SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BIOENERGY LIFE SCIENCE, INC., a Delaware corporation,

Plaintiff,

-against-

RIBOCOR, INC. (f/k/a BIOENERGY, INC.), a Minnesota corporation,

Defendant.

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Index No.: 650602/2014

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Plaintiff Bioenergy Life Science, Inc. (Bioenergy) moves, pursuant to CPLR 3212, for partial summary judgment against defendant RiboCor, Inc. (RiboCor). RiboCor opposes. For the reasons that follow, Bioenergy's motion is granted.

I. Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.

The parties both sell products containing D-ribose, a naturally occurring sugar. RiboCor is the former owner of companies that owned various D-ribose related patents. In August 2011, the parties entered into two written agreements – an Asset Purchase Agreement (the APA) (Dkt. 130)[1] and a Patent Agreement (Dkt. 131) (collectively, the Agreements)[2] – pursuant to which, among other things, Bioenergy acquired RiboCor's D-ribose related patents and provided a license to RiboCor to sell products using those patents in certain contractually defined markets.

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] The parties' corporate names changed after the Agreements were executed. Previously, their corporate names were quite similar. In the Agreements, Bioenergy is referred to as "BLS-DE" and RiboCor is referred to as "BIOENERGY". *See* Dkt. 131 at 1. In this decision, to avoid confusion, the court refers to the parties by their current corporate names, which appear in the caption.

Bioenergy commenced this action on February 24, 2014. It filed an amended complaint on June 18, 2014 (Dkt. 25), alleging that RiboCor breached the Agreements by selling patented products outside of the contractually permitted markets, improperly collecting and retaining royalty payments on Bioenergy's patents and failing to transfer all of its D-ribose related patents to Bioenergy at the time of the sale. Bioenergy seeks damages on the first two claims and specific performance on the third.[3] On February 22, 2015, RiboCor filed an answer with two breach of contract counterclaims. *See* Dkt. 54.[4] Fact and expert discovery[5] have been completed, and Bioenergy filed a note of issue on December 20, 2017. *See* Dkt. 117. Bioenergy moves for summary judgment.[6]

II. The Undisputed Material Facts

A. The Agreements

The starting point, of course, is the relevant provisions of the Agreements, both of which are governed by New York law and provide for jurisdiction in this court. Dkt. 130 at 39; Dkt.

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[3] By letter dated June 27, 2018, Bioenergy agreed to withdraw its specific performance claim if the court grants its summary judgment motion. *See* Dkt. 205. Since the court is granting its motion, the court deems the specific performance claim withdrawn. It should be noted that Bioenergy also asserted fraud claims, which were dismissed by order dated February 3, 2015. *See* Dkt. 52 (the 2015 Decision). The 2015 Decision also rejected RiboCor's contention that this action could only be brought in federal court because it involves patents. *See id.* at 5-7. Since there is nothing left to litigate after this motion, the court directs the entry of judgment at the end of this decision.

[4] RiboCor conceded its counterclaims must be dismissed. *See* Dkt. 204 at 4.

[5] While Bioenergy timely served a damages expert report (Dkt. 199), RiboCor elected not to file any rebuttal report or depose Bioenergy's expert. *See* Dkt. 121 at 33.

[6] The motion is actually dated March 15, 2018, though the dates of the opposition and reply papers do not match the dates they were e-filed. This is not an error. The parties served each other with their papers on the dates they were due (*see* Dkt. 118), and only e-filed them after they conferred about any sealing concerns they may have had regarding documents that were marked confidential during discovery. Since no sealing motion was filed, all of the documents are public.

131 at 12. Importantly, the Agreements have merger clauses stating that (1) the Agreements contain the entire agreement between the parties; (2) all prior written and oral agreements are superseded; and (3) all amendments must be in a signed writing. Dkt. 130 at 38; Dkt. 131 at 13. Oral modifications are expressly prohibited. *See id.*

The Agreements contain related provisions (sections 5.14 and 5.15 of the APA and sections 3.1.3 and 3.1.4 of the Patent Agreement) prohibiting RiboCor from selling D-ribose products[7] into defined "BLS-DE Markets." Dkt. 130 at 24-25; Dkt. 131 at 7-8. BLS-DE refers to Bioenergy, and thus BLS-DE Markets refers to the markets in which only Bioenergy, and not RiboCor, may sell D-ribose products. The relevant scope of the BLS-DE Markets is defined in the Patent Agreement as:

> making, using, offering to sell or selling D-ribose or products containing D-ribose anywhere in the Territory in any application ***intended for human use as a "food" or "food additive"*** as such terms are defined under Section 201 of the FD&C Act ***or as a Dietary Supplement***, provided that such Dietary Supplement is not knowingly sold to any clinic or hospital or to any Healthcare Professional who self dispenses any such Dietary Supplements to patients or directs patients to purchase such Dietary Supplement and provided further that any such Dietary Supplement may be sold to any other market including a Pharmacy.

Dkt. 131 at 2 (emphasis added).[8] While the APA generally prohibits RiboCor from competing with Bioenergy [*see* Dkt. 130 at 24-25], the Patent Agreement permits RiboCor to sell and

[7] The scope of these products – defined as "BLE-DE products" – includes "any product manufactured, sold and/or distributed by [Bioenergy or its sublicencees] practicing the Patents." *See* Dkt. 131 at 2. Patents are defined to those that fall within three Groups, which are listed in the Patent Agreement. *See id.* at 2-4. RiboCor was obligated under the APA to disclose and transfer to Bioenergy all of its D-ribose patents. *See* Dkt. 130 at 6, 9-10.

[8] This definition reflects the fact that, as discussed in the 2015 Decision, Bioenergy "sells D-ribose to companies that use it in food and dietary supplements" while RiboCor "uses D-ribose related technology for various commercial purposes, such as developing pharmaceutical drugs." *See* 2015 Decision at 1. This presumably explains the healthy/sick dichotomy proffered by RiboCor. *See* Dkt. 131 at 2 (defining "BIOENERGY Markets" to include drugs). But such dichotomy is not strictly consistent with the Agreements, which do not employ this nomenclature to delineate the markets into which RiboCor and its distributors may sell. To be sure, the parties

distribute its products within the "BIOENERGY Markets" [i.e., RiboCor's Markets], which are defined to mean:

> making, using, offering to sell or selling D-ribose or products containing D-ribose anywhere in the Territory in any application intended for use as a "***drug***", "cosmetic" or "device" ***as such terms are defined under Section 201 of the Food, Drug and Cosmetic Act ("FD&C Act")***, as a Medical Food, or as a Dietary Supplement, ***provided that such Dietary Supplement is only sold to any clinic, Pharmacy or hospital or to any Healthcare Professional who self dispenses such Dietary Supplement to patients or directs patients to purchase such Dietary Supplement***, and in any other application ***other than in the BLS-DE Markets***.

Dkt. 131 at 2 (emphasis added). Section 3.1.4 of the Patent Agreement obligates RiboCor to "use commercially reasonable efforts to [e]nsure" that it does not sell or distribute products in the [BLS-DE Markets]. *See id.* at 7-8. Section 3.1.4 further provides that:

> Each of the Parties ***will advise its customers and prospective customers*** of the ***permitted uses*** of the BLS-DE Products or BIOENERGY Products in the respective BLS-DE Markets and BIOENERGY Markets and ***will refuse to knowingly sell or otherwise distribute their respective BLS-DE Products or BIOENERGY Products to any such person for a use outside of the respective BLS-DE Markets and BIOENERGY Markets***. Promptly after learning that a person is using any BLS-DE Products or BIOENERGY Products outside of the respective BLS-DE Markets and BIOENERGY Markets, such Party will notify the other Party ***and will take commercially reasonable actions to stop such further use by such person***.

Id. at 8 (emphasis added).

Section 3.1.4 contains a single exception to these prohibitions: that RiboCor may engage in certain transactions set forth in section 3.1.2. *See id.* (caveating RiboCor's obligations with the phrase "except as otherwise provided under subsection 3.1.2"). Section 3.1.2 is quite limited, and (contrary to what RiboCor contends in its brief) ***does not*** permit RiboCor to sell in the BLS-DE Markets. *See id.* at 7. Section 3.1.2 merely permits RiboCor to sell and sublicense to third

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agree that the point of defining the parties' respective markets was to ensure they only sold products within their line of business. But to determine the scope of such markets, the court must apply the Agreements' precise definitions, not the casual understanding of "healthy" and "sick".

parties ***in its own*** markets without having to account to Bioenergy for such sales. *See id.* However, consistent with section 3.1.4, section 3.1.2 expressly prohibits RiboCor from selling in the BLS-DE Markets. *See id.* at 7 ("[RiboCor] will not otherwise practice, or authorize or sublicense others to practice the Patents outside of [RiboCor's] Markets."). *See id.* Nothing in section 3.1.2 purports to "grandfather" RiboCor's pre-APA sales within the BLS-DE Markets nor is there any other provision in the Agreements that so provides. *See* Dkt. 124 at 12 (correctly explaining that RiboCor's grandfathering argument begs the question, since the carveout in section 3.1.2 only applies to patents in RiboCor's Markets). Indeed, the notion that any of RiboCor's prior licenses are grandfathered is inconsistent with the APA. *See* Dkt. 130 at 25 ("Following the Closing, Sellers shall cease any co-marketing and promotion and sale activities for D-ribose anywhere in the world for food, beverage and dietary supplement applications and shall transfer any such arrangement to Purchaser." [§ 5.15]; "On Closing, Sellers shall terminate any existing license between them regarding the use of the Group 1 Patents and Group 2 Patents." [§ 5.16]).

B. RiboCor's Breaches

RiboCor breached the Agreements. It distributed D-ribose products through HVL, Inc. d/b/a Douglas Laboratories (HVL), an affiliate of a Canadian company, Atrium Innovations, Inc. (Atrium). *Prior* to the execution of the Agreements, in November 2010, RiboCor and Atrium entered into agreements permitting HVL to sell RiboCor's products using RiboCor's patents (which, as discussed, were later transferred to Bioenergy under the APA). *See* Dkt. 128 (the Atrium License Agreement). The Agreements do not contain any provision excepting HVL's sales in BLS-DE Markets. On the contrary, section 2.1 of the Patent Agreement requires

RiboCor to remit to Bioenergy all post-closing royalties on Group 1 Patents (which would include those owed to Ribocor under the Atrium License Agreement). *See* Dkt. 131 at 5.

It is undisputed that "HVL has sold D-ribose products[9] to numerous customers ***that do not fall within the definition of the RiboCor Markets***." Dkt. 121 at 10 (emphasis added).[10] This is a breach of section 3.1.4 of the Patent Agreement because such corporate customers are neither "a clinic, hospital, pharmacy, or individual licensed Healthcare Professional." *See id.* (listing all such entities); *see also id.* at 7-8 (listing "individuals who were not licensed Healthcare Professionals" and other "customers that also did not fall into the RiboCor Markets"). RiboCor has not refuted the occurrence of these sales nor does it dispute Bioenergy's contention that such sales do not fall within the definition of RiboCor's Markets (and that they thus necessarily fall within the BLS-DE Markets). RiboCor also does not dispute that it was aware of HVL's sales outside of RiboCor's Markets and it does not claim to have engaged in any commercially reasonable efforts to stop HVL from doing so. To the contrary, the unrebutted evidence establishes that "RiboCor assisted HVL in selling products into the [BLS-DE Markets] by communicating with HVL regarding marketing and sales of D-ribose products, meeting with

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[9] Bioenergy explains, and RiboCor does not dispute, that such "Corvalen" products are not "drugs" within the meaning of BIOENERGY Markets because they cannot, per FDA regulations, legally be used for medical purposes. *See* Dkt. 124 at 10. Hence, they are simply nutritional supplements, and thus fall within the BLS-DE Markets (i.e., they may only be sold to certain delineated purchasers set forth in the definition of BIOENERGY Markets). Moreover, since Corvalen products use Group 1 Patents, even if Atrium and HVL had a license to use them, the royalties collated by RiboCor were required to be remitted to Bioenergy.

[10] By undisputed, the court means that (1) Bioenergy has set forth a fact in its moving papers, supported by citations to record evidence and (2) RiboCor has not rebutted the fact in its opposition papers. As previously noted, RiboCor's opposition papers are entirely silent on the truth of many of the material facts established in Bioenergy's moving papers. By failing to attempt to refute such facts, RiboCor has conceded them.

HVL employees regarding these issues, working jointly with Dr. Jacob Teitelbaum,[11] and particularly authorizing HVL to sell to customers who were not within the RiboCor Markets." *Id.* at 17 (internal citations omitted).

It is unsurprising that HVL sold RiboCor's products in the BLS-DE Markets because "RiboCor never provided HVL with the specific definition of the RiboCor Markets" after the Agreements were executed. *See id.* at 21. In other words, RiboCor failed to "use commercially reasonable efforts" to ensure that HVL was not selling its products in the BLS-DE Markets. This is an express breach of RiboCor's obligations under section 3.1.4 of the Patent Agreement. Indeed, by not instructing HVL how not to run afoul of the Agreements, RiboCor virtually guaranteed that HVL would not comply with them as it was selling products in the BLS-DE Markets prior to closing.

Likewise, RiboCor's failure to dispute that it knew of HVL's sales to the customers in the BLS-DE Markets is a concession that it knowingly permitted its distributor to sell products in violation of the Agreements. In fact, RiboCor continued to permit HVL to sell into the BLS-DE Markets even after Bioenergy discovered what was occurring and demanded that RiboCor take corrective action. *See id.* at 25-26. RiboCor's inaction in the face of such knowledge is incompatible with its obligation under section 3.1.4 to "take commercially reasonable actions to stop such further [infringing] use." Moreover, rather than stop HVL, RiboCor kept collecting royalties from HVL's sales into the BLS-DE Markets. *See id.* at 15 ("HVL paid royalties to RiboCor on the sales of D-ribose products by HVL to its customers"; "HVL calculated the royalty paid by deducting costs from the net revenue of the D-ribose products sold and dividing

[11] Dr. Teitelbaum purchased products from HVL though his company, From Fatigued to Fantastic LLC, which, at his deposition, he admitted "is not a hospital, clinic, pharmacy or individual Healthcare Professional." *See* Dkt. 121 at 19.

the remaining gross profit in half."). It is undisputed that RiboCor did not remit these royalties to Bioenergy. *See id.* at 26.

"Joseph D. Kenyon, [Bioenergy's] damages expert, submitted an unrebutted report opining that [Bioenergy] suffered damages resulting from RiboCor's breaches of contract in the amount of $917,223." *Id.* at 29. This amount represents the total royalties received by RiboCor for sales in the BLS-DE Markets since the day after execution of the Agreements (September 1, 2011) to the date of Kenyon's report (November 2, 2017). *See* Dkt. 199 at 12. Kenyon's methodology for determining this amount is set forth on pages 8-10 of his report. *See id.* at 11-13.[12] Bioenergy's moving brief thoroughly explain how Kenyon's analysis is supported by record evidence. *See* Dkt. 121 at 30-33. RiboCor did not respond to any of this analysis.[13] It did not serve a rebuttal report and chose not to depose Kenyon. RiboCor's failure to raise any flaws in Kenyon's analysis or issue with his qualifications constitutes a concession that Kenyon's analysis is accurate. Thus, there is nothing in the record that raises a material question of fact as to the amount of Bioenergy's damages.

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[12] The Report contains appendices that set forth the documents he considered and includes his detailed worksheets (the accuracy of which has not been challenged by RiboCor). *See* Dkt. 199 at 14-18.

[13] RiboCor merely proffers baseless evidentiary objections, such as Kenyon's reliance on business records that were produced in discovery on the ground that such records are hearsay. Bioenergy laid a proper foundation for the introduction of these business records. *See* Dkt. 124 at 19 (explaining that RiboCor misidentified the records on which Kenyon relied, and that there is deposition testimony that the actual records relied upon by him were "prepared and maintained … in the ordinary course of business" and accurately reflects the relevant data); *see also In re Estate of Wang*, 2018 WL 2727353, at *2 (1st Dept June 7, 2018) (expert "opinion may be received in evidence even though some of the information on which it is based is inadmissible hearsay."); *N.Y. State Dev. Corp. v 230 W. 41st St. Assocs. LLC*, 77 AD3d 479, 480 (1st Dept 2010) ("expert appraiser's opinion as to damages was not rendered inadmissible due to partial reliance upon outside material, which was of the kind ordinarily accepted by experts in the field"). RiboCor *does not* actually contend that the sales records are inaccurate.

III. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is on the movant to make a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once a prima facie showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Bioenergy made a prima facie showing of entitlement to judgement on its claim that RiboCor breached the Agreements by, among other things, knowingly permitting HVL to sell into the BLS-DE Markets. It further proved that it was damaged in the amount of $917,223. The burden then shifted to RiboCor to raise a material question of fact. RiboCor has not done so.[14]

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[14] RiboCor's procedural arguments are rejected. All technical defects in Bioenergy's moving papers (e.g., failure to submit pleadings, which were previously e-filed) have been corrected. It is well settled that a moving party may, as here, correct such defects in its reply papers. *Washington Realty Owners, LLC v 260 Washington St., LLC*, 105 AD3d 675 (1st Dept 2013), citing *Pandian v N.Y. Health & Hosps. Corp.*, 54 AD3d 590, 591 (1st Dept 2008). RiboCor has not articulated any prejudice from such immaterial omissions. *See Serowik v Leardon Boiler Works Inc.*, 129 AD3d 471, 472 (1st Dept 2015). RiboCor's argument that Dr. Teitelbaum and certain unnamed "Others" (*see* Dkt. 132 at 21) are necessary parties under CPLR 1001 is also

First, RiboCor argues that Bioenergy's CEO, Leo Zhang, is not a credible witness. While credibility determinations are reserved for the finder of fact (*see Mazella v Beals*, 27 NY3d 694, 708 [2016]), questions regarding Zhang's credibility are not material because the dispositive issues do not turn on the veracity of his testimony. The relevant issues are the proper interpretation of the Agreements, HVL's sales, and the money that was made by RiboCor instead of Bioenergy. The Agreements, moreover, are unambiguous; thus, extrinsic evidence such as the parties' testimony as to its intended meaning is inadmissible and irrelevant. Zhang's testimony has no bearing on the accuracy of the records of RiboCor or its distributors and customers.

Second, RiboCor argues that it did not breach the Patent Agreement because HVL's sales are permitted under section 3.1.2. RiboCor's position is that even if HVL's sales violated section 3.1.4, they were grandfathered under section 3.1.2. But as discussed, section 3.1.2 does not include or even allude to grandfathering. Nor does it specifically permit RiboCor to allow HVL to sell into the BLS-DE Markets in the manner it did prior to the Agreements' execution. On the contrary, section 3.1.2 expressly prohibits RiboCor from selling or distributing products in the BLS-DE Markets. Section 3.1.2's meaning is perfectly clear and is not susceptible to any other reasonable commercial interpretation. *See Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 (1st Dept 2017) ("To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation"). Indeed, RiboCor does not claim that, on its face, section 3.1.2 permits grandfathering. *See Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002) ("if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity"), *accord Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 (2014) ("Where the terms of a contract are clear

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rejected. The only parties whose rights are at issue are Bioenergy and Ribocor; no one else stands to be "inequitably affected by a judgment" in this action. *See L-3 Commc'ns Corp. v SafeNet, Inc.*, 45 AD3d 1, 10 (1st Dept 2007).

and unambiguous, the intent of the parties must be found within the four corners of the contract"); *see also Bank of N.Y. Mellon v WMC Mortg., LLC*, 136 AD3d 1, 6 (1st Dept 2015) ("This rule applies with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople").[15] Rather, RiboCor relies on the testimony of its witnesses and the affirmation of its counsel to aver that the parties intended to grandfather the "prior Atrium agreements." *See* Dkt. 132 at 17. Such an argument is unavailing because testimony regarding the parties' intent may not be considered where the contract, on its face, is unambiguous. *Impala Partners v Borom*, 133 AD3d 498, 499 (1st Dept 2015) ("Only where a contract term is ambiguous may parol evidence be considered to clarify the disputed portions of the parties' agreement."); *see W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 163 (1990) ("extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.").[16] RiboCor's reliance on parol evidence also is precluded by the Agreements' merger clauses. *Modern Art Servs., LLC v Fin. Guar. Ins. Co.*, 161 AD3d 618 (1st Dept 2018) ("the parties' contract contains both a no-oral-

[15] RiboCor's only textual argument – that section 3.1.2 is ambiguous because it purportedly conflicts with section 3.1.4 – is nonsensical. RiboCor states that "Paragraph 3.1.4 of the Patent Agreement creates an exception for certain prior licenses of Defendant's listed in Paragraph 3.1.2", that, "[u]nfortunately, paragraph 3.1.2 contains no such list", and that "[t]he conflict between the two clauses creates an ambiguity." *See* Dkt. 132 at 18-19. While neither of these sections references any such "list", such omission does not create any confusion over the meaning of these interrelated sections. Rather, as discussed, section 3.1.4 permits RiboCor to make those sales set forth in section 3.1.2, and section 3.1.2 simply reinforces RiboCor's right to sell in its *own* market without having to account to Bioenergy while *explicitly prohibiting* RiboCor from selling outside of its market.

[16] The court rejects RiboCor's virtually identical argument made with respect to the APA. *See* Dkt. 132 at 18. RiboCor, in its answer, concedes that testimony regarding intent may not be considered where the contract is unambiguous. *See* Dkt. 54 at 4 ("To the extent Plaintiff's claims rely on additional alleged terms or understandings not set forth in the parties' agreements, they violate the parol evidence rule").

modification clause and a broad merger clause, which as a matter of law precludes any claim based on an unexpressed alleged intent").

Next, RiboCor contends that Bioenergy waived its breaches. RiboCor did not plead this defense in its answer, which was filed more than three years ago. The only remotely similar affirmative defense pleaded in the answer is unclean hands, an equitable defense inapposite to a legal claim for breach of contract. *See The Color Wheel, Inc. v Interstate Printing Co. Inc.*, 281 AD2d 161, 162 (1st Dept 2001). Regardless, even if this defense were recast as "waiver" it would still be unavailing, as it has nothing to do with Bioenergy's supposed wavier of RiboCor's breaches. Dkt. 54 at 4 ("With regard to the Second Cause of Action, Defendant on information and belief states that an affiliate of Plaintiff has sold product to the same third parties that Plaintiff is alleging Defendant failed to control, and therefore Plaintiff has unclean hands as to this Cause of Action");[17] *see* CPLR 3018 ("A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading"); *accord Ryan v Kellogg Partners Inst. Servs.*, 79 AD3d 447, 448 (1st Dept 2010) (party waives unpleaded defense if not raised until end of case), *aff'd*, 19 NY3d 1 (2012); *see 23/23 Communications Corp. v Gen. Motors Corp.*, 257 AD2d 367 (1st Dept 1999) (unpleaded defense answer cannot be raised for the first time in "eve-of-trial motion for summary judgment"). Instead of moving for leave to amend, RiboCor suggests that the court should reinterpret its unclean hands defense as the waiver defense articulated in its opposition brief. The court will not do so. RiboCor did not provide fair notice to Bioenergy that this defense was going to be part of the case; thus, Bioenergy was deprived of the opportunity to seek

[17] While now abandoned, this defense, as pleaded, fails because the Agreements do not prohibit Bioenergy from selling to the same "third parties" as RiboCor. To the contrary, under the Agreements, Bioenergy was permitted to sell its products to such third-parties in the BLS-DE Markets; RiboCor was not.

discovery on and strategize a response to such defense. Nor could Bioenergy have moved for judgement on the defense that it could not have anticipated. RiboCor does not proffer any good cause for its delay in asserting the defense or explain why material prejudice to Bioenergy should be overlooked. *See Barry v Clermont York Assocs., LLC*, 144 AD3d 607, 608 (1st Dept 2016) (leave to amend should be denied absent "a reasonable excuse for [party's] years-long delay in moving for leave to amend").

Regardless, the defense lacks merit. RiboCor now claims that "subsequent to the August 2011 closing, [Bioenergy] consented to the sales by Atrium and the royalties received by Ribocor." Dkt. 132 at 19. RiboCor contends that Zhang "knew and approved the activities of Atrium and Dr. Teitelbaum," and thus Bioenergy cannot claim such activities constitute a breach of the Agreements. Bioenergy also avers "that Mr. Thomas VonderBrink who served from 2011-2014 (until his death) as the president of [Bioenergy and RiboCor] simultaneously, approved sales of Corvalen to 'healthy people' by Atrium and its customers." *See id.* These contentions, which are asserted on page 11 of RiboCor's opposition brief, are unsupported by any record evidence. *Id.*; *see Callisto Pharm., Inc. v Picker*, 74 AD3d 545, 546 (1st Dept 2010) (holding that where party's motion papers "are virtually bereft of citations to evidence supporting its contentions" they are "inadequate to the task of contravening [opposing party's] statement of undisputed facts"). Likewise, on pages 12-13 of its brief, RiboCor does not cite any record evidence to support its argument that VonderBrink, who is now deceased, had authority to *orally* waive or alter the terms of the Agreements (which the Agreements expressly prohibit). *See* Dkt. 132 at 20-21.

To the extent RiboCor claims the Agreements were modified orally or by the parties' conduct, RiboCor does not meaningfully address how it can overcome the Agreements' express

prohibition on amendments not set forth in a signed writing (which indisputably does not exist here). While RiboCor cites the seminal case of *Rose v Spa Realty Assocs.*, 42 NY2d 338 (1977), it fails to establish how the high standard set forth in *Rose* for overcoming clauses prohibiting oral modifications has even potentially been satisfied. In *Rose*, the Court of Appeals held that "[a] party can overcome [no-oral-modifications] clause and enforce an oral modification to a written agreement by demonstrating either that the oral modification 'has in fact been acted upon to completion'; or, where there is only partial performance, that 'the partial performance [is] ***unequivocally referable'*** to the alleged oral modification." *Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 425 (2013), quoting *Rose*, 42 NY2d at 343. "[I]n order to be unequivocally referable, conduct must be ***inconsistent with any other explanation***." *Gootee v Glob. Credit Servs., LLC*, 139 AD3d 551, 558 (1st Dept 2016) (emphasis added). "In other words, 'the actions alone must be 'unintelligible or at least extraordinary,' ***explainable only with reference to the oral agreement.***'" *Id.* (emphasis added), quoting *Anostario v Vicinanzo*, 59 NY2d 662, 664 (1983).

RiboCor's conduct is not unequivocally referable to the alleged oral modification. While one explanation for RiboCor's knowing allowance of HVL's sales may be the alleged oral modification, an equally if not more plausible explanation is that RiboCor simply disregarded the requirements of the Agreement by letting HVL sell into the BLS-DE Markets based on the unfounded premise that such sales were grandfathered. These competing explanations do not raise a material question of fact because, so long as there is any plausible explanation other than the alleged oral agreement, *Rose* precludes the purported oral agreement from overcoming the contact's express prohibition on unsigned written amendments. *See Carlin v Jemal*, 68 AD3d 655, 656 (1st Dept 2009).

Finally, contrary to RoboCor's argument, the facts and relationships in this action are not "too complex for summary judgment." *See* Dkt. 132 at 23. While RiboCor's oppositions seeks to sow confusion by raising irrelevant factual issues and proffering contractual interpretations having no basis in the actual text of the Agreements, Bioenergy's briefs compellingly demonstrate that there are no material questions of fact that require a trial. In the end, the Agreements are clear. RiboCor's breaches are clear. Bioenergy's damages are clear.[18] This is exactly the type of case that is well suited for summary judgment and plaintiff's motion is granted.

Accordingly, it is

ORDERED that Bioenergy's motion for summary judgment on its first two causes of action and on RiboCor's two counterclaims is granted; and it is further

ORDERED that Bioenergy's third cause of action for specific performance is withdrawn (*see* Dkt. 205); and it is further

ORDERED that the Clerk is directed to enter judgment in favor plaintiff Bioenergy Life Science, Inc. and against defendant RiboCor, Inc. (1) in the amount of $917,223 plus 9% prejudgment interest from September 1, 2014 to the date judgment is entered; and (2) dismissing RiboCor's counterclaims with prejudice.

Dated: July 16, 2018

ENTER:

Jennifer G. Schecter, J.S.C.

[18] Since the parties do not address the proper date from which prejudgment interest should run, and since Bioenergy's damages accrued between September 1, 2011 and November 2, 2017, the court selects September 1, 2014 as a reasonable intermediate date pursuant to CPLR 5001(b). *See Solow Mgmt. Corp. v Tanger*, 43 AD3d 691 (1st Dept 2007).