IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SLMSOFT.COM, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 00C-09-163-JRJ
	)	
CROSS COUNTRY BANK,	)	
	)	
Defendant.	)	
	)	

Submitted: November 15, 2002
Decided: April 2, 2003

M E M O R A N D U M O P I N I O N

Upon Consideration of Defendant's Motion
for Summary Judgment—***DENIED***.

William M. Lafferty, Esquire, and James G. McMillan, III, Esquire (argued), of Morris, Nichols, Arsht & Tunnell, of Wilmington, Delaware, for Plaintiff,

John L. Reed, Esquire, of Duane Morris, LLP, of Wilmington, Delaware, and
David L. Braverman, Esquire (argued) of Braverman, Kaskey & Caprara, of Wilmington, Delaware for Defendant.

JURDEN, J.

INTRODUCTION

Before the Court is defendant's motion for summary judgment on plaintiff's action seeking declaratory relief and damages for, the breach of an assigned 1996 services agreement entered into by the defendant and plaintiff's predecessor in interest. Plaintiff's interest in the services contract arises via acquisition and assignment, allegedly contemplated and permissible under the 1996 services agreement. Defendant asserts, first, that plaintiff's interest, if any, is borne of an impermissible assignment that constitutes a material breach of the services agreement; such relieves the obligation of performance. Second, that plaintiff has subsequently assigned the agreement to a third party who is properly performing, and therefore this action allegedly subjects defendant to a multiplicity of lawsuits. As explained below, the resolution of these matters involve questions of fact not appropriate for summary judgment and, therefore, defendant's motion is **DENIED**.

FACTUAL BACKGROUND

Plaintiff, SLMSoft.com, Inc. ("SLMSoft")[1] is a Delaware corporation and a leading developer of electronic payment systems and transaction processing solutions with a focus on the financial services industry. One of the many products

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[1] Plaintiff, SLMSoft.com, Inc., is also associated with SLMSoft, Inc. For purposes of this motion they are treated as unrelated and "SLMSoft" is intended to mean SLMSoft.com, Inc.

SLMSoft provided to clients between 1998 and 2000 was Item Processing Services ("IP Services"). That is, SLMSoft contracted with financial institutions to collect and process incoming payments in return for a per item fee. SLMSoft contracted with and performed IP Services for many financial institutions. Consequently, SLMSoft benefited from economies of scale unavailable to many financial institutions requiring IP Services.

Defendant Cross Country Bank ("Cross Country") is rated as one of the fastest growing credit card banks in the country, issuing both secured and unsecured credit cards as their primary loan products. As such, Cross Country must sort and process a significant volume of incoming payments from cardholders. This is an enormously expensive task for a growing financial services company to perform in-house. Because of this, in 1996 Cross Country determined that it was more cost effective to outsource its item processing.

On July 1, 1996, Cross Country entered into an Item Processing Agreement and Addendum (the "IP Agreement") with BISYS Document Processing, Inc. ("BISYS"), a wholly-owned subsidiary of BISYS Group, Inc. ("BISYS, Inc."). BYSIS was to perform all of Cross Country's IP Services. Cross Country asserts it selected BISYS because of its unique capabilities. Under the IP Agreement, Cross Country was not permitted to itself perform, or contract with others to perform, any of the required Cross Country IP Services. Following are the pertinent provisions of that agreement.

The 1996 IP Agreement

The IP Agreement is comprised of two separate, simultaneously executed documents: the "Item Processing Agreement," and the "Addendum to Item Processing Agreement." Read together they comprise the terms under which BISYS would render IP Services to Cross Country.[2]

Under section 2(a), the IP Agreement operated for an initial term of three (3) years, beginning July 1, 1996. Section 2(b) of the IP Agreement was modified by the addendum to ultimately read:

> The Agreement shall automatically continue after the Initial Period for subsequent consecutive terms of (2) two years each unless and until it is terminated by either party upon written notice to the other given at least 120 days prior to the end of the Initial Period or any additional two (2) year period. BISYS agrees to provide client with at least 270 days written notice prior to the end of the Initial Period or any subsequent consecutive renewal term.[3]

The IP Agreement contains a default provision calling for termination upon a material failure of performance. That provision reads in relevant part:

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[2] The Item Processing Agreement and Addendum will be treated as the same agreement. Both documents were executed at the same time, and absent argument to the contrary, this Court finds that they were intended to comprise the whole of one agreement.

[3] Def.'s Mot. Summ. J. Ex. A.

10 DEFAULT; REMEDIES UPON DEFAULT.

(a) Any of the following events will constitute an "Event of Default" under the Agreement: (i) non-payment of any amounts due hereunder to BISYS by [Cross Country]; (ii) non-performance of any of [Cross Country's] or BISYS's other material obligations hereunder; (iii) if any representation or warranty of [Cross Country] or BISYS is materially breached…

(b) Upon occurrence of an Event of Default under the Agreement, the non-defaulting party may, at its option, terminate the Agreement provided at least sixty (60) days… prior written notice has been given to the other and such default has not been cured within such period.[4]

Both parties agreed that if Cross Country performed its own IP Services, or outsourced such services elsewhere, Cross Country would be charged nonetheless. That is, Cross Country would either be billed for the IP Services it performed for Cross Country, or Cross Country would be billed a certain percentage of the charges due the month immediately preceding the month in which Cross Country purchased IP Services from a party other than BISYS.[5] To that end, section 3(a)(iii) of the IP Agreement states:

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[4] Def.'s Mot. Summ. J. Ex. A.

[5] It should be noted that section 1 "SCOPE OF AGREEMENT," of the IP Agreement outlines the intentions of the parties that Cross Country use only BISYS and not perform its own IP Services or purchase them elsewhere. *See* Def.'s Mot. Summ. J. Ex. A at 1. However, section 3 specifies two price structures depending upon how Cross Country procures IP Services. This is important in that though the parties agreed that Cross Country would use only BISYS, Cross Country's use of another party was not in and of itself a default under the IP Agreement. Use of another party triggered a different requirement of payment under the IP Agreement, the failure of which was then subject to the default provision in section 10 of the IP Agreement. *See* Def.'s Mot. Summ. J. Ex. A.

> CHARGES
> (a) Each month commencing the day the IP Services are first operational and available to [Cross Country], whether or not [Cross Country] uses any IP Services during such month, [Cross Country] shall pay a minimum monthly charge [of]… (iii) 80% of the charges invoiced to [Cross Country] for the month immediately preceding any transfer by [Cross Country] to a new processor.[6]

Further, section 11(c) of the IP Agreement includes a non-assignability clause. That provision, also fundamental to this dispute, states:

> This Agreement may not be assigned by either party, in whole or in part, without the prior written consent of the other which consent shall not be unreasonably withheld. It shall not be deemed an assignment requiring consent if the stock of either is sold, or all, or substantially all, of the assets are sold so long as such sale does not materially negatively affect the basis of the financial bargain upon which this Agreement is based as of the date hereof and such sale does not materially negatively affect the provision of the Services hereunder. If there is such a negative impact, then the sale shall be deemed an assignment requiring consent as set forth above. This agreement shall be binding upon and shall inure to the benefit of BISYS and [Cross Country] and their respective successors and permitted assigns.

The facts surrounding the next series of acquisitions and assignments of the IP Agreement form the primary bases of the dispute regarding the ongoing validity

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[6] Def.'s Mot. Summ. J. Ex. A at 1. Specifically, SLMSoft in its amended complaint alleges that that the monthly charges during the period in which Cross Country received services from someone other than BISYS were as follows:

> 14. [p]ursuant to the terms of the… [IP Agreement], Cross Country is required to make payments in the amount of $85,135.82 to SLMSoft[ ] for each month from February 2000 until June 30, 2001 [when Cross Country had procured other IP Services]. *See* Pl.'s Am. Compl.

of, and performance required under, the 1996 IP Agreement. It is undisputed, however, that prior to February 2000, Cross Country continued to receive and pay for uninterrupted IP Services.

The Acquisitions and Assignments

Four months after signing the IP Agreement with Cross Country, BISYS was sold. On October 30, 1996, Questpoint Holdings, Inc. ("Quest Holdings"), and its affiliate Transys, L.P. ("Transys"),[7] entered into a stock purchase agreement with BISYS, Inc., to acquire 100% of the wholly owned subsidiary, BISYS. Section 1.1(c) of that stock purchase agreement mandates:

> In connection with and as a condition to the sale [by BISYS, Inc.] and purchase [by Quest Holdings] of the [BISYS] Shares, [BIYSIS] and Transys shall enter in a Services Agreement… pursuant to which Transys shall provide item processing services on behalf of the BISYS customers. It is understood that the primary assets [Quest Holdings] is acquiring in purchasing the Shares are (i) all of the [BISYS] customer contracts, (ii) the right of its affiliate, Transys, to provide item processing services to the BISYS customers pursuant to the Services [and Marketing] Agreement [("SMA")]…[8]

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[7] The record does not specify the nature or extent of the relationship between Questpoint Holdings, Inc. and "affiliate," Transys, L.P. However, section 12.1 of the BISYS, Inc./Quest Holdings Stock Purchase Agreement defines Affiliate as "a Person at any time now or hereafter who controls or is controlled by or under common control with a party to this Agreement, and includes, but is not limited to present and future subsidiaries, parents, partners, joint venture participants and successors in interest." Based upon the later Acquisition Agreement by and between, Bankline Holding, Inc. and Questpoint Holdings, Inc., it appears that Transys, Inc. changed its name to Questpoint Check Services, Inc.. Absent evidence to the contrary, this Court will treat Transys as a wholly owned subsidiary of Quest Holdings, Inc. Any alternative conclusion does not affect this holding.

[8] Def.'s Mot. Summ. J. Ex. D, Section 1.1(c) of Stock Purchase Agreement ("BISYS/Quest Holdings Acquisition").

In the separate SMA, executed concurrently with, and pursuant to, the stock purchase agreement on October 30, 1996, BYSIS and Transys agreed that:

> Bisys currently performs the services required to provide item processing services to Bisys customers. Bisys wishes to engage Transys and Transys is willing to assume responsibility for performance of such item processing services on the terms and conditions of this agreement…
> **2.1** Standard Services Provided by Transys. During the term of this agreement Transys will provide the item processing services… in accordance with Bysis's ongoing obligations to Bisys Customers under contracts executed by and between Bisys and a Bisys Customer.[9]

Thereafter, Transys serviced all of the IP Service contracts owned by BYSIS, including the 1996 Cross Country IP Agreement.

At some point between October 1996 and September 1998, Transys' name was changed to Questpoint Check Services, L.P. ("Quest-Check"). Quest Holdings also controlled a separate subsidiary named Questpoint Document Processing, Inc. ("Quest-Doc"). During this period, Quest Holdings owned both Quest-Check and Quest-Doc, Quest-Check being the successor of Transys to the SMA. Under the SMA and pursuant to the IP Agreement, Quest-Check continued

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[9] Def.'s Mot. Summ. J. Ex. D, Section 2.

to provide Cross Country with IP Services. The IP Services were performed under the Quest Holdings umbrella until September 1998.[10]

In the early fourth quarter of 1998, plaintiff SLMSoft purchased Bankline Holding, Inc. ("Bankline"), a subsidiary of Sun Belt Bancshares Corporation. Meanwhile, Bankline had apparently been in negotiations with Quest Holdings. On September 29, 1998, seven days after SLMSoft purchased Bankline, Bankline purchased Quest-Doc, and certain of Quest-Check's assets including the IP Agreement and the Quest-Check SMA. All the while, Cross Country apparently continued to receive uninterrupted IP Services.

Two years later in December of 2000, SLMSoft sold its outsourced core banking data processing services, the IP Services business. SLMSoft sold a block

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[10] It must be noted that although a factual controversy exists with respect to the notice Cross Country received regarding a change in IP Services providers, acquiescence, and material negative affects of such transfers, strong evidence exists that notice was both given and received. For example, in deposition, Dennis C. Fish of Cross Country stated:

> *Q*: So was Cross Country Bank aware of this [BISYS & Transys/Questpoint] agreement at the time?
> *A*: At some time. I don't know at what time. Well, I'm sorry. We were aware of the sale. We were not necessarily aware of the agreement.
> *Q*: How did you become aware of the sale?
> *A*: It would have been—we would have been told by our BISYS personnel, our BISYS representatives.
> *Q*:Did you have an understanding of the effect that this [BISYS & Transys/Questpoint] agreement would have on the IP Agreement…?
> *A*: My understanding was that they had bought the entire business unit lock, stock and barrel. So that the personnel who were working on our item processing when it was owned by BISYS would not change. The people were the same. The equipment was the same. The locations were the same. Everything. It would be very transparent to us.

Def.'s Mot. Summ. J. Ex. J, Dep. Dennis C. Fish, at 43:21-24; 44:1-20 (July 11, 2002).

of its assets to Intercept, Inc. ("Intercept"), including, though allegedly reserving this contract action, the 1996 IP Agreement. As of December 31, 2000, SLMSoft was no longer in the physical IP Services arena.

Genesis of the Dispute: Alleged Breach

The trouble began in February 2000, when Cross Country purportedly triggered section 3(a)(iii) of the IP Agreement by failing to remit continued payment after Cross Country either (i) began to perform its own IP Services in-house, or (ii) contracted with a third party to perform IP Services traditionally performed pursuant to the 1996 IP Agreement.[11]

Ultimately, SLMSoft claims that between September 29, 1998 and June 31, 2001, it was the successor in interest by acquisition, to the original IP Agreement between Cross Country and BISYS. That is, SLMSoft acquired Bankline, who purchased certain assets of Quest-Check during the Quest-Doc acquisition. This includes the original BISYS/Transys (now BISYS/Quest-Check) SMA effectuated as single transaction through the original 1996 Stock Purchase Agreement.

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[11] Numerous facts, although not yet fully developed, support a conclusion that during the tenure of the 1996 IP Agreement, Cross Country required additional IP Services not originally contemplated under the agreement, and procured those services without dispute from any party then allegedly holding the IP Agreement. That is, the facts highlighted in support of plaintiff's complaint were not exactly revealed to plaintiff, or its predecessors in interest, for the first time in February 2001. *Compare supra* note10. Such facts directly relate to the arguments of waiver, and acquiescence and will not be addressed here.

SLMSoft claims to have been in valid, unencumbered succession to the 1996 IP Agreement. Further, SLMSoft asserts that it preserved the right to pursue additional breaches that occurred after the transfer, but before Intercept began receiving payment in June 2001.

The gravaman of SLMSoft's complaint is that the IP Agreement automatically renewed for an additional two-year term when, on February 21, 1999, Cross Country failed to provide notice of termination.[12] Therefore, the IP Agreement was in effect in February 2000, during the alleged breach by Cross Country.

To that end, SLMSoft states that Cross Country, by its actions in February 2000, triggered section 3(a)(iii) for Charges under the IP Agreement, and then failed to pay, creating a separate individual breaches for each failure. Further, according to SLMSoft, the subsequent transfer of the IP Agreement to Intercept does not vitiate its rights to pursue this claim for the periods between February 2000 and June 2001. Consequently, SLMSoft alleges that Cross Country, pursuant to section 3(a)(iii) of the IP Agreement, owes SLMSoft $85,135.82 per month (plus costs), for the seventeen month period between February 2000 and June 2001.

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[12] The contract would automatically renew unless notice was given on February 21, 1999, 120 days prior to the termination in June of 1999.

It is undisputed that SLMSoft has billed Cross Country for the period February 2000 through June 2001, and Cross Country has not tendered payment. These, perhaps, are the only facts upon which the parties agree.

Defendant Cross Country Bank's Position.

Cross Country has moved for Summary Judgment pursuant to Superior Court Civil Rule 56(c), on three separate grounds.[13]

First, Cross Country claims that SLMSoft lacks standing to sue under the IP Agreement because SLMSoft subsequently transferred the agreement to Intercept. According to Cross Country, allowing SLMSoft to pursue this claim constitutes an "impermissible splitting of a cause of action…,"[14] and would subject Cross Country to a multiplicity of lawsuits under the same contract. Cross Country asserts that "[e]ven assuming there is a viable lawsuit to be brought, the right to do so no longer belongs to SLM[Soft]."[15]

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[13] By way of background, after the close of discovery and after the Court heard oral argument on this motion in September 2002, the parties contacted the Court and announced they had reached a settlement. Consequently, the Court did not decide the motion. Three months later, however, in January 2003, the Court learned that settlement had not actually been consummated and the defendant renewed this motion. The Court has made every effort to address this in an expeditious manner given that it was removed from the calendar, and then replaced back on with a number of outstanding motions of the same complexity and gravity.

[14] Def.'s Mot. Summ. J. at 2.

[15] *Id*.

Next, Cross Country asserts that the assignment of the IP Agreement by BISYS to Transys, without notice to or consent from Cross Country, was a breach constituting default pursuant to the non-assignibality clause.[16] According to Cross Country, SLMSoft's failure to seek Cross Country's consent was a material breach, and renders the IP Agreement voidable by Cross Country.[17] Further, because Cross Country has not waived any of the material breaches of the IP Agreement by either BISYS or the alleged predecessors in interest, including SLMSoft, Cross Country's failure to provide notice of its intent not to renew, and thereafter perform, is excused as a matter of law.[18] Cross Country also asserts that SLMSoft cannot demonstrate substantial compliance with the IP Agreement and is therefore precluded from recovery.[19]

Finally, Cross Country states that even if the assignments were permissible, a condition precedent to the automatic renewal of the IP Agreement required SLMSoft to provide Cross Country, 270 days prior to the renewal date, notice that the contract was to automatically renew.[20] Cross Country argues that SLMSoft's

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[16] Def.'s Mot. Summ. J. at 7.

[17] *Id*.

[18] *Id*.

[19] *Id.*

[20] *Id.* at 7-8.

failure to provide such notice relieved Cross Country of its obligation to provide notice to SLMSoft that it would not renew the IP Agreement.[21] Cross Country claims that, as a matter of law, failure of the condition precedent (270 days notice) excused Cross Country from informing SLMSoft that it would not renew the IP Agreement, and the IP Agreement naturally expired June 30, 1999.[22] Stated differently, Cross Country basically claims that the absence of the 270-day notice constituted a material breach of the IP Agreement that allowed Cross Country to walk away at the end of June 1999.

Plaintiff SLMSoft's Reply

First, SLMSoft asserts that it has not split its cause of action by assigning the IP Agreement to Intercept,[23] because the rule against splitting embodies severing

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[21] Def.'s Mot. Summ. J. at 8.

[22] *Id.* "Indisputably, SLM[Soft] never gave such notice. By failing to do so, SLM[Soft] failed to perform a condition precedent, thereby excusing…[Cross Country] from its obligation to give notice of its intent to terminate." *Id*. (relying on *Weiss v. Northwest Broadcasting, Inc.*, 140 F.Supp.2d 336, 343 (D. Del. 2001)). Curiously, defendants' state in their own brief supporting summary judgment that "the failure to perform a condition precedent is not tantamount to a breach of contract which would give rise to a claim for damages." Def.'s Mot. Summ. J. at 9, n.5. Apparently the inference to be drawn is that the fact of breach itself does not demand a factual inquiry with respect to damages that flow therefrom. Rather, the aggrieved party is entitled to walk away without dispute, if that party chooses not to pursue a remedy for a failure of the condition precedent. However, a factual inquiry is necessary when determining if failure of an alleged condition precedent is material in the first instance.

[23] *See* Pl.'s Opp'n Def.'s Mot. Summ. J. at 2.

one claim into multiple proceedings.[24] SLMSoft notes that although it assigned the IP Agreement to Intercept, it did not assign the pending cause of action for damages from Cross Country's failure to remit payment. According to SLMSoft, unless the assignment specifically provides, causes of action that accrue prior to the assignment can be asserted if they are independent of continued ownership and enforcement of the assigned IP Agreement.[25] Furthermore, "the SLMSoft-Intercept agreement contemplated that SLMSoft would continue its action against …[Cross Country] and provided that any recovery could be paid over to Intercept for additional consideration."[26] In the alternative, SLMSoft argues that it can at least recover for the period of February through December 2000, when it was owner.[27]

Second, SLMSoft claims to be a legitimate successor in interest to the IP Agreement.[28] SLMSoft argues there are issues of material fact with respect to

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[24] *See* Pl.'s Opp'n Def.'s Mot. Summ. J. at 2. "The rule against claim splitting has potential application only where a single plaintiff brings two separate actions arising out of the same operative facts but alleging different bases for recovery." *Id*. (citing *Webster v. State Farm Auto. Ins. Co.*, 348 A.2d 329, 331 (Del. Super. 1975)).

[25] Pl.'s Opp'n Def.'s Mot. Summ. J. at 3.

[26] *Id.*

[27] *Id.* at 3-4. "[E]ach default in the payment of a monthly installment [pursuant to section 3(a)(iii) of the default provision] is a separate breach and actions for breaches that occur after bringing of a suit are divisible and may be brought separately…." *Id*.

[28] *Id.* at 5.

allegations of 'unique capabilities,' and Cross Country fails to explain such capabilities.[29] According to SLMSoft, none of the transfers "materially negatively affected the basis of the financial bargain or the provision of services…,"[30] and Cross Country "was aware of and acquiesced in all of the successive assignments by its acceptance of services…."[31] Further, nothing "materially negatively affect[ed] the basis of the financial bargain upon with th[e] Agreement is based…."[32] In SLMSoft's view, ultimately, the breaches, if any, are not material and foreclose Cross Country's ability to walk away from the IP Agreement.[33]

Finally, SLMSoft asserts that it was only required to provide Cross Country with notice 270 days prior to termination if it intended to *not* renew the IP Agreement.[34] Further, SLMSoft argues, the 270-day notice provision is one of pure notice, not a condition precedent to Cross Country's obligation to announce

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[29] Pl.'s Opp'n Def.'s Mot. Summ. J. at 5. (citing *Baxter Pharm. Prods. Inc. v. ESI Lederle Inc.*, 1999 WL 160148 (Del. Ch.)).

[30] *Id*. at 6.

[31] *Id*. at 5.

[32] *Id.* at 5-6.

[33] *Id*.

[34] *Id.* at 7.

its intent to terminate the IP Agreement.[35] Therefore, SLMSoft's failure to notify Cross Country evidences SLMSoft's intent to renew, not a material breach.[36] Absent notice from Cross Country, the IP Agreement was renewed automatically, for a term of two years, on July 30, 1999.[37] SLMSoft further asserts that obligations are not deemed conditional unless expressly stated, and even if so, failure to provide notice did not harm Cross Country as evidenced by the fact that it continued to receive and pay for, IP Services under the IP Agreement.[38]

[35] Pl.'s Opp'n Def.'s Mot. Summ. J. at 8. SLMSoft's position regarding the 270-day "pure notice" provision is that Cross Country "may terminate on 120 days notice while SLMSoft must provide 270 days notice if it wishes to terminate." *Id.* at 8. In fact, SLMSoft's predecessor in interest to the IP Agreement, BISYS, takes a position to the contrary. According to the affidavit of William W. Neville, the then executive vice president of BISYS and negotiator of the IP Agreement,

> "Paragraph 2(b) of the IP Agreement, as amended by paragraph 2.1 of the Addendum, requires [that] BISYS or any of its successors to the IP Agreement and Addendum give [Cross Country] 270 days notice prior to the end of the contract's term, **regardless of whether or not BISYS intended to terminate the agreement and Addendum at the end of its term**… [This is] a 'pure' notice provision. The purpose of this notice was to remind [Cross Country] that it was 270 days from the end of the term…[and] the agreement would automatically renew unless either party provided notice of non-renewal to the other before the 120th day prior to the term…."

Def.'s Mot. Summ. J. Ex. B, Aff. William W. Neville, July 29, 2001. SLMSoft's and BISYS's position are inapposite and necessarily mutually exclusive.

[36] Pl.'s Opp'n Def.'s Mot. Summ. J. at 8.

[37] *Id.*

[38] *Id.* at 8-9.

ANALYSIS AND DISCUSSION

There are three issues that must be addressed before the Court can consider defendant's motion for summary judgment. First, does SLMSoft have standing to recover for breach of a contract that it has subsequently transferred to Intercept if Intercept is performing IP Services under the IP Agreement and Cross Country is paying? In other words, does this action expose Cross Country to a multiplicity of liability and piecemeal litigation? Second, were transfers made in violation of the anti-assignment clause and if so, did such transfers constitute a material breach rendering the contract voidable by Cross Country? Finally, is the renewal notice provision ambiguous, and was SLMSoft's notice obligation a condition precedent to Cross Country's commitment under the IP Agreement?

A motion for summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[39] If a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts to clarify an application of law, summary judgment

[39] *See Schueler v. Martin*, 674 A.2d 883, 885 (Del. Super. 1996); *Pierce v. International Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

is improper.[40] Moreover, if it appears that there is some reasonable theory or position under which the opponent might recover, the motion must be denied.[41]

In evaluating motions for summary judgment, the court must examine all pleadings, affidavits and discovery material.[42] In a summary judgment motion surrounding a contract dispute, the court will remain cognizant "that doubts and uncertainty lurk in the meaning and application of agreed language [and] it will consider testimony pertaining to antecedent agreements, communications and other factors which bear on the issue."[43] With this standard in mind, the Court turns to the first dispositive issue.

Splitting of a Cause of Action; The Risk of a Multiplicity of Lawsuits

Although not novel in Delaware, the law surrounding a claim of splitting a cause of action in contract is limited. With respect to an impermissible splitting of a cause of action, the Delaware Supreme Court has opined that:

> The common law rule against the splitting of one cause of action is rooted in the need to protect a defendant from a multiplicity of suits and their attendant harassment. An equally compelling consideration is one founded on public policy: piecemeal litigation

[40] *See Kysor Indus. Corp. v. Margaux*, 674 A.2d 889, 894 (Del. Super. 1996).

[41] *See Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718, 720 (Del. 1970).

[42] *See Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. 1973).

[43] *Empire of Am. v. Commercial Credit*, 551 A.2d 433, 436 (Del. 1988).

of a single cause of action is contrary to the orderly administration of justice.[44]

Federal Courts generally conclude that "[t]he rule against splitting causes of action is not altogether one of original legal right, but is rather one of interposition based upon principles of public policy and of equity to prevent the inconvenience and hardship incident to repeated and unnecessary litigation. In equity the enforcement of the rule is not so strict as in actions at law, and even at law it will not be extended to cases not clearly within its application."[45]

This rule is akin to the doctrine of *res judicata*.[46] Therefore, like *res judicata*, the splitting of a cause of action is only a defense when the potential exists for "litigation between the same parties… [to subsequently arise] from the same transaction that forms the basis of the previous adjudication."[47] In the interest of both fairness to a defendant and judicial economy, a litigant should but once, press all of his claims that arise from the same set of operative facts.[48]

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[44] *Kossol v. Ashton Condo. Ass'n, Inc.*, 1994 WL 10861, at *2 (Del Supr.) (quoting *Webster v. State Farm Mut. Auto. Ins., Co.*, 348 A.2d 329 (Del. Super. 1975)).

[45] *U.S. v. Pan-American Petroleum Co.*, 55 F.2d 753, 776 (C.A. 9 1932), *cert. denied*, 287 U.S. 612 (1932) (quoting 1 C.J. § 278).

[46] *See Kossol*, 1994 WL 10861, at *2.

[47] *Kossol*, 1994 WL 10861, at *2.

[48] *Id.*

The specter of two inquiries thrives with any claim of an impermissible splitting of a cause of action. First, the Court must determine whether there are different bases for recovery in both the action at bar and the surmised future action.[49] Necessarily, "the rule against splitting of a cause of action is restricted… to claims and demands which are part of a single and indivisible cause of action."[50] Second, there must be a real risk that the parties will be the same in both suits.[51] It is not enough that recovery is premised upon a transaction, the facts of which will be plead by a third party who may also assert a claim against the defendant. To that end, it can hardly be said that a party not authorized to join claims may be hindered by the defense of splitting a cause of action.[52] Before the Court can engage in analysis regarding the splitting of a cause of action it must define the underlying claims that plaintiff asserts.

SLMSoft seeks to recover under the IP Agreement for the period between February 2000 and June 2001. Specifically, it appears that SLMSoft seeks to recover for a series of breaches that have allegedly accrued under the IP Agreement.

[49] *Webster*, 348 A.2d at 331.

[50] 1A C.J.S. *Actions* §179(a)(1985).

[51] *Webster*, 348 A.2d at 331.

[52] *See generally* 1A C.J.S. *Actions* §179(a)(1985)(*citations omitted*).

In a contract that lacks an acceleration clause, and requires money to be paid in installments, each failure of remittance is, itself, an individual breach.[53] All installments due when an action is commenced should be sought, "for generally speaking, a recovery for one installment will bar an action for the recovery of other installments which were due and which could have been sued upon at the same time."[54] A complicating factor is SLMSoft's assignment by sale of the IP Agreement to Intercept effective January 2001. For SLMSoft to assert its claims, the IP Agreement must survive independently and continue to operate, notwithstanding the current claim for breach and damages.[55]

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[53] *See* 1 AM. JUR. 2D *Actions* §116-17 (1994). "Only one cause of action arises from the breach of an entire and indivisible contract." *Id.* at §116 (*citations omitted*). "A contract to pay money in installments is divisible, and so each default in the payment of an installment may be the subject of an independent action, provided it is brought before the next installment is due." *Id.* at §117 (*citations omitted*).

[54] 1 AM. JUR. 2D *Actions* §117 (1994)(*citations omitted*)(distinguishing contracts with acceleration clauses from those that do not call for acceleration upon breach). *See, e.g., Lorillard v. Clyde*, 25 N.E. 292, 293 (N.Y. 1890)(stating that "each default in the payment of money falling due upon a contract payable in installments [absent an acceleration clause,] may be the subject of an independent action…").

[55] Causes of action that accrue prior to an assignment may be brought after assignment if they can be asserted independently of the ongoing obligations remaining under an agreement; without throwing the entire contract into breach. *See Central Wyo. Med. Lab., LLC v. Medical Testing Lab, Inc.*, 43 P.3d 121, 128 (Wyo. 2002) (quoting 6A C.J.S. *Assignments* §77 (1975)). *See also Korte Const. Co. v. Deaconess Manor Ass'n*, 927 S.W.2d 395, 403 (Mo. Ct. App. 1996).

The IP Agreement lacks an acceleration clause, and Cross Country has itself admitted the ongoing efficacy of the IP Agreement with respect to Intercept.[56] This Court is satisfied that the IP Agreement remains in effect and that SLMSoft may pursue alleged damages. But the inquiry does not end here.

Two separate and distinct periods exist for which SLMSoft asserts its right to recovery under the IP Agreement. First, the period between February and December 2000, when SLMSoft alleges it had rights under the agreement. Second, the period between January and June 2001, after the transfer of the IP Agreement to Intercept, when SLMSoft claims to have reserved its right to pursue breaches accruing after the transfer.

This Court finds that SLMSoft has not impermissibly split a cause of action. The bases for recovery by SLMSoft are not even the same for each claim between February and December 2000, let alone those alleged to be collectively available to Intercept between January and June 2001. Because the IP Agreement does not contain an acceleration clause, each failure by Cross Country to remit payment constitutes a separate alleged breach under the IP Agreement.[57] Therefore, any

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[56] "Intercept and [Cross Country] are the extant parties to the IP [Agreement], and both are performing thereunder." Def.'s Mot. Summ. J. Ex. K, Depo. Rick Sawyer, at 15:20-23; 27:1-28:4 (May 22, 2002).

[57] *See supra* notes 53-4. The damages clause in the IP Agreement calls for continued monthly installments of 80% of the balance due on the month immediately preceding the default. Section 10(a)(i) of the IP Agreement states that an event of default "under the Agreement… [is] non-

right to recover in contract for these purported breaches flows directly to the party who then possessed such rights under the IP Agreement.[58]

That is, the claims and demands made against Cross Country are not part of a single and indivisible cause of action. Merely because plaintiff is required to bring all potentially accrued claims at once or risk losing them in the future[59] does not itself act to consolidate all claims as though they arise from a single breach.

Second, there is no real risk that the parties will be the same in both suits. Understandably, Cross Country is concerned that it may potentially be liable to Intercept for the period of January through June 2001, even if SLMSoft recovers for that same period. SLMSoft transferred an ongoing installment contract, the continued existence of which operated independently of the accrued rights to payment from Cross Country during the months of February to December 2000. This is so because, by defendant's own admission, Intercept is currently

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payment of any amounts due hereunder to BISYS…" or its successor in interest. *See supra* note 3, at 4. SLMSoft alleges default was triggered when Cross Country failed to pay between February 2000 and June 2001 pursuant to section 3(a)(iii) after Cross Country secured IP Services from another source. Further, SLMSoft did not exercise the option to terminate the IP Agreement with 60 days written notice. *See supra* note 3, at 4-5. Each month in which Cross Country was allegedly in breach and failed to remit the agreed upon payment pursuant to section 3(a)(iii), constitutes a separate breaches of the IP Agreement. Prior to the Intercept transfer and between the periods of February and December 2000, each independent breach of the IP Agreement had accrued.

[58] *See* discussion *infra* pp. 26-32.

[59] *See Kossol*, 1994 WL 10861, at *2.

performing, and Cross Country is paying for, IP Services under the IP Agreement, and neither party has alleged it provided the required 60-day notice upon default.

Recovery for alleged breaches post December 2000, after SLMSoft transferred the IP Agreement to Intercept, will ultimately be pursued by one party. If SLMSoft recovers in this action for the period between January and June 2001—allegedly because it reserved such right in the transfer—Intercept cannot also bring suit to recover for the same period. Conversely, if SLMSoft is not permitted to pursue damages accruing between January and June 2001, but it should have been and later tries to recover for that period, Cross Country will assuredly assert *res judicata*. Certainly, this presents a dilemma.

It is for this very reason that the doctrine of impermissible splitting of a cause of action does not apply here. The IP Agreement is ongoing. SLMSoft is pursuing damages that purportedly accrued for each month in which it was the alleged successor in interest to the IP Agreement. Because plaintiff is now required to bring all accrued causes of action it has for the alleged breach of the IP Agreement or risk losing them, it must be determined exactly what SLMSoft can claim as of right in this action.

To do this requires the Court to interpret the sale agreement between SLMSoft and Intercept with respect to potential damages allegedly reserved by SLMSoft. Presently, the proper parties are not before this Court and such an interpretation would amount to the impermissible rendering of an advisory opinion.[60] This, the Court will not entertain.

The Court finds that SLMSoft may pursue damages for alleged breaches of the IP Agreement during the period between February through December 2000. The Court will stay the action on damages related to the alleged breaches occurring during the period January through June 2001 until such time as SLMSoft demonstrates it is the real party in interest with respect to such claims. To hold otherwise would potentially subject Cross Country to a multiplicity of lawsuits, subject SLMSoft to a forfeiture of recovery for the periods between January and June 2001, and would lend interpretation to a contract among parties not currently at bar.

Violation of the Anti-Assignment Provision

Cross Country next claims that BISYS assignment, together with the original BISYS/Transys SMA, was an impermissible assignment in violation of the anti-assignment provision of the IP Agreement, and constituted a material breach that rendered the IP Agreement voidable by Cross Country.[61] Further, Cross

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[60] "Unless real and adverse interests are present, there is no basis for invoking declaratory relief against one who has no role in contesting a claim." *Wilmington Trust Co., v. Barron*, 470 A.2d 257, 261 (Del. 1983)(internal quotations omitted) (citing *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973)). *See also Monsanto Co. v. Aetna Cas. and Sur. Co.*, 1993 WL 542402, at *8 (Del. Super.).

[61] Def.'s Mot. Summ. J. at 7.

Country argues that SLMSoft has not met the threshold requirement of showing substantial compliance.

This Court has long upheld the validity of clauses in contracts that frame the scope within which subsequent transfers and assignments may be made.[62] "Any waiver of that [non-assignability] provision or consent to its violation would have to be clear, distinct, and unequivocal."[63] Section 322 of the Restatement (Second) of Contracts is instructive in this matter:

> (1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" bars only the delegation to an assignee of the performance by the assignor of a duty or condition.
> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,
> (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective.[64]

Section 11(c) of the IP Agreement expressly states "[t]his agreement may not be assigned by either party, in whole or in part, without the prior written consent of the other…." Absent any other provision that expressly makes subsequent assignment void, the assignment is valid, but in breach of the IP

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[62] *See Paul v. Chromalytics Corp.*, 343 A.2d 622, 625 (Del. Super. 1975) (citing 37 A.L.R. 2d 1251 (1954)).

[63] *Paul,* 343 A.2d at 626.

[64] RESTATEMENT (SECOND) OF CONTRACTS §322. *See generally Paul*, 343 A.2d at 626.

Agreement. That is, Cross Country may well have a cause of action against BISYS, Inc. for damages arising from breach of the assignment provision in the IP Agreement.[65]

Plaintiff is in an interesting position as a result of its pursuit of payment under the alternative payment provision of the IP Agreement. SLMSoft is attempting to recover under the contract itself (as opposed to advancing a theory of *quantum meruit*). This is because SLMSoft did not perform IP Services for Cross Country during the periods in question. Cross Country is allegedly liable under section 3(a)(iii) of the IP Agreement solely because it undertook to perform its own IP Services. This is critical in the sense that plaintiff must recover under the contract, and may only do so by asserting a damages claim against the original obligor pursuant to the IP Agreement.

An obligor, absent waiver, acquiescence or consent, is traditionally only liable to the original assignor.[66] Subsequent assignees alleging breach must assert their claims down the line to the original assignor, who ultimately pursues the

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[65] Only then would it be necessary to inquire into facts surrounding potential "material[ ] negative[ ] affect[s of] the basis of the financial bargain upon which [the IP Agreement] is based…" Def.'s Mot. Summ. J. Ex. A p. 4.

[66] *Paul,* 343 A.2d at 626 (citing *Paxson v. Commissioner of Internal Revenue*, 144 F.2d 772, 775 (3d. Cir. 1944)); *Rosenthal v. Landau*, 202 P.2d 810, 813 (Ca. Ap. 1949); 3 SAMUEL WILLISTON & RICHARD A LORD, A TREATISE ON THE LAW OF CONTRACTS §442 (4th ed. 1993) [hereinafter WILLISTON ON CONTRACTS]

claim directly against the obligor.[67] When confronted with a claim by the assignor, the obligor may assert breach of the anti-assignment provision.[68] In other words, damages accruing to subsequent assignees will be paid out of the previous assignor's pocket in separate breach of contract actions associated with each subsequent assignment of the original agreement.[69] Ultimately, if the original assignment is determined to be in violation of the an anti-assignment provision, it renders the contract voidable by the obligor and, if it is voided, the obligor is relieved from liability under the agreement because it no longer operates.

Typically, the obligor's requirement to perform under the contract is independent of, and irrelevant to, liability purportedly arising—by assignment agreement—between the assignor and assignee.[70] That is, an assignee potentially

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[67] *See generally Paul,* 343 A.2d at 626. Also instructive is the RESTATEMENT (SECOND) OF CONTRACTS §154 in that it says:

> A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, is for the benefit of the obligor, and does not prevent the assignee for acquiring rights against the assignor…

[68] *See Paul*, 343 A.2d at 626.

[69] *Id.* at 626-27.

[70] *See Merck & Co., Inc. v. SmithKline Beecham Pharm. Co.*, 1999 WL 669345, at *44 (Del. Ch.) (citing, e.g., *Mid-Atlantic Equip. Corp. v. Elder*, E.D. Pa., 1995 WL 447602, at *5, n.2 (July 25, 1995), where "Yamaha's assignee, Mid-Atlantic 'stands in the shoes' of the assignor and assumes the assignment subject to all defects and defenses."); *K.B. v. State Farm Fire and Cas. Co.*, 941 P.2d 1288, 1292 (Az. Super. 1997)("An assignee steps into the shoes of her assignor" and "cannot alter the defenses or equities of the third party"); *Smith v. Cumberland Group, Ltd.¸*687 A.2d 1167, 1172 (Pa. Super. 1996)("Where an assignment is effective, the assignee

has a cause of action against the assignor for breach of contract surrounding the assignment; that contract action is wholly unrelated to the contract between the obligor and assignor.[71] Therefore, subsequent assignees have claims against previous assignors—subject to other limitations such as notice, etc.—to recover for the rights they allegedly purchased.[72] Such claims stand irrespective of the ongoing efficacy of the original agreement. That is, traditionally, the assignee is not permitted to sue the obligor directly; rather it must pursue the assignor, who then asserts a separate action against the obligor for breach under the original contract.

Whether the assignment itself constitutes a material breach as to render the contract voidable by Cross Country is another issue altogether, and not under consideration here. Cross Country claims "that… [it] was given no notice of the assignment by BISYS to Transys (or any of the other subsequent transfers or

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stands in the shoes of the assignor and assumes all of his rights ... Conversely an assignee's right against the obligor is subject to all of the limitations of the assignor's right, to all defenses thereto ... and counterclaims which would have been available against the assignor had there been no assignment ...."); *Florida v. Family bank of Hallandale*, 667 So.2d 257, 259 (Fla. Dist. Ct.App. 1995)("The assignee steps into the shoes of the assignor and is subject to all equities and defenses that could have been asserted against the assignor had the assignment not been made.").

[71] *See supra* note 69.

[72] *See generally Merck & Co., Inc.*, 1999 WL 669345, at *43-5.

assignments…) [and therefore Cross Country] was excused from giving notice of its intent to not renew."[73]

The ultimate question, however, is whether or not an obligor who stands by and continues to perform for many years during multiple assignments—issues of notice notwithstanding—may claim voidability with respect to the underlying contract and preclude an assignee from pursuing a direct claim against it, when the obligor asserts that defense with respect to a brief period of non-payment, even though it continues to honor that agreement with a subsequent assignee. The answer to this question must be "no."

In the interest of judicial economy, and intrinsic fairness, and as a matter of public policy, this Court cannot allow an obligor of an assigned contract to pick and choose the periods for which it will apply its right under an anti-assignment provision like the one at issue here, and foreclose direct claims on the agreement by an assignee, when the obligor admits to the efficacy of the contract as against subsequent assignees, and readily performs under the contract when the circumstances are to the obligor's advantage.

Consequently, this Court holds that an obligor who (1) asserts a material breach that arises from an anti-assignment provision that allegedly renders the

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[73] Def.'s Mot. Summ. J. at 7. Needless to say that this is in direct contravention of testimony provided by Cross Country's own employees at deposition. *See supra* note 10.

underlying contract voidable, and (2) fails to void that contract while continuing to perform for assignees, and (3) then admits to the ongoing validity of such contract as against subsequent assignees, is estopped from arguing voidability. That obligor is further estopped from claiming that an assignee may not assert a direct claim pursuant to the underlying contract against the obligor and that the assignee's rights only accrue against previous assignors.

Ultimately, Cross Country is estopped from challenging SLMSoft's right to recover under the IP Agreement directly. Cross Country's ongoing relationship with subsequent assignee Intercept, pursuant to the IP Agreement, which Cross Country admits is valid, forecloses its ability to now void that same agreement.

Notice as a Condition Precedent to the Continued Efficacy of the IP Agreement

Cross Country claims that section 2(b) of the IP Agreement as amended by section 2.1 of the addendum imputes a 270 day notice provision upon SLMSoft as a condition precedent to Cross Country's requirement to give 120 days notice of intent not to renew. SLMSoft, naturally, states that the provision merely modified its notice requirement to read 270 days, rather than the original 120 days. In the Court's view, both interpretations appear contrary to the plain language of the contract.

"Under Delaware law, when interpreting a contractual provision, a court must direct its 'attention.... to the meaning of the written terms in light of the surrounding circumstances.'"[74] The first issue in this matter is whether there exists an ambiguity or conflict in the notice and auto-renewal provisions of the IP Agreement that requires interpretation by a fact finder. This Court makes the initial determination of alleged ambiguities surrounding an agreement. "[T]he absence of ambiguity…[leaves] no room for construction."[75] Upon careful examination, I find there is no ambiguity.

Delaware recognizes the importance of affording parties the benefit of their bargain when interpreting agreements. This Court has consistently held that when interpreting a contract, it must give effect to each and every term of an agreement, and such construction is preferred to a reading that renders some terms useless or repetitive.[76] Interpretations that render contract provisions illusory or meaningless must be avoided.[77] Any other approach would deprive the parties of the four corners of their deal. Here, an examination of the four corners of the IP Agreement

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[74] *Star Cellular* v. *Baton Rouge*, 1993 WL 294847 (Del. Ch.) (quoting *Klair v. Reese,* 531 A.2d 219, 223 (Del. 1987)).

[75] *Watkins v. Beatrice Companies, Inc.*, 560 A.2d 1016, 1021 (Del. 1989). *See, e.g., Klair*, 531 A.2d at 223 (citing RESTATEMENT (SECOND) OF CONTRACTS §201, cmt c (1981).)

[76] *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001). *See also Warner Communications Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 971 (Del. Ch. 1989), *aff'd,* 567 A.2d 419 (Del. 1989).

[77] *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992). *See, e.g., Seabreak Homeowners Ass'n v. Gresser*, 517 A.2d 263 (Del. Ch. 1986), *aff'd,* 538 A.2d 1113 (Del. 1988).

fails to reveal an ambiguity, much less raise a conflict as to the clear, plain and unequivocal meaning of the language agreed upon by the parties. The IP Agreement is to automatically renew at the end of the period unless and

> *until it is terminated by either party upon written notice to the other given at least 120 days prior to the end of the Initial Period or any additional two (2) year period. BISYS agrees to provide client with at least 270 days written notice prior to the end of the Initial Period or any subsequent consecutive renewal term*.

The provision that provides for 120 days notice specifically states "by either party" in reference to notice of termination. This sentence is not modified. The next sentence clearly imposes an *additional* duty upon BISYS to provide Cross Country with 270 days notice prior to the end of the contract period. The language of the addendum makes clear this is a separate sentence: "by inserting the following sentence at the *end* of the paragraph…."[78] To read this sentence as modifying BISYS' duty with respect to providing 120 days notice would be to render the "by either party" language useless at worst and illusory at best. The IP Agreement requires BISYS and Cross Country to provide the other with notice, at least 120 days before the contract automatically renewed, that the other intends to terminate.

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[78] Def.'s Mot. Summ. J. Ex. A, Addendum to IP Agreement.

The IP Agreement also requires BISYS to notify Cross Country of the approaching automatic renewal date by giving notice that the IP Agreement is to automatically renew in 270 days. Cross Country characterizes the 270-day notice requirement as a condition precedent to its obligation to give notice of intention not to renew. The Court does not agree.

A term rendering performance by one party contingent upon a condition or performance of another is generally a condition precedent. This condition "must be performed or happen before a duty of immediate performance arises on the promise which the condition qualifies."[79] "An event may be made a condition either by the agreement of the parties or by a term supplied by the court."[80]

Necessarily, whether a condition is one precedent to performance by the other party is divined from the intent of the parties.[81] The focus surrounding interpretation of an alleged condition has been aptly presented as follows:

> Although no particular words are necessary for the existence of a condition, such terms as 'if,' provided that,' 'on condition that,' or some other phrase that conditions performance usually connote an

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[79] 13 WILLISTON ON CONTRACTS §38:7. *See generally Marvel v. Conte*, 1978 WL 8409, at *4 (Del. Ch.).

[80] RESTATEMENT (SECOND) OF CONTRACTS §226. "No particular form of language is necessary to make an event a condition, although such words as 'on condition that,' 'provided that' and 'if' are often used for this purpose. An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language. Whether the parties have, by their agreement, made an event a condition is determined by the process of interpretation." *Id*.

[81] *See* 13 WILLISTON ON CONTRACTS (FOURTH) §38.16 (*citations omitted*).

> intent for a condition rather than a promise. While there is no requirement that such phrases be utilized, their absence is probative of the parties' intention that a promise be made rather than a condition imposed, so that the terms will be construed as a covenant.[82]

Section 227 of the Restatement (Second) Contracts provides further explanation and guidance:

> Conditions
> (1) In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.
> (2) Unless the contract is of a type under which only one party generally undertakes duties, when it is doubtful whether
> (a) a duty is imposed on an obligee that an event occur…
> the first interpretation is preferred if the event is within the obligee's control.[83]

The requirement that BISYS (or its successors and assigns) provide notice to Cross Country 270 days prior to the automatic renewal date is a covenant, not a condition precedent. The evidence, and the plain language of the IP Agreement amply support this conclusion. First, the 270-day notice provision is devoid of any provisional language traditionally associated with a condition. Further, it appears *after* the language creating the 120 non-renewal notice term. Had the parties

[82] 13 WILLISTON ON CONTRACTS §38:7.

[83] RESTATEMENT (SECOND) OF CONTRACTS §227.

intended such notice to be a condition precedent, the 270-day notice provision would have preceded the non-renewal term.

Though SLMSoft may have assumed the duty of providing notice of the impending renewal date, the Court does not interpret this provision to mean that SLMSoft forfeited its right to 120 days notice from Cross Country of its intent not to renew. This is so because, notably, Cross Country continued to receive and pay for IP Services after the date upon which Cross Country alleges the IP Agreement naturally expired due to SLMSoft's failure to fulfill the condition precedent. That being said, the next question is whether SLMSoft's failure to provide Cross Country with 270 days notice constitutes a material breach under the IP Agreement.

Before a plaintiff can recover in contract, it must demonstrate substantial compliance with *all* of the provisions of that contract.[84] A party clearly in material breach cannot thereafter complain of the other party's failure to perform.[85] Section 241 of the Restatement (Second) Contracts sets forth the factors to be considered when determining whether a failure of performance is material:

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[84] *See Eastern Elec. & Heating, Inc. v. Pike Creek Prof'l Ctr.*, 1987 WL 9610 (Del. Super.)(*emphasis added*) (citing *Emmet S. Hickman Co. v. Emilio Capaldi Developer, Inc.*, 251 A.2d 571 (Del. Super. 1969)).

[85] *See Hudson v. D & V Mason Contractors, Inc.*, 252 A.2d 166, 170 (Del. Super. 1969).

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Such a determination clearly involves issues of material fact, thus making summary judgment inappropriate.

CONCLUSION

Defendant's motion for summary judgment is denied. This action is not subject to a defense of an impermissible splitting of a cause of action. The plaintiff's rights to payment under section 3(a)(iii) of the IP Agreement have accrued individually as separate breaches not subject to acceleration. Therefore, SLMSoft is entitled to recover for the period between February and December 2000 when Cross Country was in alleged breach by failing to remit payment. As for the period between January and June 2001, that issue is not presently before this Court, as it necessarily requires a declaratory determination of SLMSoft's rights pursuant to the Asset Purchase Agreement executed between SLMSoft and Intercept. As stated, such would be an impermissible advisory opinion.

Next, SLMSoft may currently seek recovery for the period February through December 2000 directly against Cross Country. SLMSoft is not required to pursue its claim back to the original assignor, BISYS, Inc. This is so because, as a matter of law, Cross Country is estopped from asserting that the IP Agreement is voidable when, on an ongoing basis, Cross Country failed to take actions to void the IP Agreement, performed for assignees thereunder when it was convenient to do so, and has since ratified the validity of that agreement with respect to Intercept.

Finally, the notice provision in the IP Agreement is plain, clear and unambiguous. The IP Agreement contains a covenant that BISYS, or its assigns will provide Cross Country with notice, 270 days prior to automatic renewal, that such date is approaching. This is not a condition precedent. Both have a duty to give notice to one another, 120 days before the auto-renewal date, of intent to terminate the IP Agreement. Whether SLMSoft's failure to provide the 270-day notice constitutes a material breach, and if so, what damages are the proximate result of that breach, are questions of fact.

IT IS SO ORDERED.

Jan R. Jurden, Judge