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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARC LILLY, NOT IN HIS INDIVIDUAL  
CAPACITY BUT AS THE  
REPRESENTATIVE FOR THE FORMER  
SHAREHOLDERS OF VIEOSOFT, INC.,  
  
Plaintiff,  
  
v.  
  
ENVOY, LLC; EMDEON, INC.; EMDEON  
BUSINESS SERVICES, LLC; TOM GROOM  
(named as an indispensable party),  
  
Defendants.

Case No. C15-0742RSM

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

**I. INTRODUCTION**

THIS MATTER comes before the Court on Defendants' Motion for Summary Judgment on all remaining claims against them. Dkt. #79. Defendants argue: 1) that Plaintiff's claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law because Plaintiff could have anticipated the actions complained of; and 2) Plaintiff's express breach of contract claim fails because Defendants had the express right to terminate the agreement in their sole discretion and he cannot rely on a frustration defense because he could have anticipated what occurred. *Id.* Plaintiff opposes the motion, asserting that he and the other shareholders have not been paid even the "guaranteed" monies under the contract, and that there are factual

1 questions as to the nature of the parties' obligations under the contract which preclude summary  
2 judgment. Dkt. #93 (*filed under seal*). For the reasons set forth below, the Court now GRANTS  
3 Defendant's Motion for Summary Judgment.

## 4 II. BACKGROUND

5 Viewing the facts in the light most favorable to the non-moving party – in this case  
6 Plaintiff – the Court sets forth the following factual background to this matter.<sup>1</sup> *See* Fed. R. Civ.  
7 Proc. 56.  
8

9 This matter involves a dispute arising out of a Stock Purchase Agreement (“SPA”) after  
10 the merger and acquisition of a Washington start-up corporation by a larger national corporation.  
11 Emdeon<sup>2</sup> is a leading provider of revenue and payment cycle management and clinical  
12 information exchange solutions. Dkt. #86, Ex. 1 at 4. Emdeon has a well-developed network of  
13 payers and providers that connects “to virtually all private and government payers, claim-  
14 submitting providers and pharmacies.” *Id.* Vieosoft was a Washington start-up company founded  
15 by four principal shareholders: Peter Hoover, Marc Lilly, John Eastman and David Grant (the  
16 “Shareholders”). Dkt. #86, Ex. 2 at 1 and 6. These Shareholders have substantial prior industry  
17 experience with e-prescription solutions. Dkt. #86, Ex. #2 at 1. At the time of acquisition,  
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19 <sup>1</sup> In reviewing this motion, the Court utilized the publically-filed briefs and exhibits, as well as  
20 the unredacted briefs and exhibits filed under seal. In this Order, the Court cites to the sealed  
21 documents it reviewed, where applicable, and has not included the parallel citation to the redacted  
22 version of the same document. However, the Court notes for the public that any citation to a  
23 sealed document can be found at the same pages of the public, redacted versions of the briefs and  
24 exhibits. The Court further notes that in an effort to preserve the confidentiality of the  
25 information that has been sealed, the Court discusses such information only in general terms. The  
discussion of such information in that manner is not intended to imply that the Court did not  
examine the entire record before it.

<sup>2</sup> Defendant corporations have changed corporate names since the merger and filing of this  
matter. For ease of reference, the Court will refer to Defendant corporations collectively under  
the former name “Emdeon” unless the discussion of a specific corporation is necessary.

1 Vieosoft had only “trade secrets and other intellectual property” as assets. *Id.*, Exs. #2 at 6 and #3  
2 at 21. Emdeon acquired Vieosoft “primarily to obtain the talent and business plan to build a next-  
3 generation, patient-centric pharmacy hub that will compete successfully against SureScripts, Inc.  
4 and position Emdeon as a leading provider of ePrescribing, patient history, eligibility, dynamic  
5 formulary, patient messaging and related analytics services.” *Id.*, Ex. 4 at 6. Emdeon valued  
6 Vieosoft’s assets at approximately \$8.8 million (consisting of non-compete agreements, business  
7 plan, know-how, and goodwill). *Id.*, Ex. 4 at 7.  
8

9 Acquisition negotiations were conducted between mid-2012 and closing on February 12,  
10 2014. In July 2013, the parties executed an interim Professional Services Agreement (“PSA”)  
11 providing that, for \$250,000, Vieosoft would “work in good faith with Emdeon towards  
12 finalization of the development and agreement for the Staged Development Plan” for  
13 development of “a next-generation pharmacy platform . . .” *Id.*, Ex. 5 at 12-13. The PSA  
14 contains an exclusivity provision, preventing Vieosoft from negotiating with other potential  
15 acquirers or investors. *Id.* at 6, § 11.14.  
16

17 As originally conceived, Emdeon would pay Vieosoft a \$1.7 million development fee in  
18 exchange for an option to purchase all Vieosoft stock. Dkt. #86, Exs. 6 at 11:25-13:14 and 7 at 5.  
19 Vieosoft would use the funds to develop certain software and Emdeon would also build certain  
20 components. *Id.*, Exs. 6 at 15-25 and 7 at 5. In addition, during an 18-month development  
21 window, Vieosoft would operate independently. *Id.*, Ex. 7 at 6. If Emdeon declined to exercise  
22 its purchase option, the parties would part ways, without non-competes or other restrictive  
23 covenants. Emdeon’s counsel drafted the deal documents. *Id.*, Exs. 6 at 15:11-17 and 8 at 1.  
24  
25

1 In October 2013, Emdeon hired a new CEO, Neil de Crescenzo. He restructured the deal  
2 with Vieosoft as a straight acquisition with an earn-out. Dkt. #86, Ex. 9 at 97:5-20, 100:10-101:1,  
3 101: 20-102:5. Emdeon’s counsel redrafted the deal documents. *Id.*, Exs. 10 and 6 at 34:5-35:22.  
4 Under the new structure, Vieosoft shareholders would receive \$2.75 million in upfront  
5 consideration and a guaranteed additional \$5 million as a minimum payment in the event  
6 Defendants terminated the SPA. Dkt. #80, Exs. B at 87:9-88:2 and G. After several drafting  
7 revisions, reviewed by counsel for all parties, the parties executed the SPA on February 12, 2014,  
8 and Emdeon purchased Vieosoft’s stock.<sup>3</sup> *See* Dkts. #80, Exs. G, H, I and J and #86, Ex. 11.

9  
10 As noted above, through the Vieosoft acquisition, Emdeon planned a “product  
11 development initiative to build a next-generation patient-centric pharmacy hub that will compete  
12 successfully against Surescripts”. *Id.*, Ex. 2 at 1. This initiative consisted of two components: a  
13 product that would provide parity to Surescripts (“Core”), and advanced functionality that would  
14 drive adoption and revenue. *Id.*, Ex. 3 at 25 and 29. The parties drafted a detailed Development  
15 Plan, setting forth certain Milestone Objectives, which was incorporated by reference into the  
16 SPA. *Id.*, Ex. 11 at §§ 1.5 and 1.6.

17  
18 Shareholders Peter Hoover, Marc Lilly, David Grant, and John Eastman agreed to work  
19 for Emdeon (as employees or consultants) to implement the Development Plan. As a condition of  
20 the SPA, they were subject to five-year non-compete agreements. *Id.*, Ex. 11 at § 9.4. The non-  
21 competes were a “requirement of the negotiation,” *id.*, Ex. 9 at 102:13-17, and they survive  
22 termination of the SPA. *Id.*, Ex. 11 at § 6.3.

23  
24 <sup>3</sup> During negotiations, Emdeon specifically rejected proposals by the Shareholders for provisions  
25 preventing Emdeon from taking actions intentionally designed or substantially likely to prevent  
the ability of the Shareholders to meet the Milestone Objectives, further discussed below. Dkt.  
#80, Exs. K and E at 19:18-20:9, 27:2-25 and 49:21-50:4.

1 The SPA set forth the administration of the Development Plan:

2 The Executive Vice President – Pharmacy Services of Emdeon, shall be  
3 responsible for administration of the Development Plan, including, but not  
4 limited to, overseeing the management structure and other personnel  
5 involved with the execution and continued performance of the Development  
6 Plan, guiding the strategic direction in the development of products under the  
7 Development Plan, determining the timing and amount of capital  
8 investments to be made by Emdeon, implementing modifications to the  
9 Development Plan (subject to Section 1.7(d)(vii) hereof), determining the  
10 satisfaction of the Milestone Objectives set forth in the Development Plan,  
11 the calculation of Eligible Revenue and Minimum Gross Profit Margin, the  
12 determination and calculation of any Additional Consideration payments to  
13 be paid to the Shareholders pursuant to Section 1.7 of this Agreement, and  
14 the determination and calculation of any RxCentrix Payments to be paid  
pursuant to Section 1.8 of this Agreement. It is acknowledged and agreed  
that (i) Emdeon will have the authority and freedom to operate the Business  
and the Company following the date hereof without limitation under this  
Agreement, and (ii) Emdeon makes no representations or warranties with  
respect to the results of operations of (A) the Business, (B) the Company or  
(C) the Solution, or the generation of Eligible Revenue following the Closing  
or with respect to any estimates or projections provided by Emdeon to the  
Shareholders or the Shareholders’ Representative with respect to such results  
of operations.

15 Dkt. #86, Ex. 11 at § 1.6.

16 Emdeon began developing the bulk of Core (eligibility, medication history, and  
17 membership roster load) at its Fort Worth, TX, facility in summer 2013. The Development Plan  
18 provides that Emdeon was responsible for delivering these components, and the deposition  
19 testimony of executive Kevin Mahoney confirms that understanding. *Id.*, Exs. 13 at 2 and 9 at  
20 53:8-54:19 and 71:2-72:6. Based on their expertise with similar projects, the Shareholders,  
21 through the Development Team, were to develop the Batch Formulary component of Core. *Id.*,  
22 Ex.2 at 1. Batch Formulary would allow delivery of a set of authorized medication lists for  
23 insurers and pharmacy benefit managers to providers. Ex. 13. The Shareholders, through the  
24 Development Team, would also develop advanced functionality software that would: (a) allow  
25

1 real-time updating of formulary lists by payors (Advanced Formulary); (b) present medication  
2 and delivery alternatives at the point of prescription (Formulary Optimizer); and (c) allow payors  
3 to message providers and patients during this prescription process (Targeted Messaging). Dkt.  
4 #86, Ex. 13.

5 The Development Plan specified Batch Formulary, Advanced Formulary, Formulary  
6 Optimizer, and Targeted Messaging as “Milestone Objectives.” The SPA set a completion date of  
7 December 31, 2014, for the Milestone Objectives. Dkt. #86, Exs. 11 at § 1.5(a) and 13 at 2. The  
8 Development Plan included a detailed schedule guiding the Team’s timeline. Dkt. #86, Ex. 13.  
9 In its SEC Form 10-K for the year ending December 31, 2014, Emdeon stated that there was a  
10 90% probability that the Milestone Objectives would be completed. *Id.*, Ex. 1 at 11.

12 Upon closing of the SPA, assuming completion of the Milestone Objectives, the former  
13 Vieosoft shareholders had the opportunity for certain earn-out payments. Dkt. #80, Ex. A at §  
14 1.7. The shareholders also had the opportunity to receive future contingent revenue-sharing  
15 payments. *Id.* Emdeon could also terminate the SPA if the Shareholders did not complete the  
16 Milestone Objectives, subject to notice and opportunity to cure. *Id.*, Ex. 11 at § 6.1. In the event  
17 of termination, the Shareholders were guaranteed a \$4.75 million payment.<sup>4</sup> Dkt. #79 at 2.

19 Following execution of the SPA, Shareholders hired a Development Team in Seattle.  
20 Emdeon provided the budget, and Peter Hoover was placed in charge. *Id.*, Exs. 16 at 95:6-98:24  
21 and 9 at 147:23-148:11 and 199:21-200:9. Shortly thereafter, Emdeon made the decision to move  
22 its development platform from traditional Microsoft servers to an Amazon-based platform,  
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25 <sup>4</sup> To date, that payment has not been made because Plaintiffs pursued this litigation. Dkts. #80,  
Ex. N and #86, Ex. 12.

1 “AWS.” *Id.*, Exs. 17 at 5 and 18 at 40:10-43:11. This move represented a “paradigm shift” for  
2 the Development Team. *Id.*, Ex. 16 at 90:23-91:4. “[I]t would be the equivalent to saying,  
3 instead of building a train, we are now building an airplane. They’re both vehicles for  
4 transportation, but they are fundamentally different.” *Id.*, Ex. 16 at 91:1-4.

5 In early March 2014, Torsten Kablitz (hired in February 2014 by Emdeon to lead technical  
6 aspects of the Development Team) visited Emdeon’s Fort Worth facility to assess Emdeon’s  
7 progress on its Core deliverables. Mr. Kablitz reported that development was substantially  
8 delayed, would not be complete on time, and might not integrate well with the new plan to  
9 develop on AWS. *Id.*, Exs. 19 and Ex. 16 at 128:20-134:3. As a result, he recommended that

11 . . . all work on Project Victory at Fort Worth is stopped, archived and  
12 transferred to Seattle. The Seattle team will be task [sic] with the ownership  
13 of the deliverables for all of Project Victory including these components. It  
14 will be up to team Seattle to build support for these workflows into the core  
15 product offering.

16 Dkt. #86, Ex. 19 at 1. Emdeon’s CEO accepted the recommendation and approved the transfer of  
17 development of Emdeon’s Core deliverables to the Seattle Development Team. *Id.*, Ex. 9 at  
18 183:4-17.

19 In the winter of 2013-14, Emdeon began considering whether it should migrate from its  
20 incumbent master person index (“MPI”) tool – IBM Initiate (the industry standard) – to  
21 something cheaper, like Oracle’s MPI tool.<sup>5</sup> *Id.*, Ex. 20 at 1-2.

22 In July 2014, Emdeon hired Doug Hebenthal and placed the Development Team under his  
23 control. *Id.*, Exs. 24 and 9 at 199:2-200:19. By December 2014, the Development Team released

24 \_\_\_\_\_  
25 <sup>5</sup> The MPI tool is a complex algorithm that helps identify patients and collect patient records  
across disparate data sets. Dkt. #86, Ex. 23 at 137:16-138:14.

1 an initial version of Core including Batch Formulary (Milestone Objective), Member Roster Load  
2 (Emdeon deliverable), Eligibility (Emdeon deliverable), and Medication History (Emdeon  
3 deliverable). *Id.*, Ex. 25 at 2. The Development Team was also working on a substitute MPI tool  
4 for Core. *Id.*, Ex. 48.

5 In the Fall of 2014, Marc Lilly urged Mr. Kablitz to move ahead with the remaining  
6 Milestone Objectives. *Id.*, Ex. 16 at 172: 15-173:3. However, Mr. Kablitz could not assign any  
7 engineering resources to that work because those resources were tied up with completing Core.  
8 *Id.* at 174:6-176:2 and 66: 13-67:8.

9 As a result, Mr. Hoover began conversations with Mr. Mahoney about modifying the  
10 timelines for the Milestone Objectives. *Id.*, Ex. 9 at 197:14-198:3. Mr. Mahoney and other  
11 Emdeon executives appeared receptive. *Id.*, Exs. 9 at 198:4-14 and 32. One executive noted that  
12 there was “a mismatch between the four guys and their payouts and the project plan we are  
13 following.” Dkt. #86, Ex. 32.

14 On January 19, 2015, Mr. Hoover delivered a Completion Certificate to Emdeon,  
15 outlining the work accomplished on the Development Plan in 2014. *Id.*, Exs. 43 and 9 at 260:14-  
16 16. The Certificate did not state that the Development Team had completed anything. *Id.*, Ex. 9  
17 at 21-23. During the week that followed, Mr. Mahoney met with Mr. Hebenthal and executive  
18 Rob Calichman to consider how to respond to the Completion Certificate. *Id.* at 262:13-265:13.  
19 Mr. Mahoney recommended giving the Shareholders additional time to complete some aspects of  
20 the Development Plan. *Id.* at 265:2-5. Ultimately, Mr. de Crescenzo decided against any  
21 modification of the Development Plan. *Id.* at 259:24-260:6.  
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1 R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In ruling on  
2 summary judgment, a court does not weigh evidence to determine the truth of the matter, but  
3 “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d  
4 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d  
5 744, 747 (9th Cir. 1992)). Material facts are those which might affect the outcome of the suit  
6 under governing law. *Anderson*, 477 U.S. at 248.

7  
8 The Court must draw all reasonable inferences in favor of the non-moving party. *See*  
9 *O’Melveny & Meyers*, 969 F.2d at 747, *rev’d on other grounds*, 512 U.S. 79 (1994). However,  
10 the nonmoving party must make a “sufficient showing on an essential element of her case with  
11 respect to which she has the burden of proof” to survive summary judgment. *Celotex Corp. v.*  
12 *Catrett*, 477 U.S. 317, 323 (1986). Further, “[t]he mere existence of a scintilla of evidence in  
13 support of the plaintiff’s position will be insufficient; there must be evidence on which the jury  
14 could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 251.

### 15 **B. Applicable Law**

16  
17 The parties agree that this matter is governed by Delaware law. Accordingly, the Court  
18 applies such law to the instant motion.

### 19 **C. Breach of Contract**

20 The Court first examines Plaintiff’s breach of contract claim. Plaintiff asserts that  
21 Emdeon breached the Stock Purchase Agreement, and the Development Plan incorporated  
22 therein, by:

- 23 • Failing to deliver the three Core products for which it was responsible and shifting  
24 these development responsibilities to the Development Team;

- 1 • Requiring the Development Team to pioneer AWS infrastructure within Emdeon, a  
2 useful but unplanned for and time-consuming effort;
- 3 • Not making IBM Initiate available, forcing the Development Team to create an  
4 MPI tool;
- 5 • Failing to modify the Development Plan to reflect changed circumstances;
- 6 • Taking away control of the Development Team and not allowing it to work on the  
7 Milestone Objectives during 2014 or the cure period;
- 8 • Terminating key shareholders and frustrating any opportunity to cure;
- 9 • Unjustifiably terminating the SPA; and
- 10 • Failing to make the “guaranteed” termination payment.
- 11

12 Dkt. #93 at 16-17 (*filed under seal*).

13  
14 Defendants argue that the explicit language of the SPA defeats Plaintiff’s arguments.  
15 Specifically, Defendants point to § 1.6, which allowed them to operate the business as they saw  
16 fit. Dkt. #79 at 19-21. Plaintiff responds that these alleged breaches are not controverted by the  
17 language in § 1.6 giving Emdeon general “authority and freedom to operate the Business.” Dkt.  
18 #93 at 17. Rather, Plaintiff asserts that Emdeon’s express obligations and freedom to operate  
19 must be read in harmony with the remaining portions of the section and Agreement, otherwise  
20 Emdeon’s express obligations are surplusage. *Id.*

21  
22 As the Supreme Court of Delaware has long held, “Delaware law adheres to the objective  
23 theory of contracts, *i.e.*, a contract’s construction should be that which would be understood by an  
24 objective, reasonable third party.” *Salamone v. Gorman*, 106 A.3d 354, 368, 2014 Del. LEXIS  
25 583 (Del. 2014) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

1 When interpreting a contract, Delaware courts “will give priority to the parties’ intentions as  
2 reflected in the four corners of the agreement,” construing the agreement as a whole and giving  
3 effect to all its provisions. *GMG Capital Inv., LLC. v. Athenium Venture Partners I, L.P.*, 36  
4 A.3d 776, 779 (Del. 2012). “Contract terms themselves will be controlling when they establish  
5 the parties’ common meaning so that a reasonable person in the position of either party would  
6 have no expectations inconsistent with the contract language.” *Eagle Indus., Inc. v. DeVilbiss*  
7 *Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). “Under standard rules of contract  
8 interpretation, a court must determine the intent of the parties from the language of the contract.”  
9 *Twin City Fire Ins. Co. v. Del. Racing Ass’n*, 840 A.2d 624, 628 (Del. 2003).

11 The parties in this case focus on section 1.6 of the SPA. That section of the contract  
12 clearly provided Emdeon with unfettered discretion to run the business and direct the  
13 Development Plan in the way it saw fit. Dkt. #86, Ex. 11 at § 1.6. The SPA provided that the  
14 Executive Vice President – Pharmacy Services of Emdeon would be responsible for the  
15 administration of the Development Plan. *Id.* Such administration included, *but was not limited*  
16 *to*, determining the timing and amount of capital investments, implementing any modifications to  
17 the Development Plan, the calculation of any additional consideration payments, and, more  
18 importantly, determining the satisfaction of the Milestone Objectives. *Id.* Emdeon then expressly  
19 reserved the right to operate the business “without limitation under this Agreement,” making “no  
20 representations or warranties with respect to the results of operations . . . .” *Id.* There is no  
21 reasonable way to read any obligation by Emdeon to ensure the Shareholders could meet their  
22 contractual obligations.  
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1 This interpretation is consistent with the language of other provisions of the SPA. For  
2 example, with respect to the Shareholders' obligations to provide the Milestone Objectives,  
3 Emdeon reserved the right to determine whether such Objectives had been completed  
4 successfully, and if they were ultimately unsuccessful, the right to terminate the Agreement or  
5 allow modifications to the timeline for delivery. Dkt. #86, Ex. 11 at § 1.5(c)(ii). Moreover, if  
6 Emdeon allowed the Shareholders to continue to work on the Milestone Objectives until  
7 completed to their reasonable satisfaction, the Shareholders would not be eligible for their  
8 Milestone Payment. *Id.*, § § 1.5(c)(ii)(B) and 1.7(a). The contract language as a whole reflects  
9 the intent by the parties that Emdeon would be in sole control of the way the business would be  
10 run and the way the Development Plan would be administered, without any promises to the  
11 Shareholders about the results of such administration.  
12

13 To the extent that Plaintiff argues ambiguity in the contract, this Court finds none.  
14 Contractual ambiguity exists “[w]hen the provisions in controversy are fairly susceptible of  
15 different interpretations or may have two or more different meanings.” *GMG Capital Inv., LLC*  
16 *v. Athenium Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) (quoting *Eagle Indus., Inc. v.*  
17 *DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)). The Court finds that the  
18 language discussed above is not susceptible of any alternate meaning. However, even if it was,  
19 the intent of the parties appears to also be clear. Where a contract is ambiguous, ‘the interpreting  
20 court must look beyond the language of the contract to ascertain the parties’ intentions.’” *Id.* In  
21 this case, the Shareholders had specifically attempted to negotiate language that would require  
22 Emdeon to perform the tasks and actions described in the Development Plan, and language  
23 prohibiting Emdeon from taking any action intentionally designed or substantially likely to  
24  
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1 prevent the ability of the Shareholders to complete the Milestone Objections. Dkt. #80, Exs. J  
2 and K. These proposals were rejected. Significantly, Emdeon also rejected a proposal for a  
3 provision that would prevent Emdeon from asserting that the Milestone Objectives had not been  
4 completed if such failure had been caused by Emdeon's failure to perform any of its material  
5 obligations under the Development Plan. *Id.*, Ex. E at 19:18-20:9 and 49:21-50:4 and Ex. K at §  
6 1.4(d)(ii).

7  
8 As a result, the Court concludes that Defendants did not breach the SPA by taking the  
9 actions of which Plaintiff complains in this matter, and therefore Plaintiff's breach of contract  
10 claim must fail as a matter of law.

#### 11 **D. Frustration**

12 Plaintiff argues that material facts are in dispute as to whether Defendants frustrated the  
13 Shareholders' performance of their obligations under the SPA, and therefore summary judgment  
14 is not appropriate. Dkt. #85 at 19-20. Plaintiff argues that Defendants prevented them from  
15 completing the Milestone Objectives and are therefore stopped from alleging that the  
16 Shareholders' breached the SPA. *Id.* at 19. However, the very authority upon which Plaintiff  
17 relies, undermines his argument. Indeed, in *A.I.C. Ltd. v. Mapco Petroleum*, the District Court of  
18 Delaware explained:  
19

20 "The 'prevention doctrine' provides that a party may not escape contractual  
21 liability by reliance upon the failure of a condition precedent where the party  
22 *wrongfully prevented* performance of that condition precedent." *Mobile*  
23 *Communications Corp. of America v. MCI Communications Corp.*, No.  
24 8108, 11 Del.J.Corp.L. 680, 685 (Del.Ch. Aug. 27, 1985) (emphasis and  
25 footnote added).

26 One who *unjustly* prevents the performance or the happening of a  
27 condition of his own promissory duty thereby eliminates it as such a  
28 condition. He will not be permitted to take advantage of his own

1            *wrong*, and to escape from liability for not rendering his promised  
2            performance by preventing the happening of the condition on which  
3            it was pr[e]mised. One who himself induces the failure of the other  
            to perform within the time agreed upon cannot take advantage  
            [\*\*25] of such failure . . . .

4            3A A. Corbin, *Corbin on Contracts* § 767, at pp. 540-41 (1960) (emphasis  
5            added, footnote omitted). Other authorities contain similar descriptions of  
6            the prevention doctrine. *See, e.g., District-Realty Title Ins. Corp. v.*  
7            *Ensmann*, 247 U.S. App. D.C. 228, 767 F.2d 1018, 1023 (D.C.Cir. 1985)  
8            (the prevention “doctrine excuses a condition precedent when a party  
9            *wrongfully prevents* the condition from occurring” [emphasis added]); *Shear*  
10           *v. National Rifle Ass’n of America*, 196 U.S. App. D.C. 344, 606 F.2d 1251,  
            1254-55 (D.C.Cir. 1979); *Restatement (Second) of Contracts* § 245 (1979); 5  
            S. Williston, *A Treatise on the Law of Contracts* § 677A, at p. 234 (3d ed.  
            1961) (“justice . . . precludes a promisor from taking advantage of a  
            condition, the performance of which he himself prevented”).

11           Translating the prevention doctrine into the context of the instant case would  
12           produce the following rule. A promisor (i.e. Mapco) may not escape  
13           contractual liability (i.e. the payment of compensation to AIC under the  
14           consulting agreement) by reliance upon the failure of a condition precedent  
            (i.e. formation of the proposed asset sale transaction) where the promisor  
            *wrongfully prevented* the occurrence of that condition precedent.

15           There is a well recognized exception to the prevention doctrine, however,  
16           which forcefully applies in this case. The Court of Chancery of Delaware  
17           has held that “the prevention doctrine does not apply where, under the  
18           contract, one party *assumes the risk* that fulfillment of the condition  
19           precedent will be prevented.” *Mobile Communications Corp. v. MCI*, 11  
20           Del.J. Corp.L. 680, 686 (emphasis added). *See also District-Realty v.*  
21           *Ensmann*, 767 F.2d at 1023-24 (“When a contract ‘authorizes a party to  
22           prevent a condition from occurring, ‘there is no prevention.’ . . . The  
23           essential inquiry is whether or not the contract *allocated the risk* of’  
24           nonoccurrence of the condition. [emphasis added]); *Shear v. National Rifle*  
25           *Ass’n*, 606 F.2d at 1256 (“the prevention doctrine does not apply when the  
            contract, in effect, authorizes prevention”); *Dixon v. Bernstein*, 86 U.S. App.  
            D.C. 336, 182 F.2d 104, 105 (D.C.Cir. 1950); 3A *Corbin on Contracts* §  
            767, at p. 545 (“there are some cases in which some sort of prevention or  
            interference is contemplated by the parties as quite proper and within the  
            privileges of the promisor”); 5 S. Williston, *A Treatise on the Law of*  
            *Contracts* § 677A, [\*\*27] at p. 235 (“an exception to [the prevention  
            doctrine] must be made where the hindrance is due to some action of the  
            promisor which under the terms of the contract . . . he was permitted to

1 take”). Cf. *Restatement (Second) of Agency* § 453 comment a (1958) (in the  
2 context of a brokerage contract, “the parties are bound by the bargain which  
3 they make and if, advertent to the possibility of termination before  
performance is completed, they provide that no compensation shall be given  
for merely part performance, such agreement is enforced”).

4 The prevention doctrine can have no application to this case. The consulting  
5 agreement provides, in unambiguous and painstakingly crafted language,  
6 that Mapco had no duty whatsoever to enter into any of the contemplated  
7 underlying transactions, such as the proposed asset sale. It explicitly  
8 provides that “nothing [therein] requires [Mapco] to enter into any  
9 agreement with the Nigerian Government and/or NNPC or to sell any or all  
10 of its Refining and Marketing Assets.” (D.I. 1, Ex. A at 2.) AIC, having  
11 agreed to be contractually bound by such language, cannot be heard to now  
12 argue that Mapco’s failure to consummate the asset sale transaction  
*wrongfully prevented* AIC from earning its compensation under the  
consulting agreement. The consulting agreement is susceptible to but one  
reasonable reading: that AIC *assumed the risk* that Mapco would opt not to  
form the contemplated asset sale transaction. AIC’s prevention argument is  
thus without merit.

13 711 F. Supp. 1230, 1238-39 (D. Del. 1989).

14 The same reasoning applies here. Plaintiff and his fellow Shareholders assumed the risk  
15 that Defendants would not run the business in a way that allowed them to fulfill the Milestone  
16 Objectives, as discussed above. Accordingly, the Court finds that the prevention doctrine has no  
17 application in this case.

#### 18 **E. Claim for Breach of Implied Covenant of Good Faith and Fair Dealing**

19 Defendants next argue that Plaintiff’s claim for breach of the implied covenant of good  
20 faith and fair dealing fails as a matter of law because Delaware courts narrowly construe this  
21 covenant and will not apply it to displace explicit contract terms or to insert terms that a party  
22 could have obtained through negotiation. Dkt. #79 at 15-19. Plaintiff responds that the parties’  
23 expectations at the time of contract were thwarted by Emdeon, and that Emdeon acted arbitrarily  
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1 and unreasonably by creating a situation in which the Shareholders could not meet their  
2 contractual obligations. Dkt. #85 at 23-25.

3 In all contracts under Delaware law, there is an implied covenant of good faith and fair  
4 dealing. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal citation  
5 omitted); *see also Katz v. Oak Indus.*, 508 A.2d 873, 880 (Del. Ch. 1986) (“Modern contract law  
6 has generally recognized an implied covenant to the effect that each party to a contract will act in  
7 good faith towards the other with respect to the subject matter of the contract.”); *Fitzgerald v.*  
8 *Cantor*, 1998 Del. Ch. LEXIS 212, 1998 WL 842316, at \*1 (Del. Ch. Nov. 10, 1998) (“All  
9 contracts are subject to an implied covenant of good faith and fair dealing.”); 23 WILLISTON ON  
10 CONTRACTS § 63:22 (4th ed. 2000) (“Every contract imposes an obligation of good faith and fair  
11 dealing between the parties in its performance and its enforcement, and if the promise of the  
12 defendant is not expressed by its terms in the contract, it will be implied.”). The covenant  
13 “requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct  
14 which has the effect of preventing the other party to the contract from receiving the fruits of the  
15 bargain.” *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010) (quoting *Nemec v. Shrader*, 2009  
16 Del. Ch. LEXIS 67, 2009 WL 1204346, at \*5 (Del. Ch. Apr. 30, 2009)). A party is liable for  
17 breaching the covenant when its conduct “frustrates the overarching purpose of the contract by  
18 taking advantage of [its] position to control implementation of the agreement’s terms.” *Dunlap*,  
19 878 A.2d at 442.

20 Delaware courts recognize that the “implied covenant of good faith and fair dealing  
21 involves a ‘cautious enterprise,’ inferring contractual terms to handle developments or contractual  
22 gaps that the asserting party pleads neither party anticipated.” *Nemec*, 991 A.2d at 1125. Indeed,  
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1 the Supreme Court of Delaware has noted that “one generally cannot base a claim for breach of  
2 the implied covenant on conduct authorized by the agreement.” *Id.* at 1125-1126 (citation  
3 omitted). The Supreme Court of Delaware has also noted that when conducting this analysis, the  
4 Court must assess the parties’ reasonable expectations at the time of contracting and not rewrite  
5 the contract to appease a party who later wishes to rewrite a contract he now believes to have been  
6 a bad deal. *Id.* “Parties have a right to enter into good and bad contracts, the law enforces both.”  
7 *Id.*

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9 As already discussed by this Court, Defendants in this matter did not engage in actions  
10 that were not reasonably anticipated by Plaintiff or contrary to the provisions of the SPA.  
11 Defendants bargained for the freedom to run the business as they saw fit, and they specifically  
12 rejected proposed provisions from the Shareholders that would have mandated certain obligations  
13 in the Development Plan. Moreover, Plaintiff Lilly has testified that he is unaware of any facts  
14 indicating that Endeon made many of the business decisions of which he complains now in bad  
15 faith. Dkt. #80, Ex. B at 116:11-14, 117:2-6 and 121:2-8. Likewise, Plaintiff Lilly testified that  
16 he is not aware of any facts that Emdeon’s decision not to extend the deadlines for the Milestone  
17 Objectives was made in bad faith. *Id.* at 210:23-211:2.

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19 Likewise, the Court finds that Defendants did not frustrate the Shareholders from  
20 completing their contractual obligations for the reasons discussed above. *See* Section III.D.

21 As a result, the Court also finds that Plaintiff’s claim for breach of the covenant of good  
22 faith and fair dealing also fails as a matter of law.  
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**IV. CONCLUSION**

Having reviewed Defendants' Motion for Summary Judgment, Plaintiff's Opposition thereto, the Reply in support thereof, the parties' Declarations and Exhibits, and the remainder of the record, the Court hereby finds and ORDERS:

1. Defendants' Motion for Summary Judgment (Dkt. #79) is GRANTED, and Plaintiff's remaining claims are dismissed in their entirety.
2. This case is now CLOSED.

DATED this 20th day of December, 2016.



RICARDO S. MARTINEZ  
CHIEF UNITED STATES DISTRICT JUDGE