IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| PSILOS GROUP PARTNERS, L.P., VENTURE INVESTMENT MANAGEMENT COMPANY LLC, VIMAC EARLY STAGE FUND L.P., VIMAC HSI LIMITED PARTNERSHIP, VIMAC HS12 LIMITED PARTNERSHIP, VIMAC HS13 LIMITED PARTNERSHIP, VIMAC HS14 LIMITED PARTNERSHIP, VIMAC HS15 LIMITED PARTNERSHIP, VIMAC 96 VINTAGE TRUST LIMITED PARTNERSHIP, VIMAC 98 VINTAGE TRUST LIMITED PARTNERSHIP, BLUE CHIP CAPITAL FUND II LIMITED PARTNERSHIP, and BLUE CHIP IV LIMITED PARTNERSHIP, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. 1479-N |
| TOWERBROOK INVESTORS L.P. (f/k/a SOROS PRIVATE EQUITY INVESTORS LP), | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

Date Submitted: November 8, 2006
Date Decided: January 17, 2007

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**STRINE, Vice Chancellor.**

## I. Introduction

The defendant, Towerbrook Investors, L.P., f/k/a Soros Private Equity Investors LP ("Soros") is a private equity firm. Soros obtained an option to buy HealthScribe, Inc. ("HealthScribe") for $75 million. It hoped to acquire both HealthScribe and one of HealthScribe's competitors, Spheris, Inc. ("Spheris"), and to combine the two companies.

Contemporaneously with the grant of the option, Soros and certain of HealthScribe's preferred shareholders (the "HealthScribe Preferred Holders") executed a Co-Investment Agreement (the "Co-Investment Agreement") that gave the HealthScribe Preferred Holders the right to invest in the combined Spheris-HealthScribe entity (the "Combined Entity") if — and only if — Soros: (1) exercised its option to acquire HealthScribe (a "HealthScribe Acquisition"); (2) acquired Spheris (a "Spheris Acquisition"); and (3) led an equity financing for those acquisitions (an "Equity Financing").

If the HealthScribe Preferred Holders' rights were triggered, they could subscribe for up to one-third of the total equity in the Combined Entity. They would also have certain other rights, including access to the Combined Entity's books and records and the right to observe its board meetings. Soros, however, would retain the right to appoint all of the Combined Entity's directors.

HealthScribe and Spheris were ultimately combined in a transaction in which another private equity firm, Warburg Pincus & Co. ("Warburg") provided two-thirds of the equity. Soros provided the other one-third of the equity and did not seek to include the HealthScribe Preferred Holders in the deal.

The plaintiffs, certain of the HealthScribe Preferred Holders,[1] have sued to enforce their rights under the Co-Investment Agreement. They argue that Soros led an Equity Financing for a Spheris Acquisition within the meaning of that Agreement, and that Soros breached the Agreement by not giving the HealthScribe Preferred Holders a chance to subscribe for one-third of the Combined Entity's equity.

The plaintiffs' claim comes before me on a motion for summary judgment. The straightforward issue is whether Soros led an Equity Financing for a Spheris Acquisition within the meaning of those terms as they are used in the Co-Investment Agreement. In this opinion, I conclude that there are no material facts in dispute with respect to Soros's role in the ultimate acquisition and combination of Spheris and HealthScribe. Soros tried to buy Spheris off the auction block but got outbid by Warburg. That is, Soros tried, but failed, to consummate a Spheris Acquisition as defined in the Co-Investment Agreement.

Instead of securing a right to acquire Spheris for itself, Soros had to bargain with Warburg (which had obtained that right) to be cut in on the deal. Soros caught Warburg's interest by using its option to acquire HealthScribe as an enticement. Soros and Warburg ultimately struck a deal to combine the two companies, but because Warburg had won the right to acquire Spheris, Soros ended up with only one-third of the equity. That is, Soros ended up itself with the same percentage of the total equity the plaintiffs claim was due the HealthScribe Preferred Holders. Moreover, Soros did not even have the power to grant the

[1] The plaintiffs, who constitute three of the five HealthScribe Preferred Holders, are Psilos Group Partners, L.P., Venture Investment Management Company LLC and certain of its affiliates, and Blue Chip Capital Fund II, L.P. and certain of its affiliates.

plaintiffs the other rights to which they claim to be entitled, such as access to the Combined Entity's books and records.

Those realities highlight why summary judgment for Soros is required. Because there was no acquisition of Spheris by Soros, Soros was not in a position to lead an Equity Financing or to have the power to deliver the terms contemplated by the Co-Investment Agreement. That Soros was able to secure for itself equity in the acquisition of Spheris led by Warburg — the right to which Warburg won in competition (not collusion) with Soros — does not give rise to rights on the part of the plaintiffs. Because the Co-Investment Agreement only gave rights to the HealthScribe Preferred Holders if Soros itself acquired Spheris and led the Equity Financing for that acquisition — and because those conditions never came to pass — the plaintiffs were denied nothing to which they were contractually entitled. Therefore, I grant summary judgment in favor of Soros.

## II. Factual Background[2]

In the summer of 2004, Soros sought to become a player in the medical transcription industry by acquiring and combining Spheris and HealthScribe, the second and third largest medical transcription companies in the United States, respectively.[3] Spheris and its largest investor, Parthenon Capital ("Parthenon"), had engaged an investment bank to conduct an auction for the sale of Spheris (the "Spheris Auction"). Soros hoped to buy Spheris in the

[2] The facts are, as required by Court of Chancery Rule 56, viewed in the light most favorable to the plaintiffs.

[3] "Medical Transcription is the process of converting medical dictation into a text format for inclusion in a patient's medical record, and is an integral part of the medical records department for healthcare providers." Affidavit of Matthew F. Dexter ("Dexter Aff."), Ex. D at 62.

Spheris Auction. Soros hoped to buy HealthScribe via an unsolicited offer that it first presented to HealthScribe's Board of Directors in July 2004.

A. The HealthScribe Merger Agreement

The plaintiffs were among those who held Series A and Series B preferred shares in HealthScribe. The HealthScribe Preferred Holders had the right to appoint three directors (the "A/B Directors") to HealthScribe's Board of Directors. The A/B Directors, whose votes were needed to approve a transaction with Soros, were unwilling to agree to Soros's initial proposals to buy HealthScribe because those proposals would have resulted in the HealthScribe Preferred Holders receiving less than their initial capital investment in HealthScribe. The A/B Directors allegedly favored continuing to build HealthScribe's business with a view to a future transaction that would provide an enhanced return.

But Soros persisted. After some negotiation, on August 5, 2004, Soros and HealthScribe entered into a non-binding letter of intent for Soros to buy HealthScribe for $75 million.[4] To induce the A/B Directors to go along with the deal, the letter of intent provided that the HealthScribe Preferred Holders would be entitled to invest some of their proceeds from the HealthScribe Acquisition into the Combined HealthScribe-Spheris Entity (the "Co-Investment Opportunity") if Soros was able to acquire Spheris and combine it with HealthScribe.

On September 20, 2004, HealthScribe entered into a definitive Merger Agreement (the "HealthScribe Merger Agreement") with MTS Holdings, Inc., a wholly-owned

[4] Dexter Aff., Ex. C.

subsidiary of Soros.[5] The HealthScribe Merger Agreement had the effect of giving MTS an option, but not an obligation, to buy HealthScribe for $75 million. The Co-Investment Opportunity was a material inducement in convincing the A/B Directors to approve the HealthScribe Merger Agreement.

B. The Co-Investment Agreement

Simultaneously with the execution of the HealthScribe Merger Agreement, Soros and the HealthScribe Preferred Holders memorialized the Co-Investment Opportunity in the Co-Investment Agreement. That Agreement provides:

> Soros . . . or one of its affiliates (collectively 'Soros') plans to submit or has submitted a proposal to purchase Spheris, Inc. ('Spheris'). *Any such purchase of Spheris by Soros or any affiliate of Soros* shall be referred to herein as a 'Spheris Acquisition'; and collectively with the HealthScribe Acquisition, the 'Acquisitions' . . . . *Soros's non-binding intent is to provide a significant portion of and to lead the equity financing for the Acquisitions* (any such equity financing, an 'Equity Financing') . . . .
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> To the extent Soros or any of its affiliates lead an Equity Financing . . ., which Equity Financing will be provided only in Soros's sole discretion, Soros hereby grants the [HealthScribe Preferred Holders] the right, but not the obligation . . . to purchase . . . [up to] 33-1/3% of the aggregate amount of such Equity Financing . . . on the same economic terms and investment schedule as Soros.[6]

Because the Co-Investment Agreement gives the HealthScribe Preferred Holders co-investment rights only "[t]o the extent Soros or any of its affiliates lead an Equity Financing," the meaning of the term "Equity Financing" plays an important role in resolving

[5] Supplemental Affidavit of Matthew F. Dexter ("Dexter Supp. Aff."), Ex. B.
[6] Dexter Aff., Ex. F at 1-2 (emphasis added).

this dispute. By the plain language of the Co-Investment Agreement, that term must be read in relation to the definition of "Acquisitions." In this case, I focus on only one element of the term Acquisitions: the definition of a Spheris Acquisition. I do so for an obvious reason. By the HealthScribe Merger Agreement, Soros had already secured the right to consummate a HealthScribe Acquisition if it chose. But as of the date of the Co-Investment Agreement, Soros had secured no agreement to acquire Spheris. For an Equity Financing to exist, a Spheris Acquisition — i.e., a "purchase of Spheris by Soros or an affiliate of Soros" — had to come to pass.

The plain terms of the Co-Investment Agreement in this regard are supplemented by other provisions of the Agreement that reflect both the role that the Agreement envisioned Soros would play in the acquisition of Spheris and the expectation that the HealthScribe Preferred Holders would have rights only if Soros indeed played that role. These other terms outline the powers that Soros would wield and thus the rights that it would have the power to grant to the HealthScribe Preferred Holders. To wit: (1) the HealthScribe Preferred Holders would be subject to customary drag along rights[7] in favor of Soros; (2) Soros would grant the HealthScribe Preferred Holders "rights to receive the same written documents (including financial statements) that the [Combined Entity] is obligated to deliver to its senior lenders;" (3) Soros would grant the HealthScribe Preferred Holders the right to "visit and meet with members of the [Combined Entity's] management;" (4) Soros

[7] As a general matter, drag along rights give a majority shareholder the ability to require a minority shareholder to join in the sale of a company on the terms and conditions negotiated by the majority shareholder. *See, e.g., Minnesota Invco of RSA # 7, Inc. v. Midwest Wireless Holdings LLC*, 903 A.2d 786, 790-91 & n.25 (Del. Ch. 2006).

would be entitled to appoint all members of the Combined Entity's board of directors; (5) Soros would permit the HealthScribe Preferred Holders to appoint one observer to the Combined Entity's board; and (6) Soros or a Soros affiliate would enter into a definitive purchase or merger agreement for a Spheris Acquisition — if a Spheris Acquisition did, in fact, occur.[8] Importantly, these powers are of the sort that could only be exercised by a party that had secured purchase rights for itself.

Notable also is the fact that the HealthScribe Merger Agreement does not mention the Co-Investment Opportunity anywhere, and HealthScribe's obligation to perform under that Agreement was not conditioned on the completion of a Spheris Acquisition. Consistent with this, the Co-Investment Agreement unambiguously states, in several places, that Soros was under no obligation to acquire Spheris or to lead an Equity Financing.[9] The Co-Investment Agreement merely stated that Soros's "non-binding intent" was to acquire Spheris, and in the event that a Spheris Acquisition did in fact occur and that Soros led an Equity Financing, the HealthScribe Preferred Holders would be entitled to subscribe to up to one-third of the Combined Entity's equity.

In other words, Soros had the right to buy HealthScribe even if it ended up not buying Spheris. In that event, the plaintiffs concede that the HealthScribe Preferred Holders

[8] Dexter Aff., Ex. F. The Co-Investment Agreement also contained an integration clause providing that it "sets forth the entire understanding with respect to the [Co-Investment Opportunity] and supersedes any prior or contemporaneous understandings with respect thereto." *Id*. at 5.

[9] *Id*. In particular, the Co-Investment Agreement states, "nothing contained herein shall be construed as a commitment on behalf of Soros . . . to make any Equity Investment or any other investment and . . . any Equity Investment that Soros . . . may make shall be made in the sole discretion of Soros . . . ." *Id.* at 5.

would have no rights under the Co-Investment Agreement to invest in the equity of HealthScribe.

C. Soros Loses The Spheris Auction

At the same time that the HealthScribe Merger Agreement and the Co-Investment Agreement were being finalized, Soros was preparing to submit its bid in the Spheris Auction, which was a sealed-bid auction. Each bidder submitted a single offer that was not revealed to the other bidders. Soros submitted its bid on September 17, 2006 in the amount of $205 million. That was the third highest bid. Warburg's $228 million bid was the highest. On September 28, 2004, Soros submitted an increased offer of $233 million, but Spheris rejected it. That same day, Spheris granted Warburg exclusive rights to negotiate the definitive terms of an acquisition. Soros had lost the Spheris Auction. Warburg had won.

D. The Soros-Warburg Partnership

But Soros did not give up on its objective of securing an interest in Spheris. In particular, Soros believed its idea of combining Spheris and HealthScribe had value and sought to make that combination a reality, even though it had lost the Spheris Auction. Soros understood that the only way to do that was to strike a deal with its competitor, Warburg. Thus, on September 29, 2004, the day after Spheris granted Warburg exclusivity rights, Jonathan Bilzin, an executive at Soros, contacted Joel Ackerman, his counterpart at Warburg, and suggested that the two firms go in as joint-venturers in a transaction that would result in a Spheris-HealthScribe merger.

Before that September 29 contact, Bilzin had never met or spoken with Ackerman.[10] Indeed, Warburg had never considered combining Spheris and HealthScribe, nor had Warburg ever considered buying Spheris in partnership with Soros. Warburg owned the exclusive right to acquire Spheris and had every intent to complete that acquisition before Soros ever brought HealthScribe to the table. Nonetheless, Warburg soon embraced the business logic of combining the two companies. Within a day, the two firms exchanged drafts of an agreement to jointly acquire and combine Spheris and HealthScribe.[11]

Soros and Warburg negotiated at arm's length over the terms of the proposed joint venture. Because Warburg had won the Spheris Auction and was willing to proceed with the acquisition of Spheris without Soros, Warburg had the upper hand. Using its ability to deliver HealthScribe, Soros initially suggested an equal (50%-50%) partnership. Warburg rejected that proposal. Warburg insisted on being the majority investor even though the transaction would now involve not only Spheris but a combination of Spheris and HealthScribe. Facing the possibility of losing the opportunity to participate at all as an equity owner of Spheris, Soros acceded to the demand that it accept a minority interest. In the deal they ultimately struck, Warburg put up two-thirds of the equity and took a two-thirds interest in the Combined Entity. Soros purchased the other one-third of the equity.

The deal was memorialized in an October 6 letter agreement (the "Warburg-Soros Letter Agreement") that looks a bit similar to the Co-Investment Agreement. Specifically, the Warburg-Soros Letter Agreement states:

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[10] Mozkowski Dep. at 195.
[11] Affidavit of Peter R. Wilson ("Wilson Aff."), Ex. I.

> In connection with any Equity Financing led by Warburg or any affiliate of Warburg, Warburg hereby agrees that it will offer, or cause to be offered to, Soros the opportunity to purchase at the closing of the Spheris Acquisition 33-1/3% . . . of the aggregate amount of such Equity Financing. . . ."[12]

In other words, the Warburg-Soros Letter Agreement contemplated that Warburg would lead an equity financing for the acquisition of Spheris and HealthScribe in much the same way that the Co-Investment Agreement contemplated that Soros might do so. Notably, Soros gave up drag along rights to Warburg. Soros also received only two out of a total of seven board seats — not the full control of the board that Soros was expected to have upon leading an Equity Financing for a Spheris Acquisition as contemplated by the Co-Investment Agreement.[13]

Meanwhile, Warburg had been negotiating with Parthenon to formalize its purchase of Spheris. Soros did not play a substantial role in those negotiations.[14] On October 12, Parthenon and a newly-formed, wholly-owned subsidiary of Warburg, Spheris Holding, Inc. ("Spheris Holding"), entered into a Stock Purchase Agreement (the "Spheris Purchase Agreement") whereby Spheris Holding became obligated to buy all the stock of Spheris. At the same time, Warburg executed an undertaking (the "Warburg Undertaking"), under which it alone became responsible for providing all of the equity capital required to finance Spheris Holding's purchase of Spheris. As of the time of these agreements, the sole equity

[12] Dexter Aff., Ex. O.
[13] Dexter Aff., Ex. R at 5-6. The Warburg-Soros Letter Agreement provided that Warburg and Soros would have equal representation on the Combined Entity's board. Dexter Aff., Ex. O at 2. Of the other five board seats, two went to Warburg and one was reserved for the Chief Executive Officer of the Combined Entity. The last two seats were to be filled with individuals reasonably acceptable to both Warburg and Soros. Dexter Aff., Ex. R at 5-6.
[14] Bredrup Dep. at 110.

owner of Spheris Holding was Warburg, and Warburg and Spheris Holding were the only parties contractually bound to Spheris and Parthenon.

In the final transaction, as ultimately structured, Warburg formed a new entity, Spheris Holding III, Inc. ("Spheris Holding III"), to which it contributed approximately $62 million in cash and all of the stock in Spheris Holding (the entity that held the rights to acquire Spheris) in exchange for two-thirds of Spheris Holding III's equity. Soros contributed approximately $32 million in cash and all of the stock of MTS (the entity that held the option to acquire HealthScribe) to Spheris Holding III in exchange for the other one-third of Spheris Holding III's equity. Spheris Holding III then contributed all of the cash it received from Warburg and Soros to Spheris Holding, which used that equity plus some bank debt to finance Spheris Holding's purchase of the Spheris stock from Parthenon. Spheris Holding III then caused MTS to consummate the HealthScribe Merger, which was financed entirely with bank debt.

During the process of developing this transaction, Soros made no effort to include the HealthScribe Preferred Holders as equity participants. The plaintiffs brought this case because they feel aggrieved by having been denied the right to buy any equity in the Combined Entity, Spheris Holding III. They assert counts for declaratory judgment, specific performance, and breach of contract. Each count involves a straightforward contention that Soros led an Equity Financing within the meaning of the Co-Investment Agreement and breached that Agreement by not offering the HealthScribe Preferred Holders equity (and other rights) in the Combined Entity.

## III. The Procedural And Contract Law Framework

Soros has moved for summary judgment, arguing that the undisputed facts of record demonstrate that there was not a Spheris Acquisition for which Soros led an Equity Financing within the meaning of the Co-Investment Agreement. As a result, Soros argues that the plaintiffs' claims must be dismissed.

Soros's motion for summary judgment is governed by Court of Chancery Rule 56. Under that familiar standard, judgment must be granted when a movant demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law.[15] The burden is on the moving party to prove the absence of a material issue of fact, and the court must review all evidence in the light most favorable to the non-moving party.[16] But once the moving party puts facts into the record, which, if undenied, entitle it to summary judgment, the burden shifts to the opposing party to present some evidence to show the existence of a material factual dispute.[17] If the opposing party is unable to do so, summary judgment must be granted.[18]

Resolving this summary judgment motion requires me to interpret the plain language of the Co-Investment Agreement, which provides that it is to be "governed by,

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[15] *E.g.*, *Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992).
[16] *Id.* at 10-11.
[17] *E.g.*, *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979); Court of Chancery Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.")
[18] *E.g.*, *Feinberg v. Makhson*, 407 A.2d 201, 203 (Del. 1979).

and construed in accordance with, the laws of the State of New York."[19] Under New York law, as in Delaware, "[t]he construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous."[20] The interpretation of an unambiguous contract is appropriate for determination by the court on summary judgment.[21]

In New York, "the essence of proper contract interpretation . . . is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract."[22] Determination of that intent can only be done by examining the document as a whole and "giving effect and meaning to every term of the contract."[23] That is, "[p]articular words should be considered, not as if isolated from the context, but in light of the obligation as a whole."[24] Where the terms of the contract, taken as an entirety, make the overarching intention of the parties' clear, "courts examining isolated provisions should then choose the construction which will carry out the plain purpose and object of the agreement."[25]

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[19] Dexter Aff., Ex. F at 6.
[20] *Estate of Hatch v. NYCO Minerals, Inc.*, 666 N.Y.S.2d 296, 298 (N.Y. App. Div. 1997); *see also Klair v. Reese*, 531 A.2d 219, 222 (Del. 1987).
[21] *Marinas of the Future, Inc. v. City of New York*, 450 N.Y.S.2d 839, 843-44 (N.Y. App. Div. 1982).
[22] *Reiss v. Fin. Performance Corp.*, 715 N.Y.S.2d 29, 34 (N.Y. App. Div. 2000).
[23] *Niagara Frontier Transportation Authority v. Euro-United Corp.*, 757 N.Y.S.2d 174, 176 (N.Y. App. Div. 2003).
[24] *Kass v. Kass*, 91 N.Y.2d 554, 566 (N.Y. 1998) (quotations omitted).
[25] *Id.* at 567 (quotations omitted).

## IV. The Conditions Giving Rise To The HealthScribe Preferred Holders' Right To Invest In The Combined Entity Never Came To Pass

### A. Soros Did Not Lead An Equity Financing As Defined In The Co-Investment Agreement

Although one can perhaps understand why the plaintiffs feel poorly done by, their claims clearly lack merit. The Co-Investment Agreement conditioned the HealthScribe Preferred Holders' right to subscribe to equity in the Combined Entity on the existence of an Equity Financing led by Soros. For there to be an Equity Financing, there first had to be a Spheris Acquisition, defined as an acquisition of Spheris *by Soros or a Soros affiliate*. Because there was never a Spheris Acquisition, there was never an Equity Financing for Soros to lead within the meaning of the contract. Indeed, precisely because there was never a Spheris Acquisition, Soros was never in a position to exercise the power to deliver to the HealthScribe Preferred Holders the rights that the Co-Investment Agreement expected Soros to be able to deliver in "leading" an Equity Financing.

As the undisputed facts show, Warburg won the Auction for Spheris and secured the right to purchase it. The contract by which Warburg finalized that right — the Spheris Purchase Agreement — was entered into between Parthenon and Spheris Holding at a time when Spheris Holding was owned solely by Warburg. Consistent with its having won the Spheris Auction, Warburg played the dominant role in the joint acquisition of HealthScribe and Spheris. For example, Warburg: (1) formed the holding company (Spheris Holding III) that issued the securities in exchange for the equity capital; (2) drafted (through its attorneys) the documents setting forth the terms and conditions of the transaction; (3) negotiated the terms of the Spheris Purchase Agreement

with the seller, Parthenon; (4) was alone responsible to Parthenon (through the Warburg Undertaking) for the full amount of the equity commitment for the acquisition of Spheris; (5) ultimately put up two-thirds of the equity capital; and (6) received drag along rights from Soros, the only other participant in the deal.

Because it lost the Spheris Auction and could not itself consummate a purchase of Spheris — i.e., a Spheris Acquisition — Soros was in a materially different position than the Co-Investment Agreement contemplated it would be in. The Co-Investment Agreement took care in defining a "Spheris Acquisition" and an "Equity Financing" and, under New York law, those unambiguous definitions cannot be ignored and must be given their plain meaning. Under them, it is clear that no Spheris Acquisition occurred because Soros did not acquire Spheris. Instead, Soros was able to participate only as a minority investor in the acquisition of Spheris on terms acceptable to Warburg because Warburg, as a result of having won the Spheris Auction, had the upper hand in the negotiations between it and Soros and controlled the entire transaction process.

Although Soros was able to secure for itself important rights in the final deal, those rights fall well short of the powers Soros was expected to have as a purchaser of Spheris and as the leader of an Equity Financing. The Co-Investment Agreement expected that Soros would be in the driver's seat and able to grant all of the rights that the Agreement provided for. Because Soros did not secure a Spheris Acquisition, it could not wield the clout that the Co-Investment Agreement contemplated.

Some examples illustrate this reality. First, the Co-Investment Agreement provided that in the event that Soros led an Equity Financing, Soros would be entitled to

receive drag along rights to force the HealthScribe Preferred Holders to join a transaction if Soros decided to sell its shares in the Combined Entity. Instead, Soros had to give those very same rights to Warburg. Second, the Co-Investment Agreement contemplated that Soros would be entitled to appoint all of the members of the Combined Entity's board of directors but would have to permit an observer appointed by the HealthScribe Preferred Holders to attend board meetings. Instead, Soros was only able to secure two out of a total of seven board seats, and Soros had no right to grant an observer access to the deliberations of the Combined Entity's board. Third, the Co-Investment Agreement contemplated that Soros or a Soros affiliate would enter into a definitive merger or purchase agreement for the Spheris Acquisition. Instead, Spheris Holding entered into the Spheris Purchase Agreement at a time when it was a wholly-owned subsidiary of Warburg. Fourth, the Co-Investment Agreement required Soros to provide the HealthScribe Preferred Holders with the same financial information that the Combined Entity was required to deliver to its senior lenders and to grant them access to the Combined Entity's management. But Soros did not have the legal right to cause those things to happen. Soros's ability to deliver depended entirely on the grace of Warburg.

Finally, and most importantly, the Co-Investment Agreement unambiguously would give the HealthScribe Preferred Holders the right to buy a full one-third of the Combined Entity's equity — the entire amount of the equity that Soros was entitled to under its deal with Warburg. Not only did Soros not have the power to grant this right, the very notion of it underscores why the Co-Investment Agreement plainly conditioned the HealthScribe Preferred Holders' investment rights on a Spheris Acquisition. In that

context, Soros could give the Preferred Holders' one-third of the equity and retain majority control for itself. If the plaintiffs were correct, Soros would be forced to act as the HealthScribe Preferred Holders' unpaid agent in negotiating with Warburg for a piece of the Spheris deal. Because, in the plaintiffs' view, the HealthScribe Preferred Holders are entitled to one-third of the equity of the Combined Entity, Soros would be left with nothing for itself. This bizarre result highlights the business purpose for the connection between the contractual definition of a Spheris Acquisition and the requirement that an acquisition defined in that precise manner come to pass as a condition precedent to the existence of an Equity Financing led by Soros.

Rather than grappling with the fundamental problem that afflicts their case, the plaintiffs instead have belabored the record with pages of self-serving testimony and arguments about what it means in general for someone to "lead" an equity financing. In so doing, the plaintiffs correctly point out that Soros was able to secure for itself important rights in its dealings with Warburg. These included the right to appoint some board members unilaterally and to share appointment authority with Warburg over other board seats. Moreover, Soros could and did pitch itself as playing a major role in the transaction that brought about the Combined Entity. Therefore, although the plaintiffs concede that Warburg had the upper hand and came out with a majority of the Combined Entity's equity, they contend that Soros also "led the Equity Financing," or at least that there is a material factual question in that regard.[26] In making that contention, the

[26] Plaintiffs' Opp. Br. at 21. In making that contention, the Plaintiffs also point to the following other material aspects of Soros's participation in the transaction: (1) Soros had the initial idea of

plaintiffs point to one among many potential dictionary definitions of the verb "to lead," defining it as "to play a principal or guiding role in,"[27] and attempt to cobble together (primarily from their own deposition testimony) a multi-factor, fact-intensive test (which they never completely spell out) for determining whether Soros led an Equity Financing.[28]

But the plaintiffs' submissions do not address the key issue. The issue is not whether, in ordinary commercial parlance, Soros was a leader in the transactions giving rise to the Combined Entity. The issue is whether, in the particular lexicon of the Co-Investment Agreement, Soros led an Equity Financing as defined in that Agreement. To be a leader in that context, Soros had to have engaged in a Spheris Acquisition because only by securing for itself the right to purchase Spheris could Soros wield the power to deliver the rights that the Co-Investment Agreement outlined, including not only full board control for itself but also the ability to grant the HealthScribe Preferred Holders one-third of the equity in the Combined Entity, access to books and records equal to those of the Combined Entity's senior lenders; and the right to send an observer to the Combined Entity's board meetings, among other things. Whether or not Wall Street would perceive Soros to be a leader along with Warburg in the transaction creating the

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combining HealthScribe and Spheris; (2) Soros held the option to buy HealthScribe; (3) Soros performed most of the due diligence for the acquisition of HealthScribe; (4) Soros guaranteed some of the debt that funded, in part, the acquisitions; (5) Soros put up one-third of the equity capital; (6) Soros became liable on a $2.5 million break-up fee in the event the purchase of Spheris by Spheris Holding did not close; and (7) Soros got two seats on Spheris Holding III's Board.

[27] *Id.* at 18 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

[28] *Id.* at 19-20.

Combined Entity, Soros was not a leader in the sense defined in the Co-Investment Agreement. Indeed, if there was anyone who led an equity financing in that contractual sense, it was Warburg, which alone had the right to determine what, if any, access other investors had to equity and other rights in the Combined Entity.

B. The HealthScribe Preferred Holders Got What They Bargained For

The plaintiffs assert that to find that the parties to the Co-Investment Agreement did not intend to grant the HealthScribe Preferred Holders rights in the circumstances of this case would defeat the underlying purpose of the Agreement.[29] The plaintiffs claim that the HealthScribe Preferred Holders agreed to sell their interest in HealthScribe for less than they believed it was worth in exchange for the right to participate in Soros's plan to combine HealthScribe with Spheris.[30] And although Soros lost the Spheris Auction, Soros, using its option to acquire HealthScribe, still played a substantial role in bringing about the very combination that it originally contemplated even though that combination took a different form, with Warburg, not Soros, as the majority investor. But when that happened, Soros did not take any steps to let the HealthScribe Preferred Holders buy some — say one-third? — of the shares Spheris secured in its deal with Warburg. Instead, once it lost the Spheris Auction, Soros simply proceeded as if the Co-Investment Agreement no longer had any force.

But the plaintiffs' contention that they have been denied a material part of the bargain they struck in agreeing to sell HealthScribe is inconsistent with the plain

[29] Plaintiffs' Opp. Br. at 14.
[30] *Id.*

language of the relevant contracts. The HealthScribe Merger Agreement, which created Soros's right to purchase HealthScribe was not conditioned on Soros's acquisition of Spheris or the granting of co-investment rights to the HealthScribe Preferred Holders. Moreover, the Co-Investment Agreement did not require Soros to acquire Spheris. In fact, the Co-Investment Agreement specifically disclaimed that obligation.[31] Soros's freedom of (in)action was, in fact, a crucial part of the deal because there was no way for Soros to know whether it would win the Spheris Auction or otherwise secure the right to purchase Spheris.[32] The plaintiffs admit that they would have no co-investment rights if Soros had decided not to or was unsuccessful in its attempts to buy Spheris — possibilities that all parties knew might happen. Yet, if either happened, Soros would still have had the right to buy HealthScribe.

As it turns out, Soros *was* unsuccessful in its attempts to buy Spheris. It lost the Spheris Auction and then used its asset — the option to buy HealthScribe — to negotiate for a minority position in the Combined Entity. What it did not do was secure a Spheris Acquisition and lead an Equity Financing as defined in the Co-Investment Agreement.

There is nothing intrinsically unfair about that. Soros came out of its deal with Warburg in a materially different position than the Co-Investment Agreement

[31] Dexter Aff., Ex. F at 5.

[32] The plaintiffs, in their brief and at oral argument, obsess over the false premise that Soros's motion can only be granted if the only way that Soros could have secured a right to purchase Spheris was in the Auction. Soros never makes that argument. Rather, Soros correctly contends that an Equity Financing within the meaning of the Co-Investment Agreement required a Spheris Acquisition, i.e., a purchase of Spheris by Soros or a Soros affiliate. The right to such an acquisition could have been secured by any number of means. As it turns out, however, Spheris used an auction process to sell itself, Warburg beat Soros in the auction, and Warburg secured for itself the right to acquire Spheris.

contemplated it would occupy as a leader of an Equity Financing, which was that Soros would have firm control of the Combined Entity for itself and thereby have the ability to share the opportunity for one-third of the equity with the HealthScribe Preferred Holders. In its deal with Warburg, Soros has only one-third of the equity and is subject to being drug along when Warburg wants. This different reality is not covered by the Co-Investment Agreement and Soros has received no contractually-precluded windfall.[33]

C. The Plaintiffs Are Not Entitled To Reformation

The plaintiffs' position is also weakened by their concession that they would accept as a remedy the opportunity to buy only one-third of Soros's one-third interest, or 11.11%, of the Combined Entity's equity. In other words, they would have me reform the Co-Investment Agreement to give them the right to one-third of whatever equity Soros was entitled to without regard to whether Soros led an Equity Financing.

But the plaintiffs do not make any argument as to why reformation would be an appropriate remedy in this case. Indeed, they have avoided casting their claim as one for reformation because under New York law, in a contract between sophisticated parties like these, "[t]he proponent of reformation must show in no uncertain terms not only that

[33] Importantly, this case does not involve any effort or scheme by Soros to avoid its obligations under the Co-Investment Agreement. One could imagine a different case in which Soros, wanting to avoid its Co-Investment Agreement obligations, surreptitiously conspired with Warburg to structure a transaction in which it would play a non-leading role with the purpose of excluding the HealthScribe Preferred Holders from the deal. But the plaintiffs have put forth no evidence of such a nefarious plan and have not made any such arguments in this case. Indeed, there is no record evidence of collusion in the Auction process. Soros bid at the Spheris Auction and lost to Warburg. It even later made a higher offer in a last minute attempt to outbid Warburg but, as stated, that offer was rejected. Only after losing the Auction to Warburg did Soros contact Warburg to suggest the joint venture that ultimately transpired.

mistake or fraud exists, but exactly what was agreed upon between the parties."[34] The plaintiffs have put forth no evidence that the actual agreement was anything other than that expressed in the plain language of the Co-Investment Agreement. The HealthScribe Preferred Holders' co-investment rights were contingent on Soros securing a Spheris Acquisition and leading an Equity Financing. The plain terms of the Co-Investment Agreement make clear that Soros did not do that.

Thus, the plaintiffs would have me fundamentally alter the deal they struck with Soros and grant them a right that easily could have been, but was not, included in the Co-Investment Agreement. The HealthScribe Preferred Holders could have sought to have the Co-Investment Agreement provide them with rights in the event that Soros was unable to secure for itself the right to purchase Spheris but was able to secure the opportunity to buy some of Spheris' equity from a party who did secure the right to purchase Spheris. Thus, the Agreement could have provided words to the effect that "if an entity other than Soros secures the right to purchase Spheris and Soros seeks the right to participate in an equity financing for an acquisition of Spheris led by that other entity, Soros shall use good faith efforts to ensure that the HealthScribe Preferred Holders can buy one-third of the equity offered to Soros at the same price as Soros." Of course, Soros might reasonably have been reluctant to agree to that term because it would limit its freedom of action and complicate its ability to seek to become a minority investor. Warburg might not have allowed Soros to invest if Soros was required to bring along other investors, especially where, as here, the HealthScribe Preferred Holders sought

[34] *South Fork Broadcasting Corp. v. Fenton*, 528 N.Y.S.2d 837, 839 (N.Y. App. Div. 1988).

informational and observational rights beyond those guaranteed to equity holders by the relevant entity law.

The fact that the Co-Investment Agreement could, as a linguistic matter, easily have covered the situation that occurred here cuts against the implication that what Soros did was proscribed by the terms of the Agreement as actually written or that the Agreement should be reformed to grant this additional right.

D. A Soros Affiliate Did Not Lead An Equity Financing

The plaintiffs' final argument against summary judgment is premised more closely on the language of the Co-Investment Agreement, but is just as detached from the commercial reality that the Agreement contemplated.

As is the case in most commercial contracts, the Co-Investment Agreement was written in a manner that prevented the use of affiliates to circumvent the obligations imposed in the Agreement. Thus, the Co-Investment Agreement clearly indicated that if an affiliate of Soros purchased Spheris and led an Equity Financing, then the HealthScribe Preferred Holders would be entitled to purchase one-third of the Combined Entity's equity.

Seizing on the affiliate language, the plaintiffs first argue that Spheris Holding III (arguably affiliated with Soros by virtue of Soros's one-third equity ownership of it) led an Equity Financing by raising the $94 million in cash and contributing that cash to Spheris Holding to effectuate the acquisition of Spheris. That argument is without force. Spheris Holding III was merely a passive instrumentality that, by its very nature, was incapable of leading anything in a meaningful way — it was just the vehicle through

which the equity financing was eventually accomplished. But more importantly, Soros had no interest in Spheris Holding III until *after* the actual equity financing occurred. Even if Spheris Holding III led the equity financing, it was not a Soros affiliate when it did so.

Alternatively, the plaintiffs claim that Warburg itself was an affiliate of Soros by virtue of Warburg's and Soros's joint ownership of Spheris Holding III. That argument, of course, concedes that Warburg led the equity financing. But, that concession aside, again, Warburg and Soros had no relationship before the two firms struck a deal to jointly acquire and combine Spheris and HealthScribe. Only as a result of the transaction at issue in this case did Soros become a minority investor in a company in which Warburg is the majority investor.

The word "affiliate" has many gradations in American commercial law.[35] In close cases, determining whether one entity is an affiliate of another might be a difficult task.[36] But it is not so difficult here, where the purpose of the Co-Investment Agreement's reference to affiliates is clearly not implicated by Soros's joint venture with Warburg to buy Spheris and HealthScribe or by the joint venture's resulting corporate structure.

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[35] *Compare* SEC Rule 10b-18(a)(1), 17 CFR § 240.10b-18(a)(1) (defining an affiliate of an issuer of a security as "one who controls, is controlled by, or is under common control with [the issuer]") *with* NASD Rule 2720(b)(1)(B)(i) (providing that an entity is presumed to be an affiliate of any person or entity that owns 10% or more of its voting securities); *see also generally Hopkins v. Howard*, 930 So.2d 999 (La. App. 2006) (surveying various legal and non-legal dictionary definitions of the term affiliate and focusing on the purpose of the relevant statutes in selecting which definition to apply).

[36] *See* Joseph G. DeGaetano, Note, *The Need For A Clearer Definition of "Affiliate" in Rule 144 Under the Securities Act of 1933: An Economic Argument*, 33 GA. L. REV. 513, 518 (1999) (noting that under federal securities laws, whether one entity is an affiliate of another often turns on an amorphous and unpredictable facts and circumstances test and arguing that there is a need for clearer guidelines).

Agreements like the Co-Investment Agreement reference affiliates in order to close an expoitable loophole that the law's respect for the separate dignity of distinct entities with common ownership and control might otherwise be thought to open. As plainly used in the Co-Investment Agreement, the term affiliate refers to any instrumentality under the direction of Soros that Soros might use to purchase Spheris. The obvious intent was to prevent Soros from winning the right to purchase Spheris through an affiliate, acquiring for its affiliate the powers contemplated by the Co-Investment Agreement, and then denying the HealthScribe Preferred Holders their one-third of the equity on the pretense that another entity, rather than Soros, was leading an Equity Financing.

In the Spheris Auction, Warburg prevailed. Consistent with that reality, Warburg and its wholly-owned subsidiary Spheris Holding entered into the Spheris Purchase Agreement at a time when Soros had no ownership interest in Spheris Holding. And, as mentioned, Soros did not even receive its minority equity interest in Spheris Holding III until the equity financing for the purchase of Spheris was completed. Before that, Spheris Holding III was wholly-owned by Warburg. That the ultimate transaction resulted in Soros receiving a minority stake does not mean that within the meaning of the Co-Investment Agreement, a Soros affiliate made a Spheris Acquisition.

In so concluding, the facts as revealed by the summary judgment record are important. The record is undisputed that Warburg and Soros competed, by bidding against each other, in good faith in the Spheris Auction. Their ultimate collaboration

only came about when Soros lost and scrambled to preserve some of the value it thought it could secure from its idea of putting HealthScribe and Spheris together.

That the negotiations between Soros and Warburg were conducted at arm's length is also important. If Soros had had an existing joint venture with Warburg that Soros set about using to acquire Spheris, the plaintiffs would have a strong case. The Co-Investment Agreement's reference to affiliates was inserted specifically to address that type of ruse — a scenario in which an entity under the direction of Soros secured the ability to lead an Equity Financing in the sense contemplated by the Co-Investment Agreement and then denied the HealthScribe Preferred Holders a chance to participate. But what it clearly was not intended to do was to treat a bona fide competitor of Soros, who unilaterally secured the right to purchase Spheris, as an "affiliate" of Soros simply because the competitor cut Soros in as a minority investor after arm's-length bargaining following that competitor's victory in the Spheris Auction.

## V. Conclusion

For all of the foregoing reasons, Soros's motion for summary judgment is granted and the plaintiffs' claims are dismissed. IT IS SO ORDERED.