IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AHS NEW MEXICO HOLDINGS, INC., a New Mexico corporation,	)	
Plaintiff and Counterclaim Defendant,	)	
v.	)	Civil Action No. 2120-N
HEALTHSOURCE, INC., a New Hampshire corporation,	)	
Defendant and Counterclaimant.	)	

MEMORANDUM OPINION

Submitted: October 31, 2006
Decided: February 2, 2007

Andre G. Bouchard, Esquire, James G. McMillan, III, Esquire, BOUCHARD MARGULES & FRIEDLANDER, P.A., Wilmington, Delaware; C. Mark Pickrell, Esquire, Claire M. Goodman, Esquire, WALLER LANSDEN DORTH & DAVIS, LLP, Nashville, Tennessee, *Attorneys for Plaintiff and Counterclaim Defendant AHS New Mexico Holdings, Inc.*

Alan J. Stone, Esquire, Kevin M. Coen, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Jeffrey Kilduff, Esquire, Todd Rosenberg, Esquire, O'MELVENY & MYERS LLP, Washington, DC, *Attorneys for Defendant and Counterclaimant Healthsource, Inc.*

PARSONS, Vice Chancellor.

This action is before the Court on cross-motions for summary judgment relating to a Stock Purchase Agreement entered into by the parties. Plaintiff, AHS New Mexico Holdings, Inc. ("AHS"), filed its complaint on May 1, 2006 for specific performance of a provision in its contract to purchase the stock of Lovelace Health Systems, Inc. ("Lovelace") from Defendant, Healthsource, Inc. ("Healthsource"). The contract provides for a post-closing purchase price adjustment based on a closing balance sheet to be provided by the seller, Healthsource, no more than sixty days after the closing date. The contract further provides that, if the parties are unable to agree on the amount of the adjustment, either party may require their dispute to be submitted to an independent accounting firm for a binding determination. AHS claims that the contract gives it the right to submit all disputed items relating to the determination of the final purchase price to the independent accounting firm for resolution. In its counterclaim, Healthsource contends that by using the dispute resolution procedures specified in the contract the parties already have resolved most of the disputed items AHS identified, and thus can submit only the few remaining unresolved items to the accounting firm.

For the reasons stated, the Court concludes that the existence of genuine issues of material fact preclude granting either party all of the relief they seek in their respective motions for summary judgment. Partial relief under Court of Chancery Rule 54(d) is appropriate, however, in that the undisputed facts show that the only issues the parties can submit to the independent accounting firm in connection with obtaining a determination of the adjusted purchase price are the issues timely raised by AHS under the contract. In addition, the Court denies the aspect of Healthsource's motion for

summary judgment that seeks to limit the issues subject to such referral to the five items it contends remain unresolved. Disputed issues of fact exist as to whether AHS ever agreed to resolve individually and unconditionally some or all of the issues Healthsource seeks to exclude, even if the parties failed to agree on the final adjusted purchase price.

I. BACKGROUND

A. Facts

AHS, a New Mexico corporation, is a subsidiary of Ardent Health Services LLC, a health care provider. Healthsource is a New Hampshire corporation and a wholly-owned subsidiary of Cigna Heath Corporation.

On July 1, 2002, Healthsource entered into a Stock Purchase Agreement (the "Agreement") with AHS to sell to AHS all of the issued and outstanding stock of Lovelace.[1] The parties entered into a First Amendment to Stock Purchase Agreement[2] on January 15, 2003. Under these documents, AHS agreed to acquire Lovelace in exchange for an initial purchase price of $211,000,000[3] and subject to initial and post-closing purchase price adjustments to be made by the parties.[4] Under the language of the Agreement, AHS must deliver to Healthsource an initial cash "Purchase Price" in the

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1 Compl. ¶¶ 6-7; Ans. and Countercls. ¶¶ 6-7.

2 Neither party disputes any language in the First Amendment for purposes of the cross-summary judgment motions. Accordingly, unless otherwise noted, the term "Agreement" refers both to the Stock Purchase Agreement itself and the First Amendment.

3 Agreement § 2.4. Among other changes not pertinent here, the First Amendment modified the amount of the Purchase Price. Amendment at ¶ 2.

4 Compl. ¶¶ 8-9; Agreement § 2.4.

amount of $211 million, subject to an "Initial Purchase Price Adjustment," defined under Section 2.6, and a "Final Purchase Price Adjustment," defined under Section 2.7.[5] In pertinent part, Section 2.5 of the Agreement states:

> The Purchase Price shall be adjusted on or prior to the Closing Date in accordance with the provisions of Section 2.6 (the "Initial Purchase Price Adjustment") and following the Closing Date in accordance with the provisions of Section 2.7 (the "Final Purchase Price Adjustment"). Any dispute relating to the final determination of such increases or decreases in the Purchase Price shall be resolved in accordance with the dispute resolution procedure set forth in Section 2.8.[6]

Pursuant to Section 2.6, the Initial Purchase Price Adjustment takes effect on the date of closing and reflects any changes of Adjusted Net Worth[7] between the Balance Sheet Date (defined as December 31, 2001) and the "Interim Balance Sheet," or the most recently ended calendar quarter before the closing date for which financial statements are available.[8] Thus, the Initial Purchase Price Adjustment is determined based on the Interim Balance Sheet.

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5 Agreement §§ 2.4, 2.5; Amendment at ¶ 2.

6 Agreement § 2.5 (emphasis omitted).

7 The Agreement defines "Adjusted Net Worth" to mean, "as of the date of determination, the adjusted net worth of the Company as determined in accordance with Schedule 2.6." Agreement § 1.1. Neither party submitted Schedule 2.6, but the Adjusted Net Worth generally appears to be calculated by subtracting total liabilities from total assets sold. Affidavit of Stephen C. Petrovich ("Petrovich Aff.") Ex. C. Further, Section 2.6 states that Adjusted Net Worth as of the Balance Sheet Date was $85,751,681.

8 Agreement §§ 1.1, 2.6.

Section 2.7 provides that, "[f]or purposes of the Final Purchase Price Adjustment, Adjusted Net Worth shall be determined based on the Closing Balance Sheet." Section 2.7 also requires that Healthsource provide AHS with a Closing Balance Sheet within sixty days of the Closing Date, which includes the calculation of Adjusted Net Worth as of the Closing Date.

Section 2.8 of the Agreement then sets forth certain procedures for identifying and resolving disputes relating to the Closing Balance Sheet and the related Adjusted Net Worth. Specifically, Section 2.8, as modified by the First Amendment, states that:

> Within sixty (60) days after Seller's delivery of the Closing Balance Sheet, Buyer shall, in a written notice to Seller, either accept or describe in reasonable detail any proposed adjustments to the Closing Balance Sheet and the reasons therefore, and shall include pertinent calculations. If Buyer fails to deliver notice of acceptance or objection to the Closing Balance Sheet within such sixty (60) day period, Buyer shall be deemed to have accepted the Closing Balance Sheet. Representatives of Seller and Buyer shall meet, confer, and endeavor in good faith to resolve any disputed matters within thirty (30) days after receipt of Buyer's notice of objections. In the event that Seller and Buyer are not able to agree on Adjusted Net Worth within thirty (30) days from and after the receipt by Seller of any objections raised by Buyer, Seller and Buyer shall each have the right to require that such disputed determination be submitted to [a mutually agreed upon] independent certified public accounting firm . . . . The results of such accounting firm's report shall be binding upon Seller and Buyer, and such accounting firm's fees and expenses for each such disputed determination shall be borne equally by the parties. The determination of such firm with respect to such dispute shall be based solely on presentations by Seller and Buyer and shall not be by independent review. . . .[9]

[9] Agreement § 2.8. The First Amendment modifies the time requirements of Section 2.8 ("The text of Section 2.8 of the Agreement is hereby amended to (i)

After the closing on the Agreement, the parties did disagree on the Adjusted Net Worth of Lovelace. On March 13, 2003, Healthsource provided a Closing Balance Sheet and calculation of Adjusted Net Worth to AHS. Consistent with the specified time period, AHS's representative Mary Hughes sent a letter to Healthsource on or about May 12, 2003 describing AHS's objections to the Adjusted Net Worth calculation (the "Notice").[10] The Notice and attachments identified a number of objections to the Closing Balance Sheet. The Notice itself summarized under separate subheadings, such as "Medical Claims Payable (IBNR)" and "Patient Accounts Receivables" ten separate "principal concerns" AHS had with certain entries. Similarly, an attachment to the Notice listed approximately twenty proposed "Net Worth Settlement Adjustments." Over the next three years, AHS and Healthsource met, conferred and endeavored to resolve the dispute regarding Adjusted Net Worth but failed to resolve all of AHS's objections to Healthsource's calculation of that figure.

On or about February 6, 2006, AHS indicated its intention to submit the dispute to the independent accounting firm ("Crowe Chizek" or the "independent accountant") as provided in Section 2.8.[11] AHS took the position that it was entitled to seek such

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replace the references to 'thirty (30)' in the first and second sentences with 'sixty (60),' and (ii) replace the references to 'twenty (20)' in the third and fourth sentence with 'thirty (30).'") Amendment at ¶ 9.

[10] Petrovich Aff. Ex. 4. The letter is supplemented by a spreadsheet computing Lovelace Net Worth for December 2003, a line-itemization of twenty Net Worth Settlement Adjustments and a Claim Reserve Summary as of April 30, 2003.

[11] Section 2.8 stated that Deloitte & Touche LLP would determine the Adjusted Net Worth, unless the firm had been engaged by either party in the preceding three years. *See* Compl. ¶¶ 16-17 and Ans. and Countercls.¶¶ 16-17. In fact, Deloitte &

resolution of all of its objections to the Adjusted Net Worth. In contrast, Healthsource argued that only the five issues that it claimed still remained unresolved after the parties' previous negotiations could be referred to the independent accountant. Claiming that any agreements on specific objections were tentative only and contingent on full resolution of the Adjusted Net Worth dispute, AHS refused to agree to any limitation on the scope of the issues to be presented to the independent accountant.

B. Procedural History

Pursuant to Section 16.3(b) of the Agreement, Healthsource consented to the exclusive jurisdiction of the Court of Chancery and federal courts of Delaware to enforce the Agreement. AHS filed a Complaint in this Court on May 1, 2006, seeking specific performance of the Agreement and a declaration that the Agreement required the submission of all the issues listed in the Notice to Crowe Chizek. On June 13, 2006, Healthsource filed an Answer and Counterclaims, seeking a declaration that the only issues included within Section 2.8 and eligible for determination by Crowe Chizek were the objections in the Notice still remaining in dispute between the parties. AHS replied to Healthsource's Answer and Counterclaims on July 10, 2006. Thereafter, on August 4, 2006, AHS moved for summary judgment. Healthsource responded to that motion and filed a cross-motion for summary judgment on September 27, 2006.[12]

Touche LLP did work for one of the parties in the three years preceding the commencement of this dispute. Consequently, the parties agreed to retain Crowe Chizek and Company LLC ("Crowe Chizek") instead in March, 2006. Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") ¶ 8; Ans. and Countercls. ¶ 17.

[12] Healthsource's cross-motion also disputes AHS's contention that no issues of material fact exist. Accordingly, Ct. Ch. R. 56(h) does not apply to this case.

II. ANALYSIS

A. Interpretation of the Stock Purchase Agreement

Both parties seek summary judgment as to the meaning of the Stock Purchase Agreement. Under Court of Chancery Rule 56(c), a court may grant a motion for summary judgment when there are no questions of material fact and the moving party is entitled to judgment as a matter of law.[13] Under general principles of contract law, interpretation of contractual language is purely a question of law.[14]

The threshold question for the court is whether a contract is ambiguous or reasonably subject to more than one meaning.[15] Delaware courts use the "objective theory" of contract interpretation, meaning that they interpret a contract from the perspective of an objective and reasonable third party.[16] A court may determine that the contract is unambiguous on its face. Upon such a determination, Delaware courts give the disputed terms their ordinary and usual meaning.[17] Summary judgment, then, is often

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13 Ct. Ch. R. 56(c); *Bryan v. Moore*, 863 A.2d 258, 260 n.2 (Del. Ch. 2004); *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

14 *See Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 Del. Ch. LEXIS 182, at *50 (Oct. 11, 2006); *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991).

15 *Energy Partners*, 2006 Del. Ch. LEXIS 182, at *52.

16 *Id.* at *51. In particular, "a contract is not ambiguous in a legal sense merely because the parties in litigation differ on its meaning or construction. Rather, contract ambiguity exists only when the controverted provisions are fairly susceptible of different interpretations or have two or more different meanings." *Id.*

17 *Carrow v. Arnold*, 2006 Del. Ch. LEXIS 191, at *22 (Oct. 31, 2006).

appropriate when enforcing unambiguous contracts, since there is no need to resolve material disputes of fact.[18]

A court may determine, however, that the "controverted provisions are fairly susceptible of different interpretations or have two or more different meanings."[19] When that occurs, ambiguity exists and the court may consider extrinsic evidence to assess the parties' intentions.[20] If relevant facts are controverted such that adjudication cannot be made as a matter of law, the motion for summary judgment must be denied.

B. AHS and Healthsource's Contentions

In its motion for summary judgment, AHS contends that Section 2.8 of the Agreement unambiguously authorizes it to submit all issues identified in the Notice to the independent accountant for review and assessment, regardless of any less than fully successful negotiations that occurred between the parties.[21] In support of this argument,

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18 *See Cantera v. Marriott Senior Living Servs., Inc.*, 1999 Del. Ch. LEXIS 26, at *9 (Feb. 18, 1999).

19 *Energy Partners*, 2006 Del. Ch. LEXIS 182, at *52-53.

20 *Id.* at *53.

21 In their opening brief, Plaintiff also suggested that issues outside of those listed in the Notice may be brought to Crowe Chizek as part of the determination of Adjusted Net Worth. *See* Pl.'s Mot. ¶¶ 16, 18, 20; *see also* Pl.'s Reply Br. in Support of its Mot. for Summ. J. and Answering Br. in Opp. To Def.'s Cross-Mot. for Summ. J. ("Pl.'s Reply Br.") at 5 ("Section 2.8 does not, for example, limit the parties' presentations to facts known as of the date of the Closing Balance Sheet, as of the date of the Notice or as of any other particular date. It does not bar AHS from presenting what may be highly material information it was only able to discover after submitting its Notice."). At argument, however, Plaintiff's attorneys clarified to the Court that, under their interpretation of the Agreement, the issues that could be referred to the independent accountant would be limited to

AHS relies on the following language in Section 2.8: "In the event that Seller and Buyer are *not able to agree on Adjusted Net Worth* . . . Seller and Buyer shall each have the right to require that *such disputed determination* be submitted to the independent public accounting firm . . . ."[22] According to AHS, the inclusion in the Agreement of the word "such" to describe "determination" excludes a plural, or multiple, analysis. Consequently, AHS contends that the word "determination" refers to Adjusted Net Worth and that, as a result, the Agreement unequivocally means that 1) Crowe Chizek's scope of authority is to determine Adjusted Net Worth, and that 2) absent an agreement on all the subsidiary issues listed in the Notice, AHS has the right to submit all of those issues to Crowe Chizek for resolution.

For example, AHS identified "IBNR,"[23] or Medical Claims Payable, as an item in dispute in the Notice and attached a spreadsheet reflecting their analysis of that item. AHS contends that the language of the Agreement does not contemplate any limitation on the analysis of such an item, either because of good faith discussions between the parties or because the Notice indicated that the amount in dispute on IBNR and related reserves

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those issues in the Notice. AHS reserved the right, however, to try to present new or additional evidence regarding those issues to the independent accountant.

22 Pl.'s Reply Br. at 3 (emphasis in brief); Petrovich Aff. Ex. 1.

23 The accounting term IBNR stands for "incurred but not reported" and describes the estimated sum that the health plan must set aside to cover liability for medical claims that have not yet been filed by policyholders but that the company anticipates will be paid at some time in the future. *See generally* Pl.'s Reply Br. at 6 and the Notice at 1 (paragraph describing AHS's concerns relating to IBNR).

was $3,523,000.[24] Rather, AHS contends that an item such as IBNR is a component of Adjusted Net Worth and that to enable Crowe Chizek to determine Adjusted Net Worth, each party must be able to submit the information they consider relevant to a determination of such subsidiary items.

Healthsource also contends that the language of the Agreement is unambiguous. Healthsource, however, first interprets the language of Section 2.8 as limiting all relevant objections submitted to the independent accountant to those set forth within sixty days after its delivery of the Closing Balance Sheet. It argues that the Agreement excludes any objections not raised within that time. As a corollary, Healthsource also contends that Section 2.8 precludes either party from submitting to the independent accountant any information that did not become available until after the time periods specified in that Section. Additionally, Healthsource argues that the language of Section 2.8 requires the parties to "meet, confer and endeavor in good faith to resolve any disputed matters." Healthsource contends that allowing AHS to submit all issues raised in the Notice without regard to the resolution of certain of those issues during the meet and confer process would undermine the requirement that the parties meet and confer in good faith and effectively render the Agreement language internally inconsistent. Positing that, to the extent feasible, contracts must be read to give all provisions effect,[25] Healthsource contends that the only issues subject to a determination by Crowe Chizek are those issues that have not yet been resolved between the parties. According to Healthsource, those

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[24] *See* n.21, *supra*.

[25] *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985).

issues involve: 1) $3,180,000 in IBNR; 2) $791,000 in Patient Accounts Receivable; 3) $249,000 in NM Cancer Alliance; 4) $22,000 in CBH Claim Accrual; and 5) $134,000 in AP-Quest Advertising.[26]

At argument, Healthsource further contended that subsequent language of Section 2.8 supports its interpretation of the Agreement. In particular, Healthsource cites to the language providing that the "results of such accounting firm's report shall be binding upon Seller and Buyer, and such accounting firm's fees and expenses for each such disputed determination shall be borne equally by the parties."[27] In contrast to AHS's construction of "such disputed determination" discussed earlier, Healthsource contends that the modifying word "each" in the phrase "each such disputed determination" must contemplate the possibility of more than one determination, therefore supporting its view that Section 2.8 means that only those issues not previously resolved by the parties may be submitted to the independent accountant.[28]

Thus, in the example of IBNR, Healthsource seeks to limit the independent accountant's review to the parties' respective positions when the meet and confer process

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[26] Def.'s Br. In Opp. To Pl.'s Mot. for Summ. J. and in Support of Def.'s Mot. for Summ. J. ("Def.'s Main Br.") at 6; Petrovich Aff. Ex. 5. Healthsource's list not only excludes a number of issues AHS intends to pursue, but also, in the case of some of the issues Healthsource recognizes, narrows the scope of the financial discrepancy between the parties.

[27] Agreement § 2.8.

[28] In response, AHS contends that the phrase "each such disputed determination" refers to the parties' ability to contest either the Initial Purchase Price Adjustment under Section 2.6 or the Adjusted Net Worth based on the Closing Balance Sheet under Section 2.8.

ended. Since at that time Healthsource had proposed a decrease in IBNR of $2,700,000 and AHS allegedly proposed an increase of $480,000, according to Healthsource, it seeks to limit Crowe Chizek's determination of IBNR to choosing a number within that range.[29] Thus, Healthsource construes the Agreement as limiting the scope of issues AHS may pursue to those specifically enumerated in the Notice and attached calculations and not resolved during the meet and confer process. Healthsource further objects to any attempt by AHS to submit actual data accrued over the past three years to rebut the initial calculations of IBNR, arguing that it would undermine the purposes of the Agreement. Ironically, however, Healthsource simultaneously argues that it should not be bound by its Closing Balance Sheet, but rather should be able to claim a $2,700,000 adjustment it did not raise until shortly after it received the Notice.

C. Is the Stock Purchase Agreement Ambiguous?

The disagreement about the proper interpretation of the Agreement is limited in nature. In particular, the parties do not dispute the formation of a valid contract and limit their arguments to Sections 2.5 through 2.8 of the Agreement. Neither party suggests ambiguity in the contract language. Nor does either party dispute that the Notice constitutes proper notice of proposed adjustments within the meaning of Section 2.8. Rather, the parties disagree about the construction of Section 2.8 as it pertains to the effect of their meet and confer efforts on the scope of the issues that may be presented to Crowe Chizek. Thus, I first must determine whether Sections 2.5 to 2.8 of the

[29] AHS denies that their position on IBNR is that it was understated by $481,000. Pl.'s Reply Br. at 6 n.3.

Agreement are ambiguous in that regard, or whether the parties merely disagree as to the meaning of those sections.

Having considered the pertinent sections of the Agreement and the parties' arguments, I do not find the contract language to be ambiguous, in the sense that Section 2.8 is "reasonably or fairly susceptible" to multiple interpretations. Instead, I conclude that Section 2.8 clearly manifests the parties' intentions to establish a mechanism to resolve disputes over the Adjusted Net Worth of Lovelace based on the Closing Balance Sheet. The first sentence in Section 2.8 frames the section as granting an option to Buyer AHS to describe any adjustments to the Closing Balance Sheet it seeks within sixty days after receiving it. If the Buyer fails to identify any adjustments within that timeframe, it is deemed to have accepted the Closing Balance Sheet. Thus, I find that Section 2.8 unambiguously limits any adjustments to the Closing Balance Sheet that could be considered in a dispute resolution proceeding before the independent accountant to those issues timely raised by the Buyer under that Section. In this respect, I reject any implication by AHS that Section 2.8 contemplates issues extending beyond those listed in the Notice.

A second possible source of ambiguity relates to Healthsource's argument that allowing AHS to submit to the independent accountant issues that, according the Healthsource, already have been resolved would render that aspect of Section 2.8 meaningless. Taken to its extreme, this argument would mean that if the Buyer timely identified ten objections to the Closing Balance Sheet, it could only take fewer than ten objections to the accountant. A meet and confer requirement, however, does not mean

that the parties must agree on something. The language of Section 2.8 is entirely consistent with this truism. Moreover, nothing in Section 2.8 suggests that the parties must decide to agree or disagree on each of the Buyer's objections independently. Indeed, the Section implies just the opposite. That is, even though the parties ultimately must resolve each of the Buyer's objections by agreement or through a determination by the independent accountant to arrive at the Adjusted Net Worth, nothing in Section 2.8 precludes a Buyer from insisting that, absent a final settlement on the Adjusted Net Worth, it is entitled to present all of its objections to the independent accountant.

AHS and Healthsource each rely on specific terms within Section 2.8 to support their differing views of its meaning. AHS emphasizes the phrase "disputed termination" in the fourth sentence of Section 2.8, which reads:

> In the event that Seller and Buyer are not able to agree on Adjusted Net Worth within thirty (30) days from and after the receipt by Seller of any objections raised by Buyer, Seller and Buyer each shall have the right to require that such disputed determination be submitted to the independent certified public accounting firm … for computation or verification in accordance with the provisions of this Agreement.

According to AHS, that reference to "disputed determination" means the determination of Adjusted Net Worth. The argument is persuasive, but it largely begs the question of what subsidiary issues may be presented to the independent accountant.

Healthsource points to a related term, "each such disputed determination," in the next sentence of Section 2.8 as supporting its view that multiple issues can be submitted to Crowe Chizek and that it may have to make more than one determination.[30] That

[30] See Transcript of Argument on October 31, 2006 ("Tr.") at 49.

sentence states: "The results of such accounting firm's report shall be binding upon Seller and Buyer, and such accounting firm's fees and expenses for each such disputed determination shall be borne equally by the parties."

A close review of the relevant provisions of the Agreement, Sections 2.5 to 2.8, reveals that they are not a model of clarity. Nevertheless, as relates to the issues before me, I find that those provisions and Section 2.8, in particular, are not ambiguous. Section 2.8 unambiguously provides that, if the parties fail to resolve their disputes over the objections to the Closing Balance Sheet, they each may submit the ultimate dispute over the Adjusted Net Worth and any properly noticed subsidiary issues to the independent accountant for resolution.[31] The parties are free to agree to resolve any of those subsidiary issues without the need to submit them to Crowe Chizek or even to withdraw them later from their purview before Crowe Chizek reaches a final determination on Adjusted Net Worth.[32] In the event of a dispute as to whether any such agreement was

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[31] The parties disagree on the number of issues identified in the Notice. AHS contends that the Notice identifies at least twenty objections, relying on a list of twenty "Net Worth Settlement Adjustments" attached to the Notice. Def.'s Main Br. at 1. Healthsource asserted there were only ten issues, presumably based on the ten subheadings in the text of the Notice. For purposes of the pending motions, however, I need not determine the specific number of issues. Rather, I conclude that the issues that AHS timely submitted to Healthsource in the form of its Notice and attachments define the scope of the issues that may be submitted to the independent accountant for purposes of determining Adjusted Net Worth, less any issues that may be shown to have been resolved by a binding agreement of the parties.

[32] *See* Agreement § 2.8, which provides: "Appropriate payment shall be made by Buyer or Seller, as applicable, in immediately available funds promptly upon agreement of Buyer and Seller on the amount of Adjusted Net Worth as of the Closing Date or determination of Adjusted Net Worth in accordance with this Section 2.8." (Emphasis omitted.)

reached, however, the party claiming the existence of an agreement to resolve a subsidiary issue would have the burden of proving it.

I also find that the Agreement reflects a general intention of the parties to limit the evidence presented to the independent accountant to facts known or reasonably knowable as of the first half of 2003. This time period roughly corresponds to and encompasses the sixty days after the closing on or about December 31, 2002 for Healthsource to provide AHS with a Closing Balance Sheet, the sixty days for AHS to provide its proposed adjustments to the Closing Balance Sheet, and the thirty days for the parties to meet and confer regarding those adjustments. If a party attempts to submit evidence to the independent accountant of facts that were not known or reasonably knowable as of the end of the first half of 2003, that evidence should not be considered. Allowing the parties to rely on things that occurred after that time period would effectively thwart the limitation of issues contemplated by the Agreement.

The propriety of Healthsource's attempt to revise its Closing Balance Sheet by adjusting IBNR in its favor in the amount of $2,701,000 shortly after receiving AHS's May 12, 2003 Notice is a question that the independent accountant will have to resolve. Because the Court has construed Section 2.8 as reflecting an intent to limit the Buyer, AHS, to the objections described in its Notice within sixty days of receipt of the Closing Balance Sheet, it would be reasonable to conclude that the Seller, Healthsource, likewise is bound by its Closing Balance Sheet. As I read Section 2.8, however, it gives the independent accountant sufficient authority to consider whether Healthsource can demonstrate that its seemingly untimely adjustment meets the notice requirements

reflected in that provision. Furthermore, if Crowe Chizek allows that adjustment as not inconsistent with Section 2.8, the Court would expect it to apply the same general rationale in assessing any comparable modifications sought by AHS.

Therefore, I conclude that Section 2.8 of the Agreement is unambiguous. The language clearly limits the outer boundaries of disputes the parties may submit to the independent accountant to those which Buyer described within the sixty day period following the delivery of the Closing Balance Sheet. The language limits the substantive scope of the issues and timeframe of admissible evidence to be presented to the independent accountant. The section also authorizes either party to submit Adjusted Net Worth to Crowe Chizek after at least thirty days of good faith negotiations. The language as written, however, does not preclude a party from submitting every subsidiary issue relating to the adjustments to the Closing Balance Sheet timely noticed by the Buyer to the independent accountant. Based on these determinations, I do not find the language of the Agreement to support fully the interpretations of Section 2.8 advanced by either AHS or Healthsource.

D. Did the Parties Agree to Resolve Certain of the Subsidiary Issues?

As part of its cross motion, Healthsource seeks summary judgment that the parties agreed to resolve all the subsidiary issues raised in the Notice except for the five issues identified in Healthsource's counsel Todd Rosenberg's March 23, 2006 letter (the "Rosenberg Letter").[33] Thus, Healthsource seeks a declaration that the only items that may be submitted to Crowe Chizek for a binding determination are those five items.

[33] Petrovich Aff. Ex. 5.

The evidence Healthsource relies on is limited. In its main brief in support of its cross motion Healthsource cited only the Rosenberg Letter, a December 2, 2004 letter from Nancy Jones, an attorney for AHS, to Jeff Kilduff, an attorney for Healthsource,[34] and a series of e-mails exchanged between the parties' counsel from March 23 to 27, 2006.[35] In its reply brief, Healthsource also relied on a concurrently filed affidavit of Mary Hughes, the Healthsource representative primarily responsible for negotiating with AHS, and a document Hughes referred to as the "Ardent Spreadsheet."[36] Healthsource further argues that AHS "offer[ed] no evidence to show that the resolutions [of certain subsidiary issues] were intended to be anything but binding."[37]

In response to Healthsource's cross motion, AHS contends that the negotiations between the parties were tentative and that no definitive agreement was ever reached. Further, AHS contends that the Rosenberg Letter Healthsource relies upon is inadmissible hearsay and conclusory in nature.[38]

In a contract dispute, once a movant demonstrates that the relevant language is unambiguous, the burden then shifts to the nonmoving party to prove that there are still

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34 Affidavit of Kevin M. Coen ("Coen Aff.") Ex. 1.

35 Petrovich Aff. Ex. 6.

36 Hughes Aff. Ex. 1.

37 Def.'s Reply Br. at 5.

38 Pl.'s Reply Br. at 10.

issues of fact remaining that would otherwise preclude an entry of summary judgment.[39] Where issues of fact exist, a court must view the facts in the light most favorable to the nonmoving party.[40] Summary judgment is appropriate when the moving party has met the burden of showing that no material question of fact exists.[41]

Having carefully considered all of the evidence relied upon by Healthsource in support of its cross motion for summary judgment, I find that AHS has shown that a material issue of fact exists as to whether the parties reached a binding agreement on any of the subsidiary issues identified in the Notice. As AHS emphasizes, the March 23, 2006 Rosenberg Letter is hearsay. It also is self-serving, conclusory and too late to be of much use in determining the parties' intentions when they reached the alleged agreements on certain subsidiary issues.[42] Thus, the Rosenberg Letter in and of itself is not sufficient to support Healthsource's motion.

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39 *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1994 Del. Super. LEXIS 709, at *3 (July 27, 1994); *see Cantera v. Marriott Senior Living Servs., Inc.*, 1999 Del. Ch. LEXIS 26, at *10 n.2 (Feb. 18, 1999)("once the moving party has shown that there are no genuine issues of material fact for trial, the burden shifts to the non-moving party to show that there are material issues of fact") (citing *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979)).

40 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

41 *Advanced Litig., LLC v. Herzka*, 2006 Del. Ch. LEXIS 148, at *4 (Aug. 10, 2006).

42 The same timing problem applies to the March 23 to 27, 2006 e-mails, because by that time the parties' dispute about whether the subsidiary agreements were binding already had surfaced. In some of those e-mails, for example, AHS expressed its view that any such agreements were only tentative and subject to a successful resolution of all disputes listed in their Notice.

The December 2, 2004 letter from AHS's attorney Jones provides some corroboration for Healthsource's position in that it states:

> In an effort to ensure that our meeting on January 11th is as productive as possible, we thought it might be beneficial to summarize and confirm the adjustments we understand to have been previously agreed upon by our respective clients. It is our understanding that Ardent and CIGNA have previously agreed to settle the following adjustments to the Lovelace Net Worth calculation . . . .[43]

The Jones letter, however, is inconclusive. As the text of the letter indicates, AHS was preparing for a meeting with Healthsource to discuss several "open" and "outstanding" issues that also related to the calculation of Lovelace's Net Worth. In that context, a reasonable inference, though not the only possible inference, is that AHS sought a full settlement of the Net Worth issue and that its "agreement" to some of the proposed adjustments was contingent upon reaching a complete resolution of Net Worth. On Healthsource's motion for summary judgment, the Court must draw that inference because it favors the nonmovant, AHS.

Lastly, the belated Hughes Affidavit adds little other than the Ardent Spreadsheet. As Hughes explained, the AHS side prepared that document during the negotiations to keep track of each side's positions: "Over the course of the negotiations, this spreadsheet was updated by the collaborative efforts of both CHC [Healthsource] and Ardent [AHS] to reflect the resolution of some disputed items as well as the remaining few open items."[44] Yet, the Ardent Spreadsheet represents only a work in progress. For each of

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[43] Coen Aff. Ex. 1.

[44] Hughes Aff. ¶5.

over twenty line items, it lists "Ardent [AHS] Proposed Adjustments," "Cigna [Healthsource] Proposed Adjustments" and "Differences – Remaining Issues." Within those broad sections of the spreadsheet there are columns for AHS's "Proposed Adjustments To Date," "CIGNA [Healthsource] Accept," "Follow up" and "Disagreement." In my opinion, one reasonably could infer from the Ardent Spreadsheet that the parties did not intend any of the adjustments listed to be final and binding until all open issues were resolved.

Accordingly, whether the parties had a meeting of the minds to resolve definitively one or more of the individual subsidiary issues raises disputed issues of fact that preclude summary judgment. To the extent that Healthsource can show at trial that a meeting of the minds occurred and the parties agreed to a binding settlement of some of the issues presented in the Notice and attached documentation, those subsidiary issues of Adjusted Net Worth would not be eligible for submission to Crowe Chizek. At this summary judgment stage, however, Healthsource has failed to make such a showing. Thus, at this point, all issues identified by AHS in the Notice and supporting documentation conceivably could be submitted to the independent accountant.

E. Attorneys' Fees

AHS seeks its attorneys' fees and costs incurred in connection with this action. Under Section 16.12 of the Agreement, "[i]f any action is brought by any party to enforce any provision of this Agreement, the prevailing party shall be entitled to recover its court

costs and reasonable attorneys' fees."[45] Delaware courts routinely enforce contract provisions allocating costs of legal actions arising from the breach of a contract.[46]

Given my conclusions relating to the construction of Section 2.8 of the Agreement, I do not find that either party in this case has "prevailed" such that it would be entitled to its attorneys' fees under Section 16.12.[47] This determination, however, is without prejudice to either party's ability to seek attorneys' fees related to a future proceeding regarding whether a binding agreement was reached on any subsidiary issues raised in the Notice and its attachments.

III. CONCLUSION

For the reasons stated, I deny AHS's Motion for Summary Judgment and Defendant's Motion for Summary Judgment, but, pursuant to Court of Chancery Rule 56(d), determine that the following matters are without substantial controversy and shall be deemed established for purposes of further proceedings in this action. First, the issues that either party may present to Crowe Chizek are limited to those issues that were fairly and timely noticed in accordance with Section 2.8. Second, absent a binding agreement to settle a fairly and timely noticed issue subsidiary to the determination of Adjusted Net Worth, the parties are entitled to submit any such issue to Crowe Chizek for resolution.

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45 Petrovich Aff. Ex. 1 § 16.12.

46 *See Knight v. Grinnage*, 1997 Del. Ch. LEXIS 133, at *9 (Oct. 7, 1997).

47 In the case of AHS, I also note that it ultimately abandoned its most aggressive position -- *i.e.*, that Section 2.8 gave it the right to present any issue related to Adjusted Net Worth to the independent accountant whether or not it was included in the Notice.

Furthermore, a party claiming the existence of such a binding agreement will have the burden of proving it. Third, I find that Section 2.8 of the Agreement generally limits the evidence that Crowe Chizek may consider in resolving the issues before it to facts that were known or reasonably knowable as of the first half of 2003, but that the final decision on such questions rests with the accounting firm. To the extent the parties present evidence to Crowe Chizek relating to matters outside this time frame, the firm must first determine whether those matters meet the fair notice requirements of Section 2.8 as described in this memorandum opinion.

Because I do not consider either party to have prevailed on its motion for summary judgment, all claims for attorneys' fees and costs are denied.

Counsel for the parties shall confer about the course of future proceedings in this action and submit a proposed scheduling order or other report on the results of their discussions on or before February 21, 2007.

IT IS SO ORDERED.