor and James H. Steigerwald for Plaintiff and Respondent.

INTRODUCTION

Defendants VivoRx Autoimmune Inc. (VivoRx) and Abraxis Bioscience, Inc. (Abraxis) appeal from a judgment against them and in favor of plaintiff Bioquest Venture Leasing Company-A, N.V. (Bioquest) and a post-judgment order awarding Bioquest its attorney's fees. We reverse the judgment, vacate the order, and remand with directions.

FACTS

Bioquest, a Netherlands Antilles corporation, was a venture capital fund. Bioquest invested in emerging biotechnology companies through "sale-license back" transactions. A company would obtain capital by selling its biotechnology to Bioquest and then licensing it back from Bioquest, making royalty payments to Bioquest over a specified time period, after which the company had the right to buy back the technology. In 1992, Bioquest appointed Aberlyn Capital Management Ltd. Partnership (Aberlyn), a Delaware limited partnership, as its general manager and agent authorized to administer the "sale-license back" transactions, including executing agreements in Aberlyn's name, but on behalf of Bioquest.

The Regents of the University of California (Regents) owned biotechnology referred to as Hybridoma III, HD 46 (the Technology) which was created in California. In 1989 and 1992, the Regents entered into licensing agreements with MedClone, Inc. (MedClone), a California corporation with its office in Inglewood, granting MedClone an exclusive license for the Technology and various related patent and intellectual property rights.

In 1993, after receiving written consent from the Regents, MedClone entered into a "sale-license back" transaction with Aberlyn through a License Assignment and License Agreement (the 93 Agreement). Aberlyn was headquartered in Massachusetts. The 93 Agreement included a provision specifying that it was governed by Massachusetts law.

In 1997, MedClone and Aberlyn entered into a License Assignment and Assumption Agreement (the 97 Agreement) with VivoRx, a California corporation with its principal place of business in Santa Monica. Pursuant to the 97 Agreement, MedClone transferred its license with Aberlyn to VivoRx and VivoRx assumed MedClone's interest and obligations as licensee of the Technology, including the obligation to pay Aberlyn outstanding royalty payments in the amount of $648,281.93. The 97 Agreement did not include a governing law provision.

VivoRx was wholly owned by Abraxis, a multibillion dollar company. Dr. Patrick Soon-Shiong (Soon-Shiong) was the majority shareholder, President and Chairman of the Board of Directors of Abraxis, as well as the President and sole director of VivoRx. Abraxis and VivoRx kept consolidated financial statements and filed consolidated tax returns. VivoRx had no employees, and its operations were conducted by Abraxis's employees and officers, including Derek Brown (Brown) who was acting Chief Financial Officer for VivoRx.

In the month after executing the 97 Agreement, VivoRx sublicensed the Technology to Molecular Devices Corporation (MDC). Pursuant to the licensing agreement (the MDC Agreement), MDC was required to make royalty payments, which ultimately generated approximately $225,000 per year for VivoRx. When the MDC Agreement was executed, MDC paid VivoRx $450,000, representing three years of prepaid minimum royalties.

VivoRx, or sometimes Abraxis on its behalf, made the scheduled monthly payments to Bioquest, or Aberlyn as its agent, under the 97 Agreement through August 1999, and made no further payments thereafter. Until filing the instant lawsuit, Bioquest consistently demanded payment from VivoRx. Brown told Bioquest that the Technology was not profitable and VivoRx did not have the financial resources to make the payments.

In 1999, Bioquest ended its agency relationship with Aberlyn, and Aberlyn transferred the assets it held on Bioquest's behalf, including the 97 Agreement, to Bioquest. Thereafter, and including from August 1999 onward, Bioquest acted for itself

in administering and enforcing the 97 Agreement. Bioquest consistently requested financial documents from VivoRx which would support Brown's representations. For more than three years, VivoRx did not provide financial documents. In March 2003, Bioquest made a written demand for payment, in the absence of which, Bioquest would declare VivoRx to be in default under the 97 Agreement. VivoRx responded by sending a two-page balance sheet for 2002, which included a line item stating that $380,000 was due from "Related Parties," later identified as Abraxis (then known as American Bioscience). Bioquest learned that VivoRx had transferred the money to Abraxis as an intercompany loan, and the loan was repaid to VivoRx in 2004.

In January 2004, VivoRx provided Bioquest with a certified consolidated balance sheet for 2002. Brown wrote Bioquest that the financial outlook for VivoRx was not promising, the corporation had been losing money for some time, royalty income was likely to decline, VivoRx was paying most of its income to UCLA as royalties, and VivoRx had ceased research and development of the Technology due to the lack of positive results.

After 12 months of further demands by Bioquest with unsatisfactory response from VivoRx, Bioquest filed suit in February 2005. The case went to trial on the second amended complaint filed in March 2007, against VivoRx, Soon-Shiong, and Abraxis. Bioquest alleged that VivoRx breached the 97 Agreement in September 1999. The causes of action Bioquest pled were breach of contract, unjust enrichment and alter ego liability of Abraxis and Soon-Shiong for the breach.

In its answer, VivoRx raised a statute-of-limitations defense, claiming that the four-year limitations period set forth in section 337 and the two-year period specified in section 339 of the Code of Civil Procedure applied to Bioquest's claims and, as a result, the action was time barred. VivoRx moved to have the statute-of-limitations issue bifurcated from the remainder of the action and heard first. After a hearing on March 20, 2007, the trial court denied the motion.

Bioquest's causes of action for breach of contract and unjust enrichment were tried to a jury. The jury returned a special verdict in favor of Bioquest on these causes of action.

At the close of Bioquest's case and just prior to the jury's verdict, VivoRx moved for nonsuit. VivoRx argued that the 97 Agreement did not have a choice-of-law clause and California statutes of limitations applied and barred Bioquest's claims. VivoRx also argued that Bioquest had no standing to sue, in that Bioquest failed to show that Aberlyn was its agent. Bioquest countered that the 97 Agreement incorporated the choice-of-law clause in the 93 Agreement designating Massachusetts law and under the six-year statute of limitations, Bioquest's claims were timely. The trial court adopted Bioquest's arguments that the evidence showed that Aberlyn's principal place of business was in Massachusetts and, under applicable law, that was sufficient basis to enforce the choice-of-law provision. The court ruled that the 97 Agreement should be interpreted "to incorporate the choice of law of Massachusetts on the theory that the determination of the rights and obligations of the parties cannot be made independent of the law that governs them. . . . [T]he parties' choice of law[] is integral. And Massachusetts is the choice of law." The trial court denied defendants' motion.

The cause of action for alter ego liability was tried to the court, which found that Abraxis was the alter ego of VivoRx. Judgment was entered in favor of Bioquest and against VivoRx and Abraxis in the sum of $2,575,448 plus interest, costs and attorney's fees.

VivoRx and Abraxis moved for a new trial and for judgment notwithstanding the verdict. Among other grounds, VivoRx and Abraxis contended that the trial court had erred in ruling that, under the choice-of-law provision incorporated in the 97 Agreement, the six-year statute of limitations set by Massachusetts law applied, rather than the four-year or two-year period set by California law, and therefore, Bioquest's causes of action were time barred. The trial court denied the motions.

Bioquest subsequently moved for an award of $1,280,114.50 in attorney's fees. Bioquest presented billing records and declarations from its attorneys. After finding that

some of the fees were duplicative or otherwise not allowable, the trial court awarded Bioquest the reduced amount of $900,000.[1]

DISCUSSION

Defendants' primary contention is that the trial court erred in ruling that Bioquest's claims are not time barred. The pivotal issue is whether the six-year Massachusetts statute of limitations (Mass. Gen. Laws, ch. 260, § 2 [six years; contract actions])[2] or California's statutes of limitations (Code Civ. Proc., §§ 337, subd. 1 [four years; breach of written contract], 339, subd. 1 [two years; unjust enrichment: obligation not founded on instrument of writing])[3] must be applied to determine if Bioquest's causes of action are time barred. The trial court found that the longer Massachusetts statute applied, in that the Massachusetts choice-of-law provision in the 93 Agreement was incorporated by reference in the 97 Agreement.

Standard of Review

The record contains no disputed extrinsic evidence bearing on the parties' intention regarding choice of law and, therefore, whether the 97 Agreement includes the

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[1] Defendants first appealed from the judgment, designated as appeal number B201454. Subsequently, defendants appealed from the order awarding attorney's fees, designated as appeal number B204301. We ordered the appeals to be consolidated and all documents filed under B204301 to be refilled under appeal number B201454.

[2] Massachusetts General Laws, chapter 260, section 2 provides as follows: "Actions of contract . . . shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues."

[3] Code of Civil Procedure section 337, subdivision 1, provides that "[a]n action upon any contract, obligation or liability founded upon an instrument in writing" must be commenced "[w]ithin four years," except as otherwise provided by law.

Code of Civil Procedure section 339, subdivision 1, provides that "[a]n action upon a contract, obligation or liability not founded upon an instrument of writing" must be commenced "[w]ithin two years," except as otherwise provided by law.

Massachusetts choice-of-law provision presents a purely legal question that we review de novo. (See *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc.* (1995) 38 Cal.App.4th 1532, 1539, fn. 4; *Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1320; see generally *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [interpretation of written instrument solely a judicial function "when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence"]; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126-1127 [contract interpreted as matter of law even when undisputed extrinsic evidence renders the terms susceptible to more than one reasonable interpretation].)

Incorporation by Reference

For the terms of one document to be incorporated into a separate agreement executed by the parties, "[t]he contract need not recite that it 'incorporates' another document, so long as it 'guide[s] the reader to the incorporated document.'" (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54.) However, "'"the reference [to the first document] must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties."'" (*Ibid*.; accord, *Troyk v. Farmers Group, Inc*. (2009) 171 Cal.App.4th 1305, 1331.)

We agree with defendants that there is not a sufficiently "clear and unequivocal" reference to the entire 93 Agreement between MedClone and Aberlyn, including its choice of the internal laws of the Commonwealth of Massachusetts as its governing law, for that choice-of-law provision to be incorporated by reference into the 97 Agreement between Aberlyn (as Bioquest's agent) and VivoRx. A brief review of the agreements covering the Technology will provide the context for our analysis.

On June 30, 1989, the Regents granted MedClone, a California corporation, an exclusive license to develop and utilize certain intellectual property rights relating to the

Technology (an "invention" made in the course of research at UCLA). The agreement had a 17-year term. It contained a California choice-of-law provision.

On March 3, 1992, the Regents and MedClone entered into a further license agreement, which granted MedClone a worldwide royalty-bearing license with respect to certain other intellectual property rights. The 1992 Regents' license agreement also contained a California choice-of-law provision.

In February 1993, the Regents consented in writing to the assignment of MedClone's licensing rights and interest in and to the 1989 and 1992 Regents' license agreements to Aberlyn. The 1993 Regents' consent agreement contained a California choice-of-law provision.

On March 2, 1993, MedClone entered into the 93 Agreement with Aberlyn (acting for Bioquest) pursuant to which Aberlyn purchased from MedClone all of MedClone's rights, title and interest in and to the 1989 and 1992 Regents' license agreements and Aberlyn, in turn, granted MedClone an exclusive license (actually, a sublicense) to use, make, sublicense and otherwise practice the inventions set forth in those two agreements, as well as an option to repurchase from Aberlyn, on the date the last royalty payment was due, all of Aberlyn's rights, title and interest in the 1989 and 1992 Regents' license agreements. As the parties have explained, this sale, license-back and option to repurchase, together with the Regents' consent to the new arrangement, were elements of a financing transaction, intended to provide MedClone with the capital it needed to commercially develop the Technology.

The 93 Agreement described Aberlyn as a Delaware limited partnership with its office in Waltham, Massachusetts. In a section labeled "Governing Law" the 93 Agreement provided, "[T]his Agreement and all rights and obligations hereunder, including matters of construction, validity and performance, shall be governed by and construed and enforced in accordance with the internal laws of the Commonwealth of Massachusetts (without reference to its conflicts of laws rules or principles)."

On June 30, 1997, in a written consent agreement with VivoRx, the Regents agreed to the substitution of VivoRx for MedClone as the sublicensee in the 93

Agreement with Aberlyn. The 1997 Regents' consent agreement, which contains a California choice-of-law provision, was acknowledged by Aberlyn and MedClone.

The following day, July 1, 1997, MedClone, VivoRx and Aberlyn entered into the 97 Agreement at issue in this litigation. In the 97 Agreement's recitals, the parties state "[MedClone] desires to transfer to [VivoRx], and [VivoRx] desires to acquire [MedClone's] interest, as licensee" in the 93 Agreement with Aberlyn, and further, "Aberlyn is willing to release [MedClone] from the covenants and obligations of licensee under the 93 Agreement and to accept those of [VivoRx] on the terms and conditions set forth herein . . . ." Thereafter, the 97 Agreement provides that "[MedClone], for and in consideration of one dollar and other valuable consideration paid to [MedClone] by [VivoRx], hereby transfers and assigns to [VivoRx] all of [MedClone's] interest, as licensee, in and to the said [93 Agreement] and to the Collateral [the 1989 and 1992 Regents' license agreements]. [¶] In consideration of Aberlyn's consent to said transfer and assignment, [VivoRx] hereby promises to pay Aberlyn the aggregate unpaid Royalty Payments as stated above, and [VivoRx] hereby assumes all of the obligations of [MedClone] under said [93 Agreement] as though [VivoRx] were the original licensee of the 93 Agreement and to the Collateral."[4]

Schedule B-1 to the 97 Agreement is identified as "License Terms and Base Royalties" and provides for the term of VivoRx's license (48 months), a royalty payment schedule and the repurchase option "[i]n accordance with Section 2(c) of the [93 Agreement]." The 97 Agreement itself provides that "the License Terms are as follows: See Schedule B-1 attached hereto and accordingly made a part hereof."

In addition to several other schedules, the 97 Agreement also attaches as exhibits the 1989 and 1992 Regents' license agreements, the 1993 Regents' consent agreement, the 93 Agreement and the 1997 Regents' consent agreement. None of those exhibits is

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[4] Contemporaneously with, and as partial consideration for, Aberlyn's agreement to the 97 Agreement, VivoRx and Aberlyn entered into a warrant purchase agreement by which Aberlyn acquired a warrant to purchase VivoRx common stock. The warrant purchase agreement includes a California choice-of-law provision.

expressly incorporated by reference into the 97 Agreement. The 97 Agreement contains no choice-of-law provision.

Pursuant to the 97 Agreement, MedClone transferred and assigned to VivoRx all its interests in the 1989 and 1992 Regents' license agreements and in the 93 Agreement. VivoRx, in turn, agreed to pay royalties to Aberlyn according to the schedule attached to the new 97 Agreement (Schedule B-1) and further agreed to "assume[ ] all of the obligations of [MedClone] under said [93 Agreement] as though [VivoRx] were the original licensee . . . ." The parties specifically recited that Aberlyn was willing to accept VivoRx in place of MedClone "on the terms and conditions set forth herein"—that is, on the terms and conditions recited in the 97 Agreement itself. As discussed, there is no separate choice-of-law provision; nor is there any specific reference to the 93 Agreement's Massachusetts choice-of-law provision.

In contrast, as described in recitals to the 97 Agreement, with respect to the 1989 and 1992 Regents' licensing agreements, the 1997 Regents' consent agreement provides that VivoRx "assumed all liability and obligations and acquired all rights under the License Agreements *and is bound by all the terms in all respects* as if [VivoRx] were the original licensee in place of [MedClone]." (Italics added.)

The difference between agreeing to be bound by "all the terms" of the 1989 and 1992 Regents' license agreements (which contain California choice-of-law provisions) and only by the "obligations" in the 93 Agreement (with its Massachusetts choice-of-law provision) is significant. (Cf. *Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 474 [contract language should be interpreted "in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory"].) Although the choice of Massachusetts law is plainly a "term" of the MedClone-Aberlyn 93 Agreement, it was not one of MedClone's 93 Agreement "obligations," interpreting that word in its "ordinary and popular sense." (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 [the "'"clear and explicit" meaning of [the contract's] provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls

judicial interpretation'"]; see also *Belz v. Clarendon America Ins. Co*. (2007) 158 Cal.App.4th 615, 625.) At the very least, the assumption of "obligations," rather than "all the terms" of the prior agreement does not manifest a "clear and unequivocal" intention to incorporate the Massachusetts choice-of-law provision. (See *Shaw v. Regents of University of California, supra,* 58 Cal.App.4th at p. 54.)

We note that the 97 Agreement not only clearly identifies (and attaches as an exhibit) the 93 Agreement but also makes several amendments to provisions in, or schedules attached to, the 93 Agreement. At least parts of the 93 Agreement plainly remain relevant to the parties' rights under the 97 Agreement. But those amendments are material, not because they demonstrate the 93 Agreement was incorporated by reference into the 97 Agreement, but because they modify the obligations imposed in 1993 on MedClone, which VivoRx assumed in 1997 when it acquired MedClone's interest in the Technology. Modifying those specific obligations fails to manifest a clear and unequivocal intention to incorporate by reference the 93 Agreement's unmentioned choice-of-law provision.

Governmental Interest Analysis and Civil Code section 1646 for California Law

California is the forum state for the lawsuit initiated by Bioquest. The Technology was initially developed here and is owned by the Regents. VivoRx and its parent Abraxis are California corporations with their principal places of business in California. MedClone, the company that VivoRx replaced as the sublicensee to exploit the Regents' Technology, is also a California corporation. Bioquest, the other contracting party, is a Netherlands Antilles corporation with its principal place of business in Curacao, Netherlands Antilles; its sole shareholder is located in Switzerland; Bioquest has no Massachusetts office. Its former agent and general manager, Aberlyn, did maintain its principal place of business in Massachusetts and administered the 97 Agreement for a time from its offices there, but it has had no connection to the parties to this litigation or their dispute since April 1, 1999, nearly six years before Bioquest filed the lawsuit.

Because the 97 Agreement contains no choice-of-law provision, then under either a governmental interest analysis (see generally *Offshore Rental Co. v. Continental Oil Co.* (1978) 22 Cal.3d 157, 161 ["[q]uestions of choice of law are determined in California . . . by the 'governmental interest analysis'"]; *Reich v. Purcell* (1967) 67 Cal.2d 551, 555) or application of Civil Code section 1646,[5] California's statutes of limitations are properly applied to bar enforcement of Bioquest's claims.

Accrual of Limitations Period

Bioquest contends that even if California's four-year statute of limitations (Code Civ. Proc., § 337) were applied, not all of its claims would be barred. According to Bioquest, the 97 Agreement is an installment contract and included installment payments which became due from March 2001 to July 2001. Each such installment payment, Bioquest maintains, became due within four years of the filing of the complaint on February 10, 2005, and therefore, would not be time barred. We disagree.

Where, as here, the underlying facts are not in dispute, the issues of whether an agreement is an installment contract and when a statute of limitations begins to run on breach of a contract are questions of law subject to independent review on appeal. (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1388.) In ordinary contract actions, under the so-called "date-of-injury" accrual rule, the statute of limitations starts running upon the occurrence of the last element of the cause

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5 Civil Code section 1646 provides: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Although Civil Code section 1646's continued vitality in light of California's general adoption of the governmental interest approach to choice-of-law issues has occasionally been questioned, it was recently applied by our colleagues in Division Three of this court. (See *Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal.App.4th 1436, 1454-1461 [governmental interest analysis does not supplant Civil Code section 1646 as to the law governing interpretation of contracts].)

of action, that is, breach of the contract.[6] (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 826; see also 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 520, p. 664.) This is consistent with the policy underlying statutes of limitation to protect "'potential defendants by affording them an opportunity to gather evidence while facts are still fresh.' [Citation.]" (*April Enterprises, Inc.*, *supra*, at p. 826.)

As Bioquest asserts, for an installment contract, failure to pay an installment when due triggers the statute of limitations to begin running as to that installment. (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, *supra*, 116 Cal.App.4th at pp. 1388-1389; *White v. Moriarty* (1993) 15 Cal.App.4th 1290, 1299.) Each unpaid installment, therefore, has its own trigger date in sequence with all other unpaid installments. This sequential accrual rule has also been applied, as Bioquest points out, to other types of contracts where payments were due at specified intervals, such as monthly lease payments (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1344) and contracts calling for periodic payments on an obligation with no fixed total amount (*Conway v. Bughouse, Inc.* (1980) 105 Cal.App.3d 194, 199). (See *Armstrong*, *supra*, at p. 1388.) Bioquest claims the 97 Agreement is an installment contract, or subject to the same rule for sequential accrual of the limitations period as an installment contract, in that the 97 Agreement required VivoRx to make royalty payments on a monthly basis.

Periodic payments, however, are not determinative as to whether a contract is an installment contract or when the statute of limitations for failure to make a payment begins to run. (*Jozovich v. Central California Berry Growers Assn.* (1960) 183 Cal.App.2d 216, 223-224.) If the parties intended to make an entire agreement, rather than a divisible one, notwithstanding that the agreement requires periodic payments,

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6 "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

courts will not construe it as an installment contract. (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, *supra*, 116 Cal.App.4th at p. 1389; *Jozovich v. Central California Berry Growers Assn.*, *supra*, 183 Cal.App.2d at pp. 224-225.) To ascertain the parties' intent, we can look to the nature and purpose of the agreement, the express language, and the conduct of the parties, including their course of performance. (*Armstrong*, *supra*, at p. 1389.)

The case cited by Bioquest, *Conway v. Bughouse, Inc.*, *supra*, 105 Cal.App.3d 194, does not support its installment contract argument, given the facts in the instant case. The *Conway* court determined that in the agreement at issue each payment was separable from the others based upon whether specified contingencies had occurred at the time the payment was due. (*Id.* at p. 199.) Each payment was not, according to the court, a part of a total payment, a fixed sum, to be paid out over a period of time. (*Ibid.*) The court held that, therefore, the agreement at issue was an installment contract and, thus, the limitations period for each unpaid installment began running from the time when the installment actually became due.[7] (*Id.* at pp. 199-200.)

The inference from the *Conway* holding is that an agreement for a fixed sum to be paid out over time, such as the 97 Agreement, does not constitute an installment contract subject to sequential accrual of the limitations period. VivoRx was required to pay a fixed sum, all the monthly royalty payments in the specified amounts and thereafter, a lump sum payment equal to the purchase price, by the end of the specified term of the agreement, upon termination of the agreement due to VivoRx's default, or the earlier issuance by VivoRx of a public offering of its stock. The monthly payments were not equal, but varied widely from about $96,000 the first month, zero dollars for several months, with the remaining months at $18,000 per month. There were no performance

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[7] The other cases cited by Bioquest also do not provide supporting authority, in that the contracts at issue were for repayment of notes in installments (*White v. Moriarty*, *supra*, 15 Cal.App.4th at p. 1299; *Vatcher v. Grier* (1920) 50 Cal.App. 39, 41-42; *Bissell v. Forbes* (1905) 1 Cal.App. 606, 607) or payment of rent in monthly installments (*Davenport v. Stratton* (1944) 24 Cal.2d 232, 251-253.) The 97 Agreement clearly is not a note or a rental or lease agreement.

benchmarks for the use or development of the Technology throughout the license term by VivoRx, and thus, no performance contingencies or any payment formula linked to any contingency. Applying the rationale in *Conway*, the 97 Agreement would not be an installment contract. (*Conway v. Bughouse, Inc.*, *supra*, 105 Cal.App.3d at pp. 199-200.)

We agree with VivoRx that the 97 Agreement also does not come within Williston's definition of a divisible, or installment, contract: "[A] divisible contract has been defined as one where both the performance by each party is divided into two or more parts, and the performance of each part by one party is the agreed exchange for a corresponding part by the other party . . . . On the other hand, a contract is indivisible or 'entire,' when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent. . . . [¶] A divisible contract differs in only one respect from other contracts—namely, that on the performance on one side of each of its successive divisions, the other party becomes bound or indebted for the agreed price of that division, and must thereafter pay or perform despite a subsequent breach by the performing party." (15 Williston on Contracts (4th ed. 2000) § 45:1, pp. 259-268, fns. omitted; see also § 45:8, p. 294; *Jozovich v. Central California Berry Growers Assn.*, *supra*, 183 Cal.App.2d at pp. 223.)

Performance of Bioquest and VivoRx was not divided into two or more parts. The parties' bargain was that Bioquest would buy the Technology in its entirety for a specified amount and then Bioquest would lease it to VivoRx for a specified amount, plus the purchase price for a specified period of time. Omitting or deleting any of these promises from the agreement would frustrate the purpose of the agreement, and nothing indicates that less than full performance by each party was acceptable. According to Williston, "[i]f striking any promise or set of promises would destroy the basis of the bargain, . . . [the contract] is indivisible." (15 Williston on Contracts, *supra*, § 45:10, p. 305; see also § 45:8, p. 294 and fn. 92, p. 297, citing and discussing *Jozovich v. Central California Berry Growers Assn.*, *supra*, 183 Cal.App.2d 216.)

Based upon the foregoing considerations, we conclude that the 97 Agreement is not an installment contract or otherwise severable. (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, *supra*, 116 Cal.App.4th at pp. 1388-1389; *Jozovich v. Central California Berry Growers Assn.*, *supra*, 183 Cal.App.2d at pp. 223-224.) Accordingly, there was no sequential accrual of the limitations period as to each payment not paid when it became due and payable. (*Ibid.*)

In sum, the trial court's determination to apply the Massachusetts statute of limitations and, therefore, the judgment based thereon, cannot stand. Accordingly, the matter must be remanded for application of the appropriate California statutes of limitations for an indivisible contract consistent with this decision.

The other contentions raised by the defendants are essentially rendered moot by the resolution of the statute of limitations issues. We therefore decline to consider them.

DISPOSITION

The judgment is reversed and the cause is remanded for further proceedings consistent with this decision. The order is vacated. Defendants shall recover their costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.