UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0008

September Term, 2013

MEDIMMUNE, LLC

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF MASSACHUSETTS d/b/a UNIVERSITY OF MASSACHUSETTS BIOLOGIC LABORATORIES, ET AL.

Meredith,
Zarnoch,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 3, 2015

This case concerns disputes between parties to an agreement that was entered into for the purpose of collaborating to discover new products for the treatment of a viral disease known as RSV — an acronym for respiratory syncytial virus — a disease that is particularly serious for premature infants. As will be described more fully below, during the collaboration, MedImmune, LLC ("MedImmune"), appellant/cross-appellee, developed a highly effective treatment for which MedImmune received a patent. MedImmune marketed the product as Synagis®. Pursuant to the provisions of the collaboration agreement, MedImmune shared its financial success with other members of the consortium, including the Board of Trustees of the University of Massachusetts ("UMass"), appellee/cross-appellant.

On August 19, 2011, MedImmune filed suit in the Circuit Court for Montgomery County asserting three causes of action against the Henry M. Jackson Foundation for the Advancement of Military Medicine, Inc. ("Henry Jackson Foundation"); Third Sector New England, Inc. ("Third Sector"); and UMass. Prior to trial, MedImmune settled with Henry Jackson Foundation and Third Sector, leaving UMass as the only defendant in the case. MedImmune's complaint sought: a declaratory judgment that UMass had breached the RSV collaboration agreement ("count 1"); damages for the breach of that agreement ("count 2"); and a declaratory judgment that the agreement had expired or was terminable ("count 3"). MedImmune prayed a jury trial.

After MedImmune had filed an amended complaint — which asserted the same causes of action against the same parties as the original complaint — UMass filed a motion for summary judgment. On September 25, 2012, the motion was heard by the Honorable

Michael D. Mason. Judge Mason granted UMass's motion as to counts 1 and 2, but denied the motion as to count 3. Additionally, Judge Mason granted UMass's motion to strike MedImmune's demand for a jury trial.

On October 1-5, 8-10, and 17, 2012, the court conducted a bench trial (with Judge Mason presiding) on MedImmune's claim for declaratory judgment. On February 7, 2013, the court issued an oral ruling. Applying Massachusetts law relative to the termination of contracts, the court determined that, although the contract between MedImmune and UMass had no fixed date of termination, MedImmune's obligation to pay royalties under the agreement would continue for a reasonable period of time, which the court stated would be for as long as MedImmune manufactured and sold a product contemplated by the collaboration agreement. On February 15, 2013, the court filed its written judgment memorializing the February 7 ruling. This order was docketed on February 26, 2013. On March 1, 2013, MedImmune noted an appeal, and on March 28, 2013, UMass filed a notice of cross-appeal.

QUESTIONS PRESENTED

MedImmune presents three questions for our review:

> 1. Did the trial court err in declining to apply the U.S. Supreme Court's *per se* rule [*see Brulotte v. Thys Co.*, 379 U.S. 29, 32, 85 S.Ct. 176 (1964)] that royalties under a license of both patents and know-how, without provision for reduction upon patent expiration, must end when the patents expire?
>
> 2. Did the trial court deny the right to jury trial guaranteed by the Maryland Declaration of Rights and Rule 2-511(a) when it struck the jury demand and decided without a jury what constituted a "reasonable" contract duration?
>
> 3. Did the trial court also deny the right to jury trial and violate Rule 2-501(f) by improperly deciding disputed issues of material fact on summary judgment?

For the reasons stated below, we are not persuaded that the court impermissibly decided genuine disputes of material fact in granting UMass's motion for summary judgment as to counts 1 and 2. Additionally, MedImmune has failed to persuade us that the *per se* federal rule regarding payment of royalties to licensors of patented technology — as announced in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), and developed in subsequent cases — applies to the collaboration agreement that is the focus of this case. Furthermore, we perceive no error on the part of the circuit court in striking MedImmune's jury demand with respect to the trial on count 3.

In the cross-appeal, UMass presents one issue:

> Did the circuit court commit legal error under governing Massachusetts contract law by overriding the duration that the parties negotiated and defined in their written agreement?

We conclude that the circuit court did not commit a legal error in its finding concerning the duration of the contract.

Accordingly, we will affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

In the late 1980s, a group of retired United States Army physicians formed two companies — Molecular Vaccines, Inc. ("Molecular Vaccines"); and Pediatric Pharmaceuticals, Inc. ("Pediatric Pharmaceuticals") — devoted to researching and developing cures for infectious diseases.[1] Three diseases were of particular interest to

[1]Pediatric Pharmaceuticals played virtually no role in the current action and was eventually folded into MedImmune. Both Molecular Vaccines and Pediatric Pharmaceuticals (continued...)

Molecular Vaccines and Pediatric Pharmaceuticals: respiratory synctial virus ("RSV"), influenza, and parainfluenza.[2]

In 1989, doctors at Molecular Vaccines became aware of late-stage development clinical trials — at Henry Jackson Foundation and the Massachusetts Health Research Institute, Inc. ("Massachusetts Health") — for a polyclonal antibody product to treat RSV.[3] Polyclonal antibody products — a "shotgun approach" as described by the circuit court — are made by pooling the blood plasma of several donors and separating out the antibodies.[4] Dr. Jeanne Leszczynski, an employee of the Massachusetts Biologic Laboratory (sometimes referred to by the parties as "MBL"), explained that, in order to make a potent polyclonal antibody product, researchers seek to produce lots — called titers — containing higher levels

[1](...continued)
were formed under the laws of the State of Delaware. Molecular Vaccines had its headquarters in Gaithersburg, Maryland; Pediatric Pharmaceuticals's main office was in Edison, New Jersey.

[2] RSV is a virus that infects the lungs and breathing passages. It is sometimes fatal, particularly for newborn infants. RSV is the most common cause of bronchiolitis — inflammation of the airways of the lung — and pneumonia in infants under one year of age.

Parainfluenza, or human parainfluenza viruses (HPIVs), cause respiratory illnesses, particularly in infants and children. HPIVs can lead to more serious conditions, such as croup or pneumonia. *See* Centers for Disease Control, *Human Parainfluenza Viruses (HPIVs)*, CENTERS FOR DISEASE CONTROL (Nov. 5, 2012), http://www.cdc.gov/parainfluenza/about/overview.html.

[3] Henry Jackson Foundation had its principal place of business in Rockville, Maryland. Massachusetts Health was a corporation formed under the laws of the Commonwealth of Massachusetts, with its principal place of business in Boston, Massachusetts.

[4] Antibodies are the body's reaction to diseases. Antibodies combat diseases and also serve as protection against reacquiring the same disease.

of antibodies for the targeted disease.[5] Ideally, researchers will produce titers with the desired antibodies in a sufficient amount to be able to treat the condition. In less scientific terms, a polyclonal antibody product is a synthesis of naturally occurring antibodies designed to target a particular disease. Molecular Vaccines was interested in collaborating with Henry Jackson Foundation and Massachusetts Health toward the goal of putting such a product on the market to treat RSV.

Accordingly, Molecular Vaccines, Henry Jackson Foundation, and Massachusetts Health entered into agreements creating an RSV collaborative consortium whereby the parties agreed to cooperate in developing treatments for RSV.[6] In broad terms, Molecular Vaccines agreed to underwrite the research and development of any potential product, as well as pay any manufacturing costs. In exchange, Henry Jackson Foundation and Massachusetts Health would share equally in any royalty payments resulting from the commercialization of any products produced as a result of the RSV consortium. The parties also agreed to share any research findings, data, and "know-how" in the field, as defined by the contracts. Additionally, the agreements contained non-competition provisions whereby Massachusetts

[5] Massachusetts Biologic Laboratory is a division of the University of Massachusetts. In this opinion, we will refer to Massachusetts Biologic Laboratory and UMass interchangeably unless otherwise noted.

[6] Molecular Vaccines entered into separate agreements with Henry Jackson Foundation and Massachusetts Health, but the contracts are virtually identical.

We note that Massachusetts Health administered this project on behalf of the Massachusetts Public Health Biologic Laboratories, a state agency within the Massachusetts Department of Public Health.

Health and Henry Jackson Foundation agreed not to assist a competitor of Molecular Vaccines in putting a similar product on the market.

Furthermore, the parties orally agreed that each entity would take a different approach to create and develop products for treating RSV. Massachusetts Health would pursue the development of a polyclonal antibody product which, at the time of the agreement, was set for a clinical trial. Researchers at Henry Jackson Foundation would attempt to develop a vaccine. Molecular Vaccines, meanwhile, hoped to genetically engineer an antibody for the treatment of RSV, and Molecular Vaccines's goal was the development of a monoclonal antibody product. In contrast to the polyclonal antibody approach, a monoclonal antibody product is a genetically engineered antibody designed to treat a specific condition. In 1989, that technology had never before been attempted for the treatment of RSV. The circuit court commented on the uncertainties and difficulties the consortium faced:

> While the science of polyclonal antibody therapy was understood, there was currently no . . . such treatment for RSV. Even if such product could be found, significant problems in the manufacturing process and in delivering it to the target population, infants, would have to be overcome.[7]
>
> Similarly, while the principle of vaccines was well understood, none then existed for RSV.
>
> While the monoclonal antibody approach held the prospect of being the most effective method of treatment, the challenges involved in engineering an effective monoclonal antibody for the treatment of RSV made project three the most speculative of the approaches being taken.

[7] Because a polyclonal antibody product is based on naturally occurring antibodies in blood plasma, large quantities of the product are needed to treat the disease. The only effective method to deliver large quantities of blood plasma to recipients is infusion, which would be problematic for infants.

Shortly after the formation of the RSV consortium, Molecular Vaccines changed its name to MedImmune and absorbed Pediatric Pharmaceuticals.[8]

Massachusetts Health's project initially suffered a setback, but, with the assistance of MedImmune, in 1995 and 1996, Massachusetts Health obtained patents for a polyclonal antibody product that became known as Respigam®. The Food and Drug Administration ("FDA") approved Respigam®, and, in 1996, sales of Respigam® began. MedImmune handled all sales and paid to Massachusetts Health and Henry Jackson Foundation the contractually agreed royalties with respect to MedImmune's sales of this product.

In August 1996, the Massachusetts legislature established Massachusetts Biologic Laboratory — *see* Mass. Gen. Laws ch. 75, § 43 (2013) — in response to a scandal regarding Massachusetts Health. (It appears that two Massachusetts Department of Public Health officials received payments of a portion of the royalties the RSV consortium paid to Massachusetts Health on sales of Respigam®.) The legislation creating Massachusetts Biologic Laboratory placed it within the University of Massachusetts system, and UMass assigned Massachusetts Biologic Laboratory to its medical school. The legislation establishing Massachusetts Biologic Laboratory stated that that new entity "assume[d] all rights, obligations and duties under existing contracts" from the Massachusetts Department of Public Health. 1996 Mass. Acts ch. 334, § 3(c).

[8] MedImmune was originally a corporation but later became a limited liability company, organized under the laws of the State of Delaware, with its headquarters in Gaithersburg, Maryland.

Accordingly, in February 1997, UMass informed MedImmune that it had succeeded Massachusetts Health as the licensor in the RSV consortium contract. UMass stated that it was entitled to receive any royalty payments due Massachusetts Health, and would otherwise meet Massachusetts Health's obligations under the contract.[9]

In 2002, MedImmune, Massachusetts Biologic Laboratory, and Massachusetts Health executed an assignment and assumption agreement pursuant to which Massachusetts Biologic Laboratory formally assumed the rights and obligations of Massachusetts Health under the RSV consortium agreement.

In the meantime, MedImmune continued its research efforts to develop a monoclonal antibody product. MedImmune was successful. In 1998, MedImmune obtained a patent for, and the FDA approved, the monoclonal antibody product which became known as Synagis®. This was the first monoclonal product ever approved for treatment of RSV, and as of the time of the trial, Synagis® remained the only monoclonal antibody product approved for use in humans. Dr. Jeffrey Ravetch, an expert witness who testified at trial, characterized MedImmune's achievement as "beyond remarkable." Indeed, the circuit court noted that, "[i]n engineering . . . Synagis®, MedImmune achieved a result never seen before and not seen since."

Synagis® was more effective than Respigam® in treating RSV, and, in 2004, Respigam® was withdrawn from the market. Pursuant to the RSV consortium agreement,

[9] Massachusetts Health disputed UMass's claim to royalties pursuant to the RSV agreement, but in 2000, UMass and Massachusetts Health entered into an agreement whereby Massachusetts Health retained a portion of the royalties paid to UMass.

even though MedImmune had done the bulk of the research and development on the monoclonal antibody product, and even though MedImmune obtained and owned the patent for Synagis®, MedImmune paid royalties to Henry Jackson Foundation and UMass on all sales of Synagis®. At trial, Atul Saran (the Senior Vice President of Corporate Development and Ventures at MedImmune) testified that MedImmune had paid over $360 million in royalties to the RSV collaborators in the course of the RSV agreement, 99% of which was due to sales of Synagis®.[10]

In 2002, MedImmune and UMass became involved in litigation concerning the RSV agreement. UMass had demanded that MedImmune share information about Synagis® so that UMass could produce the product in Maine and Massachusetts.[11] UMass also asserted that it was entitled to be paid additional royalties as a result of an agreement MedImmune had reached with Abbott Labs to distribute Synagis®. At the time, MedImmune suggested that its RSV agreements with UMass could be terminated at will. Eventually, the parties settled that lawsuit. MedImmune agreed to pay a higher royalty on sales of Synagis® in Maine and Massachusetts, and, in exchange for that concession, UMass dropped its demand for MedImmune's research results and data.

As time passed, MedImmune became concerned that UMass was not providing any information pursuant to the RSV collaboration agreement and was merely collecting royalties. MedImmune took the position that UMass had failed to share research data and had

[10] We note that Mr. Saran's name is sometimes spelled "Soran" in the record.

[11] The RSV license agreement permitted Massachusetts Health — and, later, its successor, UMass — to produce any licensed product in Maine and Massachusetts.

also collaborated with competitors to place competing products on the market. On August 19, 2011, MedImmune filed the present suit in the Circuit Court for Montgomery County, Maryland, against UMass and Henry Jackson Foundation. In its complaint, MedImmune sought: 1) a declaratory judgment that UMass had breached the RSV agreement by failing to share information; 2) damages for that breach; and 3) a declaratory judgment that the RSV collaboration contract had either already expired or was terminable by MedImmune after the expiration of a reasonable period of time. MedImmune also prayed a jury trial. On May 7, 2012, MedImmune filed an amended complaint, asserting the same causes of action against the same defendants. UMass moved to dismiss the suit for lack of jurisdiction and for *forum non conveniens*, but the court denied this motion.

On August 31, 2012, UMass filed two separate motions for summary judgment — one for counts 1 and 2, and the other addressing count 3. UMass also filed a motion to strike MedImmune's jury demand. Following a hearing on September 25, 2012, the circuit court determined that there was a genuine dispute of material fact as to the intention of the parties concerning the duration of the contract. Accordingly, the court denied UMass's motion as to count 3. The court, however, granted UMass's motion as to counts 1 and 2 on the grounds that: 1) MedImmune's claims were barred by the statute of limitations; and, in the alternative, 2) the proffered evidence of breach did not generate a genuine dispute of material facts. In its ruling, the court opined that MedImmune's notice of termination pursuant to the agreement was deficient. Further, the court observed that it was clear that that the alleged assistance to MedImmune's competitors had been committed by employees of UMass who were outside of the control of Massachusetts Biologic Laboratory. Additionally, the court

granted UMass's motion to strike MedImmune's jury demand because the crux of the relief being pursued by MedImmune was equitable in nature.

The claims asserted in count 3 proceeded to a bench trial on October 1-5, 8-10, and 17, 2012. On February 7, 2013, Judge Mason delivered an oral opinion. The court's oral findings of fact and its discussion of legal precedent were extensive, consuming 81 pages of transcript.

The court determined that the parties had not specified a durational term in the RSV collaboration agreements (hereafter referred to in the singular). Accordingly, pursuant to Massachusetts law, the court would determine a reasonable duration of the contract.[12] The court determined that a reasonable period of time for the applicability of the contract "extends through the period during which MedImmune continues to engage in the manufacture and sale of Synagis®." In making this ruling, the court determined that a rule of federal patent law — as first stated in *Brulotte*, *supra*, 379 U.S. at 32 — did not invalidate the obligation to continue the payment of so-called royalties under the peculiar circumstances of this case. The court explained that *Brulotte* and its line of cases were applicable to licensing agreements that were unlike the revenue sharing arrangement created by the RSV collaboration agreement in the present case. On February 15, 2013, the court filed its written judgment — docketed on February 26, 2013 — documenting the ruling that had been

[12] Neither party disputes the applicability of Massachusetts law to the contract. *See* RSV Contract § 11.11 ("This Agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Massachusetts without reference to its choice of law principles.").

explained on the record on February 7. On March 1, 2013, MedImmune noted an appeal, and on March 28, 2013, UMass noted a cross-appeal.

STANDARD OF REVIEW

With respect to the trial court's judgment concerning count 3 of MedImmune's complaint and the applicability of the U.S. Supreme Court's *per se* rule regarding payment of royalties to a licensor of patented processes, our review is governed by Rule 8-131(c). Accordingly, we "will review the case on both the law and the evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous . . . ." Rule 8-131(c). Our review of the court's conclusions of law, however, is *de novo*. *See Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233, 246 (2005) (citing cases).

In determining whether the court properly granted UMass's motion to strike the jury demand, we are reviewing a question of law. Accordingly, we review this issue *de novo*. *See Davis v. Slater*, 383 Md. 599, 604 (2004) (citing cases).

We review the grant of a motion for summary judgment for legal correctness. *See Puppolo v. Adventist Healthcare, Inc.*, 215 Md. App. 517, 532 (2013) (quoting *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152-53 (2008)). The Court of Appeals has noted: "'The trial court may grant summary judgment only when there is no genuine dispute of material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law.'" *Montgomery Cnty. v. Soleimanzadeh*, 436 Md. 377, 397 (2013) (quoting *Hines v. French*, 157 Md. App. 536, 549 (2004)). In conducting our review, we focus first on whether or not a genuine dispute of material fact was demonstrated by the affidavits filed in support of and in opposition to the motion. *Id. See* Maryland Rule 2-501(a), (b), and (f).

If we conclude that there was no genuine dispute of material fact apparent from the motion and response, then we review whether or not the prevailing party was entitled to judgment as a matter of law. *Id.* This Court has remarked that, in making such a determination, "[w]e must determine 'whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented, and there must be more than a scintilla of evidence in order to proceed to trial.'" *Puppolo*, *supra*, 215 Md. App. at 533 (quoting *Laing*, *supra*, 180 Md. App. at 153).

DISCUSSION

1. Appellant's first question: application of the *Brulotte* rule

MedImmune contends that the circuit court committed an error of law in failing to apply a rule of federal patent law in this case. MedImmune argues that, in *Brulotte*, *supra*, 379 U.S. at 32, the United States Supreme Court announced a *per se* rule that licensing agreements which extend beyond the expiration date of a patent without any reduction in royalties are unlawful. Appellant asserts that, if the court had properly applied federal patent law in this case, it would have determined that the RSV agreement could not extend beyond the expiration of the patent for Respigam® on May 2, 2012, and MedImmune could cease making royalty payments to UMass. MedImmune points out that federal courts have consistently applied the rule from *Brulotte*, and appellant contends that the rule fits situations in which a licensing agreement anticipates a patent.

UMass argues that the circuit court correctly determined that the rule from *Brulotte* does not apply in this case. UMass contends that the RSV license agreement is different from the licensing agreements in *Brulotte* and the federal cases applying the *per se* rule.

UMass also points out that MedImmune presented no argument as to the circuit court's finding that UMass nor Massachusetts Health exerted any sort of leverage that would have impermissibly forced MedImmune to continue making royalty payments beyond the expiration of the patent.

Preliminarily, UMass contends that this argument is not preserved because MedImmune did not argue *Brulotte's* impact in the circuit court in the same manner it frames the issue on appeal. *See* Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue [except for subject matter jurisdiction] unless it plainly appears by the record to have been raised in *or decided by* the trial court . . . ." (Emphasis added)). But the circuit court expressly decided: "This is not a *Brulotte* case[.]" Accordingly, we conclude the issue is adequately preserved for our review.

In *Brulotte*, a company sold hop-picking machines to farmers and issued licenses for their use. 379 U.S. at 29. The company owned several patents related to the machines. *Id.* The license agreements stipulated that the farmers would pay an annual royalty to the company, extending well beyond the expiration of the patents held by the company. *Id.* at 29-30. The Supreme Court determined that the company was misusing the monopoly power conferred by its patents. Writing for the Court, Justice William O. Douglas stated:

> **A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly**. But to use that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent by tieing [sic] the sale or use of the patented article to the purchase or use of unpatented ones. **The exaction of royalties for use of a machine after the patent has expired is an assertion of monopoly power in the post-expiration period** when, as we have seen, the patent has entered the public domain. We share the views of the Court of Appeals in *Ar-Tik Systems, Inc. v. Dairy Queen, Inc.*, 3 Cir., 302 F.2d

> 496, 510, that **after expiration of the last of the patents** incorporated in the machines '**the grant of patent monopoly was spent' and** that **an attempt to project it into another term by continuation of the licensing agreement is unenforceable**.

Id. at 33-34 (emphasis added) (citations omitted).

The Supreme Court revisited *Brulotte* in *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979), in which Mrs. Aronson had entered into a contract with the Quick Point Pencil Company ("Quick Point") concerning her invention of a keyholder, for which she had filed a patent application. The contract stated that Quick Point would have the exclusive right to manufacture pencils with the keyholder, and the company would pay a royalty to Mrs. Aronson. *Id.* at 259. The contract also included a provision for a reduced royalty payment in the event that Mrs. Aronson failed to obtain a patent, but there was no durational term. *Id.* Several years after Mrs. Aronson's patent had been rejected, and Quick Point had been making the reduced royalty payments, Quick Point sued, seeking to have the agreement declared unenforceable. *Id.* at 260. On appeal, the Supreme Court determined that *Brulotte* did not apply because the agreement was governed by state contract law, not federal patent law. *Id.* at 262 ("Commercial agreements are traditionally the domain of state law."). The Court found that *Brulotte* posed no impediment to the enforcement of the royalties negotiated by Mrs. Aronson. The Court explained:

> [In *Brulotte*,] we held that the obligation to pay royalties in return for the use of a patented device may not extend beyond the life of the patent. **The principle underlying that holding was simply that the monopoly granted *under a patent* cannot lawfully be used to "negotiate with the leverage of that monopoly."** The Court emphasized that to "use that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent . . . ." *Id*., at 33, 85 S.Ct., at 179. Here

> the reduced royalty which is challenged, far from being negotiated "with the leverage" of a patent, rested on the contingency that no patent would issue within five years.

440 U.S. at 264-65 (bold emphasis added, italics in original).

The Court held that Mrs. Aronson did not exert any monopoly leverage on Quick Point in negotiating the agreed royalty payments. *Id.* at 265. Similarly, in the present case, the royalty-sharing agreements were negotiated at a time when no party enjoyed any patent-based monopoly or leverage.

The United States Court of Appeals for the Federal Circuit has recognized "that the key inquiry under the patent misuse doctrine is whether, by imposing the condition in question, the patentee has impermissibly broadened the physical or temporal scope of the patent grant and has done so in a manner that has anticompetitive effects." *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1328 (Fed. Cir. 2010) (citing *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1426 (Fed. Cir. 1997)). *Cf. Kimble v. Marvel Enterprises, Inc.*, 727 F.3d 856, 865 (9th Cir. 2013) ("in the absence of a discounted rate, there must be some other clear indication that the royalty was in no way subject to patent leverage"), *cert. granted*, ___ U.S. ___ , 135 S.Ct. 781 (2014). *See generally* Michael Koenig, *Patent Royalties Extending Beyond Expiration: An Illogical Ban From Brulotte to Scheiber*, 2003 DUKE L. & TECH. REV. 5 (2003).

In this case, the circuit court determined that *Brulotte* and its progeny were inapplicable to the RSV agreement. Judge Mason explained:

> Turning to the issue then of the *Brulotte* line of cases, the Court rejects [MedImmune]'s argument that the Court's decision concerning a reasonable duration of this agreement is controlled by *Brulotte*. This is not a *Brulotte* case,

> in the Court's view. *Brulotte* is concerned with the exploitation by the owner of the monopoly powers granted under a patent, owner or inventor. There are multiple patents in this case, some where MBL [Massachusetts Biologic Laboratory] was the inventor and some where MedImmune was the inventor.
>
> At the inception of this agreement, MedImmune sought to commercialize research being done by [Massachusetts Biologic Laboratory] and HMJ [Henry Jackson Foundation], and at the same time to advance MedImmune's own research and development capabilities. **As at least one expert testified, this was really a co-development agreement**. [Massachusetts Biologic Laboratory] did not simply license information to MedImmune[;] it undertook substantial research and development duties of an ongoing nature, as well as certain manufacturing responsibilities. The licensing agreement, the license agreement was only one of a number of agreements that were being negotiated simultaneously.
>
> **This is not a case where [Massachusetts Biologic Laboratory] was seeking bargaining leverage based on a potentially patentable discovery**. Clearly there was no patent existent at the time, or extant at the time, in negotiations with MedImmune. Rather, according to the evidence presented, it was MedImmune who was seeking the rights to potentially patent any such information to protect against future competitors in the event they were able to commercialize a product.

(Emphasis added.)

The federal rule applied in *Brulotte* and its progeny is concerned with licensing agreements wherein the owner of a patent (or pending patent) wielded monopoly power in negotiating an agreement for another entity to use the patented technology in exchange for payment of royalties. In the present case, Henry Jackson Foundation, Massachusetts Health (and later UMass), and MedImmune were not negotiating over a patent and royalties at the time they entered into the RSV collaboration agreement and adopted a revenue-sharing arrangement. Rather, the parties to the RSV consortium were agreeing to pool their resources and know-how in order to cooperate in the hopes of developing a cure or treatment for RSV. As the Supreme Court recognized in *Aronson*, "[s]tate law is not displaced merely because

the contract relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law." 440 U.S. at 262 (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974); *Goldstein v. California*, 412 U.S. 546, 557-58 (1973)).

In describing the circumstances surrounding the formation of the RSV consortium, the circuit court noted that there was an "all for one and one for all" mentality. At the inception of the consortium, when the agreement was made for the payment of royalties on sales of successful products, there was great uncertainty surrounding the group's projects. The circuit court found: "As they sat around the table in late 1989, there was no way for them to predict which if any of the approaches [of developing treatments] might prove successful." Accordingly, the RSV agreement ensured the cooperation of all parties by rewarding the parties equally. Section 3.1(a) of the RSV agreement reads, in pertinent part: "[MedImmune] agrees to pay [UMass] a royalty of three percent (3%) of Net Sales of any Royalty Bearing Product which is sold by [MedImmune] or its affiliates, including uses outside of the Field." The contract defined "Royalty Bearing Product" (without limiting the scope to patented technology) as "any immunoglobulin product or any monoclonal antibody (including but not limited to Licensed Product) used for the treatment or prevention of [RSV], influenza or parainfluenza virus infection."

Furthermore, we note that the *payment* of royalties as provided for by the RSV agreement does not depend upon the existence of a patent. As noted above, section 3.1(a) of the contract provides for payment of royalties for sale of any "Royalty Bearing Product." "Licensed Product," included as part of the definition of "Royalty Bearing Product," is

defined as "any product, composition, chemical, machine, apparatus, etc. which incorporates or utilizes Technology." Technology is, itself, expansively defined by section 1.3 of the contract. Accordingly, nothing in the agreement conditions MedImmune's payment of royalties to UMass on the existence of a patent, and we see no error in the circuit court's determination that *Brulotte* was inapplicable to the facts of this case.

The RSV agreement was not negotiated based upon patents or by wielding any monopoly leverage conferred by any patents. Rather, the parties negotiated the RSV agreement to foster cooperation in hopes of treating RSV. Accordingly, we agree with Judge Mason's conclusion that enforcing the royalty provisions of this contract is in no way contrary to the goals of federal patent law, and the *Brulotte* rule is not applicable to these facts. *See Aronson*, *supra*, 440 U.S. at 262 (noting that state law applies if enforcement does not "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[]'" concerning patent law (quoting *Kewanee Oil*, *supra*, 416 U.S. at 479)). Consequently, the trial court was not obligated to find that the obligation to pay royalties under the RSV agreement became unenforceable upon the expiration of the Respigam® patent.

2. Appellant's second question: Summary Judgment as to Counts 1 and 2

a. Research Sharing Obligations

MedImmune contends that the circuit court should not have granted summary judgment to UMass as to counts 1 and 2 of its complaint because there were genuine disputes of material fact concerning UMass's alleged breaches. MedImmune also points out that the court acknowledged that UMass failed to share research data and collaborated with

MedImmune's competitors in the development of a vaccine to combat RSV. Accordingly, MedImmune asserts, it presented sufficient evidence of material breaches on the part of UMass to generate a dispute of material fact, which made the grant of summary judgment improper.

UMass contends that Massachusetts Biologic Laboratory and UMass are different entities, and the RSV agreement placed no obligations on UMass.[13] Furthermore, UMass contends that the RSV agreement does not obligate it to share research data on technology outside of the field, as defined in the agreement. The circuit court, however, did not directly address these arguments.

Instead, the circuit court granted summary judgment for UMass as to counts 1 and 2, primarily based on the expiration of the statute of limitations. The court determined, in the alternative, that summary judgment would be appropriate for UMass because any of the asserted breaches were not material. UMass contends that the court was correct and also proposes additional grounds upon which we could affirm. As we have stated, however, we generally may affirm only on grounds relied upon by the circuit court. *See Puppolo*, *supra*, 215 Md. App. at 533 (quoting *Ashton*, *supra*, 339 Md. at 80).

The statute of limitations for a suit on a contract in Maryland is, generally, three years. *See* Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"),

[13] Although UMass devotes much of its chief brief to differentiating UMass from Massachusetts Biologic Laboratory, UMass routinely uses the terms interchangeably in its briefs and throughout the record.

§ 5-101.[14] The Court of Appeals has held: "In breach of contract cases, a cause of action typically accrues at the time of the breach." *Shailendra Kumar, P.A. v. Dhanda*, 426 Md. 185, 195 (2012) (citing cases). Furthermore, it must appear that the plaintiff knew or should have known of the breach in order for the statute of limitations to start running. *See Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 444-45 (2000) (citing cases).

Here, the circuit court determined that the statute of limitations had expired because MedImmune became aware that UMass had breached the sharing obligations under the contract more than three years prior to filing suit on August 19, 2011. The circuit court stated:

> The plaintiff in this case maintains under their definition of technology within the field that all research involving the production of antibodies has to be shared with them, because such research has the potential to be of benefit to them within the field, and what the plaintiff refers to in effect as platform technology.
>
> Mr. Berl even argued on behalf of MedImmune to the Court that it's not just the successes that MedImmune is entitled to know, but they're also entitled to know about the failures that the defendants experienced as they tweaked the various steps in antibody production and purification, because the failures can also provide valuable information to the plaintiffs with respect to the process of production and purifying antibodies. It's important not only to know what does work, but it's important to know what doesn't work.

[14] Although we are construing a Massachusetts contract in this case, the statute of limitations is a procedural rule, and the law of the forum state applies. *See Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 55 (2002) (citing *Chase Manhattan Bank, N.A. v. CVE, Inc.*, 206 F. Supp. 2d 900, 906 (M.D. Tenn. 2002); *Maltas v. Maltas*, 197 F. Supp. 2d 409, 423 (D. Md. 2002), *rev'd on other grounds*, 65 F. App'x 917 (4th Cir. 2003)).

We note that although the link between a civil action and a declaratory judgment action may be "'iffy,'" in terms of applying the statute of limitations, there is little doubt that the limitations period of a declaratory judgment action expires at the same time as the underlying ordinary coercive action. *See Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 657-59 (1997).

And with respect to the tweaking in general, that would include such matters, as has been discussed, and is beyond dispute, that the cells are generally created, or grown, rather, in media, that you can modify the mixture in the media by adding certain nutrients or substituting nutrients, so that's one way in which you can tweak the production. The purification process involves the use of columns and filters, which can also be manipulated and altered. And, in addition, in order to produce antibodies in almost all instances, the [] scientists are using mice and there are certain processes that can be manipulated to enhance or stimulate the immune response by the mice, which in turn would affect the antibodies being produced, so that those are among the tweaks that can be made in research involving antibodies.

That the uncontested evidence in this case shows that [U]Mass has been involved in research involving antibody purification and production for at least the past 10 years, and, frankly, I think if I had more weeks and months to look at it, I could probably find that the research goes back much further than 10 years, but certainly for at least the 10 years, the past 10 years.

During that same period of time, it is undisputed, and, in fact, **the plaintiff in their pleadings complains during that same, for at least the last 10 years, so says the plaintiff, [UMass] has not provided MedImmune with the details about the results of any of that research** as it involved the steps that they had taken to tweak the production and purification process of the various antibody subjects that they were researching.

In addition, it is undisputed that MedImmune well before August of 2008 was fully aware that [U]Mass was engaged in this research, that is, the research involving the production or purification of antibodies, specifically over the last 10 years MedImmune [sic] has engaged in research and development of monoclonal antibodies for treatment of C. difficile, rabies, SARS, hep[atitis] C, ALS, but not RSV, influenza, or parainfluenza.

In 2006, it is undisputed that the plaintiffs were presented with information by [U]Mass in connection with a proposed buyout of royalty obligations under the RSV licensing agreement that [U]Mass was, the work that [U]Mass was doing on developing antibodies to treat SARS, C. difficile, and rabies. As well, articles were published relating to that same research in 2005, which were in the public sector.

In April of 2008, [Massachusetts Biologic Laboratory's] executive director approached MedImmune about licensing MBL's [Massachusetts Biologic Laboratory's] antibodies for treatment of C. difficile. **In July of 2008, it's undisputed that [Massachusetts Biologic Laboratory] did a 75-**

> **slide PowerPoint presentation with respect to the same antibody research that they were doing**. This included information that demonstrated that [U]Mass had conducted research on antibodies for treatment of SARS, hep C, C. difficile, [and] rabies with various partners.
>
> MedImmune, as part of its complaint, alleged the failure to share certain information contained in [U]Mass patents, in [UMass] patents including the, what's been referred to as the 559 patent for C. difficile. The application for that patent was filed in December of 2005. **It is beyond any dispute that the plaintiff was fully aware that [UMass] was involved in an extensive and ongoing research into the development and purification of therapeutic antibodies for the treatment of various diseases other than RSV, influenza, and parainfluenza**.
>
> It is also beyond dispute that [UMass] at no time over the past decade provided the plaintiffs with any information relating to the tweaks to the process of producing and purifying antibodies.
>
> Given MedImmune's interpretation of technology in the field, it is beyond dispute that the plaintiff was aware that the defendants were necessarily acquiring information which they had not shared and were, according to the plaintiffs, obliged to share well before August of 2008.
>
> Therefore, the claim for breach of contract under Count 2 is time barred. The claim — as well as the claim under Count 1 . . . .

(Emphasis added.)

In section 1.3 of the RSV agreement, technology is defined as "any discovery, know how, invention, improvements, development, trade secret, data, governmental approvals or licenses . . . in the Field which . . . is created, developed, conceived or reduced to practice by [UMass] or its employees . . . ." Section 1.2 of the contract states: "'Field' shall mean the prevention or treatment of [RSV], influenza or parainfluenza virus infection by immunoglobulin and/or monoclonal antibodies . . . ."

Although UMass argued — and continues to argue — that this research falls outside of the definition of technology, and UMass was not obliged to share this data, MedImmune

contended at the summary judgment hearing that UMass's research into antibodies designed to treat other diseases and the tweaking process — all of which MedImmune was aware of at least as early as July 2008 — falls within the definition of technology (as defined by the RSV agreement) that UMass was contractually obligated to share. Consequently, MedImmune's argument supported the court's determination that the statute of limitations had expired. MedImmune delayed the filing of its suit until August 2011, which is beyond the expiration of the statute of limitations.

In the opposition to UMass's motion for summary judgment, MedImmune contended that the July 2008 slideshow was not enough to put them on notice that UMass was conducting research that they should have shared. MedImmune argues that this is a dispute of fact. MedImmune, however, also contended that the RSV agreement obligated UMass to share information of the type revealed in the slideshow. Accordingly, pursuant to its own interpretation of the agreement, MedImmune was aware of technology that UMass was contractually obligated to share by at least July 2008, and MedImmune's suit in August 2011 was beyond the expiration of the statute of limitations.

Moreover, in opposing UMass's motion for summary judgment, MedImmune had an affirmative duty to introduce detailed facts demonstrating a dispute of material fact. *See O'Connor v. Balt. Cnty.*, 382 Md. 102, 110-11 (2004). MedImmune failed to do so. MedImmune's allegations that UMass's slideshow and information available in the public domain did not put it on notice of a possible breach are conclusory statements and not sufficient to successfully oppose UMass's motion for summary judgment.

b. Non-Compete Clause[15]

MedImmune also argued that UMass shared information with a competitor to develop a vaccine to combat RSV. Specifically, MedImmune alleged that it presented evidence that a Dr. Trudy Morrison, a UMass employee, had collaborated with Novavax in an effort to produce a vaccine. MedImmune contends that this was a breach of the non-competition clause of the RSV agreement.

UMass argues that Dr. Morrison was not an employee of Massachusetts Biologic Laboratory and, hence, was not precluded by the non-compete provision from collaborating with a competitor of MedImmune.

The circuit court determined that Massachusetts Biologic Laboratory is the party obligated by the RSV agreement, not the entire UMass system. The court recognized that the legislation establishing Massachusetts Biologic Laboratory placed it within the UMass system. *See* Mass. Gen. Laws ch. 75, § 43 (2013). The UMass Board of Trustees designated Massachusetts Biologic Laboratory as part of the University of Massachusetts medical school and also authorized Massachusetts Biologic Laboratory to enter into contracts of its own accord. Accordingly, in 2002 when Massachusetts Biologic Laboratory entered into the assumption agreement with MedImmune and Massachusetts Health, Massachusetts Biologic Laboratory was not obligating the entire UMass system to perform the RSV agreement. *See Dagastino v. Comm'r of Corr.*, 754 N.E.2d 150, 152 (Mass. App. Ct. 2001) (citing cases)

[15] In this section, we will differentiate between UMass and Massachusetts Biologic Laboratory. "UMass" refers to the entire University of Massachusetts system. "Massachusetts Biologic Laboratory" means the biological lab specifically.

(noting that Massachusetts public agencies can bind only those for which the person signing has authority).

In order to prevail on a claim that Massachusetts Biologic Laboratory breached the non-compete provision of the RSV contract, MedImmune needed to proffer in its opposition to the motion for summary judgment evidence that an employee of Massachusetts Biologic Laboratory provided assistance to a competitor. Maryland Rule 2-501(b). MedImmune failed to provide the court such evidence prior to the ruling on the motion for summary judgment. MedImmune presented no such evidence in its opposition to UMass's motion for summary judgment. We will, therefore, affirm the grant of summary judgment to UMass as to counts 1 and 2.

3. Appellant's third question: demand for jury trial

MedImmune contends that a jury should have determined the reasonable duration of the contract at the trial on count 3. MedImmune argues that the right to a jury is preserved in cases of declaratory judgment, and the question of a reasonable duration of a contract is a jury issue. In making this argument, MedImmune advances the theory that the court should have considered whether a jury would have been available in an inverted lawsuit — *i.e.*, in a situation in which UMass had sued MedImmune. MedImmune notes that the circuit court would not have had to speculate as to UMass's inverted lawsuit because UMass actually sued MedImmune in Massachusetts state court for breach of contract. Because breach of contract is a cause of action a jury may decide, MedImmune asserts that the circuit court committed error in striking its demand for a jury.

UMass points out that its suit in Massachusetts sought specific performance — an equitable remedy — rather than money damages. Moreover, UMass argues that the inverted lawsuit analysis is inconsistent with Maryland law.[16] Additionally, UMass contends that MedImmune sought a declaratory judgment for an equitable claim, for which juries are not permitted.

Declaratory judgment actions in Maryland are governed by CJP § 3-409. Certainly, the fact that MedImmune filed for declaratory relief does not, in and of itself, preclude the appropriate participation of a jury. *See* CJP § 3-404 ("The fact that a proceeding is brought under this subtitle does not affect a right to jury trial which otherwise may exist."). This Court has recognized, however, that there is "no right to a jury trial in actions in equity under federal or state law." *Mattingly v. Mattingly*, 92 Md. App. 248, 255 (1992) (internal citations omitted). The threshold determination, then, is whether MedImmune's count 3 asserted a claim in equity or at law.

There are three factors courts generally review in making this determination: "1) [T]he customary manner of trying such a cause before the merger of law and equity, 2) the kind of remedy sought by the plaintiff, and 3) the abilities and limitations of a jury in deciding the issues." *Moshyedi v. Council of Unit Owners of Annapolis Rd. Med. Ctr. Condo.*, 132 Md. App. 184, 192 (2000) (citing *Merritt v. Craig*, 130 Md. App. 350, 362 (2000)). This Court has noted that the second prong of the analysis — the remedy sought — is the most

[16] The availability of a jury is a procedural rule, and Maryland law applies. *See Cooper*, *supra*, 148 Md. App. at 55 (citing *CVE*, *supra*, 206 F. Supp. 2d at 906; *Maltas*, *supra*, 197 F. Supp. 2d at 423).

important, and courts should also consider whether the claim traditionally sounded in law or in equity. *Id.* (citing cases).

In the oral ruling granting UMass's motion to strike the jury demand, the circuit court concluded that MedImmune sought an equitable remedy. Accordingly, it determined that the case should not be tried by a jury. The court noted: "[MedImmune's argument is] not so much a question of fact, in the Court's view, but a matter of public policy."

The Court of Appeals has recognized that, when parties omit an express term as to the duration of a contract, the court may supply one. *See Boland v. Boland*, 423 Md. 296, 370 (2011) (quoting *Lerner v. Lerner Corp.*, 132 Md. App. 32, 45 (2000)). Massachusetts law is similar. *See Plymouth Port, Inc. v. Smith*, 530 N.E.2d 194, 196 (Mass. App. Ct. 1988) (citing cases). In making this determination, the court should look to the subject matter of the agreement in an effort to supply a durational term that produces a reasonable result. *See Lerner*, *supra*, 132 Md. App. at 46 (quoting MARGARET N. KNIFFIN, 5 CORBIN ON CONTRACTS § 24.29, at 320 (Rev. ed. 1998)). In supplying a durational term, the court is effectively reforming the contract, which is an equitable remedy. *See LaSalle Bank, N.A. v. Reeves*, 173 Md. App. 392, 408 n.9 (2007) (citing cases). Accordingly, in count 3, MedImmune asked the circuit court to use its equitable powers to reform the RSV agreement to give it a reasonable durational term. This clearly sounds in equity, and, consequently, the court committed no error in striking MedImmune's jury demand.

MedImmune cites numerous cases from this State and other jurisdictions for the proposition that a reasonable period of time in a contract is a question of fact that may be

decided by a jury. MedImmune also highlights model jury instructions directing the jury to make a decision as to what constitutes a reasonable period of time in a contract.

We note, however, that MedImmune's cases are inapposite. For example, in *Mann Brothers Logging, Inc. v. Potlatch Corp.*, 149 F.3d 790, 791-92 (8th Cir. 1998), a small logging contractor entered into an agreement with a large corporation to provide logging services. The evidence before the court indicated that both parties expected the agreement to last at least five years. *Id.* at 793. The trial court instructed the jury that it could determine a reasonable duration of the contract if it concluded that the parties had omitted a durational term. *Id.* The United States Court of Appeals for the Eighth Circuit found no error with the jury instruction, noting that the jury was not determining the length of the contract. *Id.* Rather, the issue was a dispute of fact concerning the parties' expectations as to the duration of the agreement. *Id.* Accordingly, the jury was not asked to reform the contract and supply a durational term. *See also McGinnis Piano & Organ Co. v. Yamaha Int'l Corp.*, 480 F.2d 474, 479-80 (8th Cir. 1973) (noting that Minnesota law permits courts to instruct juries to find reasonable duration of a contract so long as court instructs jury that reasonableness is limited to definitions as found in that state's case law).

MedImmune cites two cases from this State in support of its argument that the question of a reasonable duration of the contract should have been determined by a jury. But neither case supports MedImmune's argument that it was entitled to have a jury supply the durational term in this case. In *Goldman, Skeen & Wadler, P.A. v. Cooper, Beckman & Tuerk, L.L.P.*, 122 Md. App. 29, 46-47 (1998), we noted that jury instructions stating that contracts without durational terms exist for reasonable periods of time and were terminable

by either party were correct statements of law. The jury in that case, however, was not instructed to determine what constituted a reasonable period of time. Similarly, MedImmune's reliance upon *Lerner* is unavailing because in that case, we specifically held: "When an agreement is silent as to duration, a reasonable duration ***will be implied by the court***." 132 Md. App. at 45 (emphasis added).

We decline to adopt MedImmune's inverted lawsuit theory. The test for obtaining a jury in declaratory judgment cases is well-established in Maryland. As we have noted, MedImmune asked the court to supply a durational term of the RSV agreement — reformation of the contract — which is equitable in nature. Accordingly, the court committed no error in striking MedImmune's jury demand.

4. UMass's cross-appeal

UMass contends that the court erred in making its determination as to a reasonable duration of the contract. UMass argues that the parties had, in fact, negotiated a durational term — section 1.9 of the contract, in conjunction with article 9 — and the court should have simply enforced the contract as written. Furthermore, UMass contends that the circuit court misinterpreted Massachusetts contract law and adopted a remedy that would not be considered by that state's courts.

MedImmune counters that the RSV agreement unambiguously omitted a durational term. MedImmune contends that UMass's reading of section 1.9 is tautological and does not provide the court with an express durational term. Additionally, MedImmune argues that UMass's reading of article 9 as providing the only grounds for termination is inconsistent with Massachusetts law.

Pursuant to Massachusetts law, the interpretation of a contract is an issue of law which we review *de novo*. *See Metro. Life Ins. Co. v. Cotter*, 984 N.E.2d 835, 844 (Mass. 2013) (citing cases). The Appeals Court of Massachusetts has noted: "Contracts that are free from ambiguity must be interpreted according to their plain terms." *Suffolk Constr. Co., Inc. v. Lanco Scaffolding Co., Inc.*, 716 N.E.2d 130, 133 (Mass. App. Ct. 1999) (citing *Fairfield 274-278 Clarendon Trust v. Dwek*, 970 F.2d 990, 993 (1st Cir. 1992); *Freelander v. G.K. Realty Corp.*, 258 N.E.2d 786, 788-89 (Mass. 1970)). We should give unambiguous terms their "usual and ordinary" meaning. *Id.* (citing *Morse v. Boston*, 157 N.E. 523, 526 (Mass. 1927)). Neither MedImmune nor UMass contend that there is an ambiguity as to the durational term in the RSV agreement. Rather, UMass argues there already is an unambiguous durational term, and MedImmune contends there unambiguously is no durational term.

Section 1.9 of the RSV contract reads: "'Term' shall mean the period beginning on the effective date of the Agreement and ending when this Agreement is terminated." We agree with the circuit court that this provision, in and of itself, does not provide a durational term for the agreement. Section 1.9 simply states that the contract starts when it starts and ends when it ends. UMass, however, contends that we must read section 1.9 in conjunction with article 9 in order to ascertain the durational term contemplated by the parties, notwithstanding the fact that section 1.9 fails to make any reference to article 9.

Article 9 provides:

> 9.1 In the event that within two (2) years from the effective date of this Agreement, a clinical trial has not been instituted with respect to a Royalty Bearing Product, [UMass] or [MedImmune] shall have the right but not the

obligation to terminate this Agreement upon sixty (60) days' prior written notice.

9.2 Upon breach of any provisions of this Agreement or the Research Agreement attached as Exhibit A by either party to this Agreement, in the event the breach is not cured within sixty (60) days after written notice to the breaching party by the other party, in addition to any other remedy it may have, the other party at its sole option may terminate this Agreement.

9.3 [UMass] may terminate this agreement if [MedImmune] becomes insolvent, files for protection under any bankruptcy law, makes an assignment for the benefit of creditors or seeks relief generally from its debts and obligations in accordance with a similar or analogous procedure.

9.4 Upon any termination of this Agreement, [MedImmune] shall be entitled to finish any work-in-progress and to sell any completed inventory of a Licensed Product covered by this Agreement which remains on hand as of the date of the termination, so long as [MedImmune] pays to [UMass] the royalties applicable to said subsequent sales in accordance with the same terms and conditions as set forth in this Agreement.

9.5 In the event that this Agreement is terminated, [UMass] agrees that any sub-license then in existence shall remain in effect in accordance with the terms and conditions thereof, provided that such sub-licensee is not then in breach of such sublicense agreement and such sub-licensee agrees to be directly obligated to [UMass] under the terms and conditions of such sublicense agreement.

9.6 (a) In the event that [UMass] terminates this Agreement under the provisions of Section 9.2 and the license between [MedImmune] and [Henry Jackson Foundation] with respect to Royalty Bearing Product is still in effect, [MedImmune] shall continue to make payments to [UMass] in accordance with Sections 3.1 and 3.2 of this Agreement for as long as the [sic] such agreement between [MedImmune] and [Henry Jackson Foundation] remains in effect.

(b)(i) In the event that [MedImmune] declines to provide the funds for, or perform the laboratory work required by the [FDA] to bring any Royalty Bearing Product to licensure, the licenses and rights granted hereunder for such product shall be converted from exclusive to nonexclusive status and [UMass] may seek other funds for continuation of the research.

> (ii) In the event that [UMass] declines to conduct the research required by the [FDA] to bring any Royalty Bearing Product to licensure, [UMass] shall forfeit its right to royalties from sale of such product by [MedImmune].
>
> 9.7 In the event that [MedImmune] decides to discontinue all sales of Royalty Bearing Product for an Indication, then [UMass] by written notice may terminate [MedImmune]'s rights and licenses for such Indication, and the covenants of Sections 5.3 and 5.4 shall terminate with respect to such Indication.

UMass argues that the above circumstances constitute the only specific circumstances upon which a party may terminate the agreement.

UMass contends that Massachusetts law will enforce contracts that lack a specific durational term. Certainly, MedImmune takes no issue with that argument. UMass, however, has conflated enforceability with durational term. The issue here is the durational term.

UMass argues that courts will limit the events causing termination to those delineated by the parties, if any, citing *G.M. Abodeely Insurance Agency, Inc. v. Commerce Insurance Co.*, 669 N.E.2d 787, 789-90 (Mass. App. Ct. 1996), for support. In that case, the trial court had concluded that a contract was not terminable at will because the parties had included provisions specifically limiting the causes for termination. *Id.* The appellate court made no remark about this determination. We note, however, that the court was not considering whether to limit termination to the events delineated in the agreement; rather, the issue in the case was whether jury instructions as to material breach were proper. *Id.* at 790-91. Additionally, the termination provisions explicitly stated, "[t]his Agreement is terminable," and proceeded to list four specific circumstances. *Id.* at 789. The RSV agreement contains no such language.

UMass also cites *BPR Group Limited Partnership v. Bendetson*, 906 N.E.2d 956 (Mass. 2009), for support. In that case, the parties disputed the dissolutions of real estate joint ventures. *Id.* at 957. The partnership agreement explicitly stated: "'This Agreement shall commence as of the date hereof ***and shall continue and not be dissolved or terminated except as hereinafter provided***.'" *Id.* at 959 (emphasis added). Accordingly, the partnership agreement in *Bendetson* expressly limited termination to the circumstances delineated in the contract. Article 9 of the RSV agreement includes no such limitations.

We do not read article 9 of the RSV agreement to provide a definite term of duration under which the contract will terminate. Section 1.9 — defining "Term" — does not refer to article 9. Section 1.9 merely states that the contract will end when it ends. Furthermore, pursuant to Massachusetts law, contractual provisions allowing a party to terminate an agreement will not be construed to be the exclusive means to terminate. *See Tropeano v. Dorman*, 441 F.3d 69, 78 (1st Cir. 2006). Accordingly, we conclude that the contract does not contain a durational term, and the court properly acted to supply one.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID, ONE-HALF BY APPELLANT, ONE-HALF BY APPELLEE.