PUBLIC VERSION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE NCS HEALTHCARE, INC., SHAREHOLDERS LITIGATION	:	Consolidated C.A. No. 19786

NCS DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

After a search for restructuring alternatives spanning over two years, the NCS Board entered into a merger agreement with Genesis on July 28, 2002. At all times NCS was (and remains) insolvent, and to this very day NCS cannot pay its defaulted obligations to creditors. From this search, Genesis emerged as the only party willing to pay all of NCS's creditors in full and pay significant value to equity. Omnicare, which had targeted NCS's financial weakness and sought to exploit it by proposing various bankruptcy asset purchase offers directly to NCS's creditors and other high pressure tactics, offered for the first time to negotiate a highly conditional alternative less than two days before the Genesis agreement was executed. With Genesis threatening to pull NCS's only viable proposal received over the last two years, and faced with the threat that Omnicare would revert to its established tactics (leaving shareholders with nothing and exposing creditors to material risk of loss), the NCS Board agreed to the merger with Genesis. Significantly, this decision was fully supported by two shareholders (who are also directors), and who together would have had nearly $7 million to gain from the Omnicare proposal had it been firm. Under any legal standard of review, the sound decision by the NCS Board was correct.

The unique circumstances leading up to the NCS/Genesis Merger Agreement decisively support the NCS Board's process and decision. The NCS/Genesis Merger was the end result of the NCS Board's active canvassing of the marketplace for an appropriate restructuring alternative. Throughout that process, the NCS Board was faced with managing a company in default on its obligations to creditors – consisting of senior, subordinated and trade debt of approximately $350 million – with fiduciary duties to both shareholders and creditors. Part of the two-year process also involved negotiations with various suitors, including failed discussions with Omnicare (NCS's largest direct competitor) about three proposals Omnicare made to purchase NCS's assets under Section 363 of the United States Bankruptcy Code at scavenger prices. Not once in those discussions did Omnicare offer a merger proposal that would have resulted in any recovery for NCS shareholders, even though as early as October 2001, NCS, through its financial advisors, informed Omnicare that it would not accept any deal providing less than fair recovery for all NCS stakeholders. This excluded, in Omnicare's explicit view, NCS shareholders – i.e., the NCS noteholders were, in its view, "the true owners of NCS."

Indeed, buying NCS's assets at a discount during a period of financial distress was Omnicare's strategy all along. Once Omnicare realized that NCS would not accept its low-ball bankruptcy proposals, Omnicare abandoned direct discussions with NCS, and began negotiating exclusively with an Ad Hoc Committee of noteholders, led by DDJ Capital. Gemunder, who dominates the Omnicare board and runs Omnicare as a "one man show," was convinced that if he could get DDJ Capital to agree to terms favorable to the Noteholders, DDJ Capital would pressure the NCS Board into accepting that deal. Ultimately, that plan did not succeed, as the NCS Board persevered and found a suitor in Genesis, which was willing to pay off NCS's creditors in full and offer fair value to NCS's equity holders.

It was never NCS's intention, however, to abandon Omnicare as a potential suitor. NCS's financial advisors repeatedly extended invitations to Omnicare's advisors to continue discussions (which were completely ignored). NCS also kept the Ad Hoc Committee fully informed of the status of its negotiations with Genesis. Put off by NCS's insistence on a deal providing recovery to NCS shareholders, Omnicare never meaningfully responded to these invitations. Ultimately, NCS determined that it was necessary to end any further exploration for a potential restructuring partner, and that it was in NCS's best long-term interests to execute a stock-for-stock merger agreement with Genesis.

By Friday morning, July 26, 2002, after months of vigorous negotiations with Genesis, the terms of the NCS/Genesis Merger were all but finalized. For the first time since NCS had embarked on its more than two-year journey to find a viable restructuring alternative, NCS had within its grasp a deal completely satisfying all of NCS's obligations to creditors and making substantial provision for equity. In order to continue the negotiations, however, NCS had to grant an extension of an exclusive negotiating agreement entered into earlier, on July 3.

Then, late that same day, after six months of radio-silence, Omnicare sent over the transom a highly conditional indication of interest in acquiring NCS at $3.00 per share in cash. Among other things, Omnicare conditioned its proposal upon due diligence (which Plaintiffs fail to mention in their brief), despite having the opportunity for substantial due diligence during its earlier failed bankruptcy negotiations with NCS, as well as undesignated third-party approvals. Reacting to this conditional "offer to negotiate," and bound by an exclusive negotiating arrangement with Genesis, the NCS Board directed its advisors to go back to Genesis and obtain even more consideration for NCS stakeholders – and NCS's advisors were successful, obtaining an almost 300% premium for NCS shareholders over NCS's trailing 20-day average as of July 26. However, as a quid pro quo for this increase, Genesis issued an ultimatum: execute the NCS/Genesis Merger Agreement by midnight on July 28, 2002, or Genesis would forever pull its offer.

Taking this ultimatum (and the prospect of winding up without any deal and/or regression to the status quo ante of material creditor loss and no equity recovery at all) seriously, the NCS Board met on Sunday, July 28 to consider its options: execute the firm Genesis deal providing recovery for all NCS stakeholders, or roll the dice on Omnicare's belated "offer to negotiate" and risk losing any recovery in full or in part for NCS stakeholders. Indeed, on July 28, 2002, after receiving advice from its professional advisors and the NCS Independent Committee, the NCS Board appropriately considered several viable risks, including:

- The risk that Genesis would retract its offer providing recovery for all NCS stakeholders, leaving NCS with no offer at all.
- The risk that Omnicare, following due diligence, would either (1) rescind its "offer to negotiate" or (2) downwardly adjust the contemplated dollar figure of that offer.

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- The risk that once Genesis was out of the picture, Omnicare would have every incentive to crush NCS by driving it back into bankruptcy negotiations, or avoid a deal altogether.
- The risk that Omnicare would not guarantee to pay off NCS's creditors in full.

Taking these risks into account, the NCS Board made the right decision for all its constituencies and chose the option providing guaranteed recovery by approving the NCS/Genesis Merger. For this reason, and the other reasons expressed below, the NCS Board acted well within its fiduciary authority by authorizing the execution of the NCS/Genesis Merger Agreement.

STATEMENT OF FACTS

A. NCS Confronts Deteriorating Market Conditions In The Health Care Industry And Becomes Overwhelmed By Debt

In late 1999, NCS[1] became increasingly concerned about the effects of deteriorating market conditions on the healthcare industry, stemming (in no small part) from reductions in reimbursements from government and third-party programs. (Outcalt 12-13; Sells Ex. 1 at 4; Hager 12 (testifying about impact of rate reductions on skilled nursing industry))[2] NCS was also having difficulty collecting accounts receivable, and began to experience a precipitous decline in stock price. (Outcalt 13) In July 2000, a committee was formed (the "Ad Hoc Committee") to represent the interests of the holders of NCS's subordinated debentures (the "Notes"). (Sells Ex. 1 at 4) By spring 2001, NCS was in default on approximately $350 million in obligations, including $206 million in senior debt and $102 million in Notes, with the

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1 NCS, a Delaware corporation with its principal place of business in Beachwood, Ohio, is an independent provider of pharmacy services to long-term health care institutions such as skilled nursing and assisted living facilities. (NCS 7658, Ex. 1; Sells Ex. 7 at 3) The NCS Board of Directors is composed of four members: Jon H. Outcalt, Kevin B. Shaw, Boake A. Sells and Richard L. Osborne (the "NCS Board"). Outcalt has been Chairman since 1986, and Shaw has been President since 1993 and Chief Executive Officer since 1995. Sells and Osborne form the NCS Independent Committee.

2 References to depositions are cited as ("Witness page"). References to deposition exhibits are cited as ("Witness Ex." or "Witness Ex. at __"). References to other documents are contained in the Transmittal Affidavit of James A. Whitney, filed herewith, and cited as ("Document, Ex. __"). References to Plaintiffs' Opening Memorandum of Law are cited as ("OB at __").

remainder consisting of outstanding trade debt to its primary pharmaceutical supplier.

B. NCS Actively Explores The Marketplace For Strategic Restructuring Alternatives, And Finds No Success

Earlier, NCS began exploring strategic alternatives to ensure its long-term viability and to protect the interests of all its stakeholders. (NCS 789, Ex. 2)

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In February 2000, NCS retained UBS Warburg LLC ("UBS Warburg") to identify potential acquirors and possible equity investors. (NCS 789-96, Ex. 2) UBS Warburg contacted over fifty different entities to solicit their interest in a variety of transactions with NCS. (NCS 834-47, Ex. 3) By October 2000, however, UBS Warburg's efforts had produced only one non-binding indication of interest valued at $190 million, substantially less than the face value of NCS's senior debt. (Sells Ex. 1 at 5)

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[3] Omnicare, a Delaware corporation with its principal place of business in Covington, Kentucky, is NCS's largest direct competitor in the institutional pharmacy business. (OMN 10983-11057, Ex. 4; Gemunder 278) Joel Gemunder is Omnicare's President and Chief Executive Officer; David Froesel is Omnicare's Chief Financial Officer; and Cheryl Hodges is Omnicare's Secretary. Dr. Andrea Lindell is an outside director on the Omnicare board, and Catherine Greany is a former Omnicare Vice President of Acquisitions.

In December 2000, NCS terminated UBS Warburg and engaged Brown, Gibbons, Lang & Company L.P. ("Brown Gibbons") as its exclusive financial advisor. (Berlin Ex. 5; Pollack 26) Since that time, Glenn Pollack has been NCS's lead financial advisor.[4]

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(Outcalt 23-24)

(Shaw 22)

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[4] Glenn Pollack, who began his engagement for NCS as a member of Brown Gibbons and later, as a member of Candlewood Partners, has been NCS's lead financial advisor since December 2000. (Pollack 39-40) Plaintiffs' attack on Pollack's credentials is wholly unfounded. (OB at 10-11)

REDACTED (Pollack 17) (Pollack 222) Plaintiffs also conveniently ignore Pollack's successful track record with healthcare companies. (Pollack 11-13)

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(Pollack 14-19) (Pollack 18-19) Given these credentials (as well as his familiarity with working with troubled healthcare companies such as NCS), the NCS Board and the Independent Committee were justified in relying on Pollack's financial advice.

[5] The decision to retain Brown Gibbons at that time was an informed one. Before making that decision, the NCS Board spoke with clients of Brown Gibbons, interviewed Glenn Pollack (who was then a member of Brown Gibbons) multiple times and consulted with its lenders. (Outcalt 25) Plaintiffs provide no support for their speculation that Pollack was chosen by the NCS Board because he was not aggressive enough. In fact, the Independent Committee held the exact opposite view. (Osborne 84 (calling Pollack "aggressively independent"))

By early 2001, full recovery for NCS's creditors was "remote," and recovery for NCS shareholders seemed impossible. (Sells Ex. 1 at 5) To facilitate discussions, NCS invited several parties to conduct due diligence, and negotiated extensively with some of those parties. These efforts, however, did not result in any proposal that NCS believed provided an acceptable recovery to its stakeholders. (Sells Ex. 1 at 5)

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C. Omnicare Attempts To Buy NCS's Assets Out Of Bankruptcy, While NCS Attempts To Strike A Deal Providing Fair Value To All Stakeholders

By June 2001, Gemunder had targeted NCS for an asset sale transaction under Section 363 of the United States Bankruptcy Code.[7]

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Gemunder made his move at an industry conference in July 2001, when he approached Shaw and expressed interest in a transaction with NCS. (Gemunder 13) After consulting with the NCS Board, Shaw informed Gemunder that NCS was interested in a possible transaction with Omnicare. (Sells Ex. 1 at 5) In a letter dated July 20, 2001, Omnicare made its first Section 363 proposal for $225 million, conditioned upon, among other things, satisfactory completion of due diligence. (Shaw Ex. 1) This proposal failed to provide full recovery to NCS's creditors, let alone any recovery for NCS's shareholders.

To foster negotiations, NCS sent Omnicare a standard confidentiality agreement previously executed by at least thirty-six other parties that had investigated potential transactions with NCS. (NCS 998-1007, Ex. 5) Having Omnicare sign this confidentiality agreement was especially important to NCS in light of

Omnicare's position as NCS's largest competitor.[8] (Froesel 22-23) Omnicare refused to execute the confidentiality agreement provided by NCS (which contained a garden-variety standstill provision), and instead proposed revised terms. Omnicare also objected to a provision prohibiting it from soliciting NCS's customers outside of the ordinary course of Omnicare's business. (Sells Ex. 1 at 6)

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. Omnicare continued to object to a non-solicitation clause and a standstill provision that would have prevented it from independently negotiating a transaction with the Ad Hoc Committee,

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In the interest of keeping the lines of communication open, however, NCS asked Omnicare to submit a list of desired due diligence materials. (NCS 1008-09, Ex. 7)

Thereafter, on August 29, 2001, Omnicare made a second Section 363 proposal for $270 million, still well below NCS's debt liability and still providing absolutely nothing to NCS shareholders. (Greany Ex. 7 at NCS 1067-68)

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In late September 2001, almost two months after NCS sent Omnicare its proposed agreement, Omnicare finally agreed to execute a limited confidentiality agreement, and NCS provided substantially all of the documents and information Omnicare identified as critical to its due diligence review. (OMN 501, Ex. 8; OMN 184-250, Ex. 9; OMN 488-90, Ex. 10; OMN 1978, Ex. 11) Because of the limited scope of the agreement, however, and because Omnicare was NCS's largest competitor, NCS withheld certain highly sensitive, non-public competitive information. (OMN 707, Ex. 12) (NCS refusing to provide drug purchase history);

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9 Both Omnicare and Plaintiffs clearly recognize the dangers in providing a competitor with sensitive information such as pricing. (Hodges 183-86; Miles 35-36; Marti 54)

In October 2001, tired of receiving low-ball proposals from Omnicare, NCS sent Pollack to meet with Omnicare's financial advisor (Merrill Lynch) to discuss Omnicare's interest in NCS. (Berlin 79-80) At this meeting, Pollack identified $77 to $87 million worth of synergies in a potential NCS/Omnicare combination and, in recognition of these synergies, sought a non-bankruptcy transaction that would provide value to all NCS stakeholders. (Berlin 82; Pollack 64-68, 73-77; Pollack Ex. 7; Pollack Ex. 8) Omnicare, however, indicated it was not interested in anything other than a Section 363 sale. (Pollack 67-68) Nevertheless, NCS continued to provide due diligence materials to Omnicare, and responded to Omnicare's additional inquiries. (OMN 501, Ex. 8; OMN 184-250, Ex. 9; OMN 488-90, Ex. 10; OMN 1978, Ex. 11)[10]

D. To Pressure NCS Into Accepting A Bankruptcy Deal, Omnicare Deals Exclusively With The Ad Hoc Committee

By mid-November 2001, Omnicare was frustrated with NCS's refusal to accept a bankruptcy offer. In order to squeeze NCS into accepting such a deal, Omnicare abandoned direct discussions with NCS and began to negotiate exclusively with the Ad Hoc Committee. (Pollack 69-71) REDACTED

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[10] Pollack made similar overtures to Omnicare's advisors in January 2002, and again Omnicare failed to provide a meaningful response. (Pollack 64-66, 68-69, 71) Indeed, Omnicare's financial advisor admits that he made no attempt (nor is aware of any attempt made by Merrill Lynch) to contact Pollack between November 15, 2001 to July 22, 2002. (Hartman 132)

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In February 2002, the Ad Hoc Committee informed the NCS Board that Omnicare had prepared a third Section 363 bankruptcy proposal for $313,750,000, subject to an undefined purchase price adjustment. (NCS 252-312, Ex. 14) Again, this proposal was lower than the face value of NCS's debt, and provided no recovery to NCS's shareholders. (Hodges 228-29) Although the Ad Hoc Committee was dissatisfied with many of the terms in Omnicare's draft agree-

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ment, particularly the requirement that 20% of the purchase price be held in escrow, it nevertheless forwarded the proposal to NCS for its review in April 2002. (Sells Ex. 1 at 7) Despite Mencher's stark warnings about forcing a bankruptcy (Pollack Ex. 20), NCS promptly informed the Ad Hoc Committee that it was not interested in Omnicare's proposal – or any other bankruptcy proposal, as Pollack had previously explained, that did not provide for NCS equity – and would not participate in the Ad Hoc Committee's bankruptcy sale discussions with Omnicare. (Pollack 88-89; Sells Ex. 1 at 7)

At this point, the Ad Hoc Committee was fully aware of NCS's negotiations with Genesis, and remained a potential source of information for Omnicare to keep informed of those negotiations. For example, on May 9, Hager met with the Ad Hoc Committee to provide an overview about a potential NCS/Genesis combination. (Hager 22-24, 26) On May 16, Sells and Pollack met with Genesis representatives to discuss the status of negotiations, and the next day Sells wrote an e-mail to Outcalt, Glenn Pollack (Candlewood Partners) and Scott Berlin (Brown Gibbons) recounting a conversation he had with Mencher about that meeting. Specifically, he wrote (further confirming the fact that Omnicare was looking to squeeze NCS by dealing with the Ad Hoc Committee):

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(Pollack Ex. 20) Mencher also suggested to Sells that Genesis might be willing to pay more than Omnicare based upon her conversation with representatives of Genesis. (Mencher 45)

E. Unlike Omnicare, Genesis Proposes A Transaction That Provides Recovery For All NCS Stakeholders

In the meantime, Genesis was undertaking its own financial recovery. In the late 1990s, Genesis had taken a severe financial hit when government reimbursements for Medicare and Medicaid declined. (Hager 11-12) As a result, Genesis (the fifth-largest nursing home operator in the nation) declared bankruptcy in 2001. (Hager 12) After a successful restructuring, Genesis took steps toward financial recovery by focusing on the health services portion of its business and targeting growth opportunities by acquisition. (Hager 57) Along the way, Genesis lost a bidding war to Omnicare to acquire the assets of American Pharmaceutical Services ("APS") out of bankruptcy, leading to bitter feelings between the principals of both companies. (Hager 187-90)

Thereafter, in January 2002, representatives of the Ad Hoc Committee contacted Genesis regarding a possible transaction with NCS. (NCS 1485-89, Ex. 15; Hager 18-19) Genesis executed NCS's standard confidentiality agreement quickly and began a due diligence review.[12] (NCS 1485-89, Ex. 15; Pollack 112) Early in negotiations, Genesis indicated that any proposal it made would be conditioned upon a significant majority of the bondholders and controlling voting interests supporting the transaction. (Hager 42-43, 64-65)

In March 2002, the NCS Board created an Independent Committee, consisting of Sells and Osborne, to ensure an even-handed approach for all NCS constituencies in any transaction.[13] Sells and Osborne were selected because Outcalt and Shaw were both officers of NCS, as well as large shareholders.[14] (Sells 33, 44-

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12 Around this time, NCS began to forecast improved operating performance due to certain initiatives management had taken to improve cash flows. (Osborne 37-38) Notably, however, this did not change its overall perilous financial condition considering its outstanding debt obligations. (Osborne 38-39)

13 At deposition, Sells and Osborne were asked about why the Independent Committee was formed, and they attempted to explain in their own words why it made sense. For example, Sells testified that his role as a special committee member was "[t]o be independent in terms of outcomes from any concentration on any particular constituency. That my role as the head of the special committee was to make sure that we were absolutely balanced in our approach to whether it was the senior debt, the noteholders, the vendors, the equity, that there was to be a very even handed approach to how we dealt with all those constituencies, and I was to protect that position at all times." (Sells 44-45) As Osborne explained:

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(Osborne 31) Critically, and as Plaintiffs themselves recognize, the Independent Committee was not created to ensure fairness in an interested transaction, such as the situation confronted in Kahn v. Lynch Communications Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994) (review of Independent Committee in the context of a merger with a controlling shareholder).

14 Plaintiffs' criticisms of the composition of the Independent Committee are un-

(continued...)

45; Osborne 31; Outcalt 49-52) The Independent Committee utilized the same legal and financial counsel as the NCS Board, given that a transaction with Genesis would not involve an interested party and all of the constituencies' interests were essentially aligned.[15] On May 14, 2002, the Independent Committee met to review the status of the restructuring process. (Sells Ex. 2 Tab 17) At that time, NCS had not received any proposals that would have provided recovery for all of its stakeholders, although the Independent Committee felt that preliminary negotiations with Genesis showed promise. (Id.)[16] Pollack recommended REDACTED

[14] (...continued)
founded. (OB at 8-9) Neither Sells nor Osborne had anything more than de minimis NCS holdings (as measured at the time the committee was created, when NCS stock was trading at or below 15 cents per share). (Sells 20; Osborne 20-21; NCS Historical Stock Prices, Ex. 16) Moreover, Sells and Osborne were not NCS employees. (Osborne 27) Further, Plaintiffs offer no authority for their contention that Outcalt should have appointed new directors to the Independent Committee. As Osborne explained:

(Osborne 28) REDACTED

[15] Indeed, the Independent Committee considered whether there was any conflict raised by retaining Benesch Friedlander and Brown Gibbons (i.e., Glenn Pollack) as its advisors, and concluded there was not. As Osborne explained, the Independent Committee believed retaining Benesch Friedlander made good sense: "What I believe is that based on the experience with them, the realtime experience of them advising us, that there was no conflict at all. That they were also aggressively independent in their dealings with us and differentiated us and reminded us of the differences all the time of their work with us and their work with the board." (Osborne 68-69) The same was true for retaining Brown Gibbons: "My memory is Boake and I discussed the capability that Brown Gibbons, Glenn Pollack in particular, had demonstrated in the many months of assistance to us. And we believed that they were the most appropriate people to help the independent committee do its duty for all of the shareholders in the best possible way." (Osborne 83-84)

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(continued...)

REDACTED (Pollack 166), and the Independent Committee (at the time) believed this approach made sense.

In June 2002, Genesis proposed a transaction with no associated bankruptcy filing (although less than the full amount of NCS's outstanding debt), and – for the first time since NCS began its search for restructuring alternatives – recovery for NCS shareholders to the tune of $7.5 million in Genesis stock. (CP 2177-79, Ex. 17; Pollack 119-21) Finally, NCS had an offer on the table providing recovery for all of NCS's constituencies, including NCS shareholders, but was still looking for more.

By July 3, Genesis had improved its offer significantly. NCS's Noteholders would receive par value for their notes, paid with a mixture of Genesis stock and cash, and NCS's equity holders would receive $24 million in Genesis stock. (CP 2142, Ex. 18) This proposal stood in stark contrast to Omnicare's earlier Section 363 proposals, which offered nothing to NCS's equity holders, and would provide Noteholders less than REDACTED recovery. (CP 2010-11, Ex. 19 (estimating 61.53% recovery for Noteholders and all other unsecured creditors)) Genesis,

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16 (...continued) REDACTED , Mencher felt there was "a huge amount of risk going back to Omnicare, because I was afraid it would chase Genesis away, and a bird in a hand is always worth more than two in the bush." (Mencher 194)

however, refused to proceed further without an exclusive negotiating agreement. (Hager 77)

Fearful of losing Genesis, and given the fact that no other comparable proposals had surfaced over the past two years, NCS decided to modify its "stalking horse" approach and enter into an exclusive negotiating agreement with Genesis on July 3 (the "Exclusivity Agreement").[17] (Osborne 107-08; Sells Ex. 9) Both members of the NCS Independent Committee believed that a reasonably brief exclusive negotiating period with Genesis was an appropriate step, and did not restrict them from rejecting a Genesis proposal (if warranted) when the agreement lapsed.[18] (Sells 128; Osborne 107-08) Later that day, Genesis provided NCS with a draft merger agreement, a draft of the Noteholders agreement, and draft voting agreements for Outcalt and Shaw. (Hager 102) Despite the comparative generosity of the Genesis offer from the earlier bankruptcy proposals it had received from Omnicare, NCS

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[17] The Exclusivity Agreement lasted two weeks with a one-week extension if the parties had not reached an agreement and were still negotiating in good faith. (Hager 68) Genesis initially requested a thirty-day exclusivity agreement but representatives of NCS denied this request. (Hager 68) An exclusive negotiating agreement of such short duration seemed quite reasonable given the two-year restructuring process undertaken by NCS. (Hager 77; Osborne 103-04)

[18] For this reason, Plaintiffs' suggestion that the Exclusivity Agreement "precluded NCS from even considering a superior offer from Omnicare or anyone else" (OB at 16), is patently untrue. (Sells 131-34) (the purpose of the exclusivity agreement was to "get to the point where we could have a vote on merger agreement" and if "we failed in this period of time to reach agreement, then . . . we were still open to being able to accept offers from anywhere")

continued to seek a higher offer price and other concessions from Genesis, to which Genesis agreed. (Pollack 184-85)

Although substantial progress had been made toward a firm proposal, NCS and Genesis were unable to finalize a definitive merger agreement and secure a consensus among the Noteholders prior to the July 26, 2002 expiration date of the Exclusivity Agreement. By telephonic meeting held on the morning of July 26, 2002, the Independent Committee, believing a final agreement was imminent and fearful of losing Genesis altogether, authorized an extension of the Exclusivity Agreement through July 31, 2002, as requested by Genesis. (Osborne Ex. 1; Pollack 136-37; Osborne 111-13)[19]

F. After Six Months Of Radio-Silence, Omnicare Reappears With A Highly Confidential "Offer To Negotiate"

Purportedly tipped off by increased activity in NCS's stock in mid-July REDACTED Omnicare began re-evaluating its interest in NCS

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[19] The Independent Committee also engaged Candlewood Partners to serve as their financial advisor at this point. (Pollack Ex. 24 at CP 3421-29) Essentially, this meant that Glenn Pollack would remain NCS's lead financial advisor.

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there is nothing in the record to suggest that Brown Gibbons did not act in NCS's best interests at all times during its engagement.

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In the afternoon of July 26, Omnicare's board authorized Omnicare's officers to make a written offer to NCS for $3.00 per share. (Hodges Ex. 3; Hodges 51-52) Later that day, Omnicare sent its "offer to negotiate" to the NCS Board (the "July 26 Letter").[20] (Froesel Ex. 7; Hodges 71-74) This was Omnicare's first direct communication with NCS in six months (Froesel 178-80), despite the fact that Omnicare was well aware of NCS's negotiations with Genesis, and that NCS advisors had offered to continue discussing a potential transaction with Omnicare earlier in the year. (CP 1249, Ex. 20; Pollack 68-70, 109-10)

Critically, the July 26 Letter informed the NCS Board that Omnicare's negotiation proposal hinged on two significant conditions:

> Our proposal contemplates, among other things, the negotiation and execution of a mutually acceptable definitive merger agreement, which we believe can be accomplished very quickly. [1] <u>The definitive merger and other agreements will contain provisions customary for transactions of this type, including the receipt of any required regulatory and third party approvals and consents.</u> Please note that we will not request voting or similar agreements from any NCS stockholder, since we believe that the stockholders should have the option to chose a transaction providing them with the greatest value. [2] <u>In addition, since we have not yet been afforded the opportunity to conduct any meaningful due diligence, we would like to conduct an expedited due diligence investigation of NCS, which we expect can be</u>

[20] Notably, Omnicare did not send the July 26 Letter until <u>after</u> NCS had agreed to extend the Exclusivity Agreement with Genesis. (Pollack 186-87)

completed in seven to ten days from the date materials are made available to us.[21]

(Froesel Ex. 7) (emphasis added)

Omnicare was well aware that the due diligence condition could cause it to lose NCS. (Mencher 91; Gemunder 160)

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G. Concerned It Might Be Left With Nothing, The NCS Board Chooses The Firm Genesis Offer And Rejects The Highly Conditional Omnicare Offer To Negotiate

That evening, the Independent Committee met to consider its options, and concluded that discussions with Omnicare about its "offer to negotiate" – given the Exclusivity Agreement and Genesis' previous skirmish with Omnicare over APS – presented an unacceptable risk that Genesis would abandon merger discussions. (Sells Ex. 2 Tab 21; Mencher 229 ("It was my sense that if you moved forward with Omnicare, you would – you could potentially scare away Genesis, and then if

21 Late in the afternoon of July 26, Omnicare representatives left voice mail messages with NCS representatives seeking to discuss the July 26 Letter. (Sells Ex. 2 Tab 22 at NCS 8264)

Genesis – if Omnicare did not complete the deal because of its due diligence out, you had no deal"); Miles 60 (agreeing NCS Board had to evaluate risk that Genesis and Omnicare would walk away))

The Independent Committee also believed that, given Omnicare's past Section 363 proposals and unwillingness to engage in discussions about a transaction providing recovery to all NCS shareholders, as well as its six months of radio-silence, Omnicare's "offer to negotiate" would likely lead to either another bank-ruptcy proposal or, even worse, no proposal at all. (Sells Ex. 2 Tab 21; Mencher 109-10 (expressing surprise Omnicare made a proposal not conditioned on Section 363 transaction given their prior insistence)) After this discussion, the Independent Committee directed its financial advisor to request that Genesis improve the economic terms of their proposed transaction. (Sells Ex. 2 Tab 21)

In response to this request, on Saturday, July 27, Genesis raised its offer for noteholders and shareholders by a total of approximately $28 million, $17 million of which was allotted for shareholders (an 80% increase in the number of Genesis shares). (Sells Ex. 2 Tab 22 at NCS 8263-64; Hager 134-35) As a condition for these improvements, however, Genesis issued an ultimatum: accept the offer on the table by midnight Sunday, July 28, or discussions would be terminated and the offer withdrawn. (Sells Ex. 2 Tab 22 at NCS 8263; Hager 149-50; LaNasa 94) Taking this ultimatum seriously, and fearful that without a quick response NCS and its stakeholders would be left with no deal at all, the Independent Committee met the following day to consider Genesis' increased offer. (Sells Ex. 2 Tab 23; Pollack 189, 196) Among other things, the Independent Committee probed the sincerity of Genesis' deadline and examined the risks of not proceeding with the Genesis proposal. (Sells Ex. 2 Tab 23 at NCS 8257-58)

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. see also LaNasa 71-72 (reflecting Genesis' belief that Omnicare would only put forth a fair proposal for NCS if necessary to protect its market position versus Genesis)) The Independent Committee concluded that Genesis was sincere in its threat to abandon discussions if the Genesis proposal was not executed by the July 28 deadline, and further concluded that not proceeding with the transaction presented a viable risk to NCS's stakeholders that no transaction would take place. (Sells Ex. 2 Tab 23 at NCS 8257) REDACTED

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22 Genesis had previously spent considerable management time and attention in attempting to acquire APS in a bankruptcy auction, which Omnicare eventually won. (LaNasa 28, 41) Genesis believed that Omnicare would only offer a fair price to NCS if Genesis were bidding on NCS. (LaNasa 71) Genesis did not want a repeat of the APS transaction, whereby Genesis essentially performed due diligence for Omnicare, and for which Genesis would not be adequately compensated, even with a reasonable termination fee. (LaNasa 41, 122-23; Gemunder 214-15)

REDACTED

The Independent Committee, therefore, recommended that the NCS Board approve the Genesis Agreement before NCS lost the opportunity to do so. (Sells Ex. 2 Tab 23 at NCS 8258)

Just as he had done at the Independent Committee meeting, at the ensuing meeting of the NCS Board, Pollack delivered his opinion (on behalf of Candlewood Partners) that the Genesis offer was fair to NCS shareholders from a financial point of view.[23] (Sells Ex. 2 Tab 23 at NCS 8258) In addition to walking the directors through his presentation materials, Pollack specifically provided the directors with an analysis about the intrinsic value of the consideration under the NCS/Genesis Merger.[24]

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23 REDACTED

24 REDACTED

(continued...)

Additionally, Pollack analyzed the synergies inherent in an NCS/Genesis combination (as Plaintiffs concede) (OB at 60), and determined they represented approximately $45 to $55 million. (Pollack 76-77; Shaw 84)[25] Moreover, the NCS Board was well-informed and "satisfied" about Genesis' ability to close the merger.[26]

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24 (...continued)

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REDACTED

26 Specifically, Outcalt testified that: "I have a financial background. I know how to read balance sheets. I understand sources of financing. I can read security analyst reports. I went to Genesis' offices and met with management and asked a lot of questions. And based on all of that, I came away very satisfied that Genesis could close the merger." (Outcalt 105) According to Outcalt, Genesis had a "substantial amount of cash on its balance sheet" and "ample room on their lines of credit." (Outcalt 107)

REDACTED

(continued...)

The NCS Board also discussed Omnicare's offer to negotiate, and compared it with the Genesis offer. (Sells Ex. 2 Tab 22 at NCS 8264-65) Sells noted that, given NCS's past negotiations with Omnicare that had led only to Section 363 bankruptcy proposals, NCS simply could not assume that Omnicare's "offer to negotiate" would be likely to result in an agreement superior to the Genesis Offer. (Sells Ex. 2 Tab 22 at NCS 8265; Sells 222-23) Among other things, the NCS Board considered the same risks the Independent Committee had considered, including:

- The risk that Genesis would retract its offer providing recovery for all NCS stakeholders, leaving NCS with no offer at all. (Mencher 229 (recognizing risk that if NCS had moved forward with Omnicare, it could scare away Genesis and then lose any deal if Omnicare exercised its due diligence out); Sells 219 (he "couldn't stand the thought" of "losing [the] Genesis deal")) Indeed, as George Hager, Chief Executive Officer of Genesis, testified, this was a viable risk to the NCS Board because Genesis would "[a]bsolutely" have walked away if it had not received a signed deal by midnight on July 28. (Hager 151; LaNasa 94, 96 (if no agreement was reached, Genesis would "walk away and never talk to [NCS] again"))

- The risk that Omnicare, following due diligence, would either (1) rescind its "offer to negotiate" or (2) downwardly adjust the contemplated dollar figure of that offer. (Osborne 124-25, 128-29)

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26 (...continued)

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REDACTED

(continued...)

- The risk that Omnicare would not be able to achieve the requisite consent approvals from its credit facility and, therefore, would not have been able to finance a deal at the price contemplated by its offer to negotiate. (Sells 78, 201)

REDACTED

- The risk that once Genesis was out of the picture, Omnicare would have every incentive to drive NCS back into negotiations over a Section 363 bankruptcy deal, or rescind its conditional offer completely. (Osborne 125 ("worried that [Omnicare's July 26 Letter] was simply an effort to break up this other deal and prevent this other deal from happening")) Indeed, this risk was confirmed by Cheryl Hodges, Omnicare's secretary, when she explained that the only reason Omnicare added an equity component to its offer – after squeezing NCS for a Section 363 bankruptcy transaction for more than a year – was because Genesis, a competitor, was offering <u>something</u> to NCS's shareholders. Without the Genesis offer, Omnicare would have no incentive to offer anything whatsoever to NCS equity. (Hodges 252-53; LaNasa 71-72)

- The risk that Omnicare would not guarantee to "pay-off" NCS's creditors in full. This was a concern for Sells, who astutely recognized that Omnicare was not currently intending to pay off NCS's creditors in full as of July 26, as Omnicare ambiguously described its potential treatment of NCS's debt by using the phrase "assume and/or

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27 (...continued)

REDACTED

The board was also mindful that the Ad Hoc Committee would not have reacted well to a lower-priced deal than that which Genesis had already committed. (Mencher 103 (declaring that would be "a terrible outcome for the bondholders"); Sells 187) retire." (Sells 93) Sells' concern about Omnicare's intentions was right on the money, and confirmed by Omnicare's use of the qualifying phrase "we currently intend" in its August 8 Offer to Purchase to explain its purported willingness to pay off NCS's debt. (Froesel Ex. 9 at OMN 8736)[28]

Ultimately, the NCS Board concluded (after receiving the advice of its advisors and the recommendation of the Independent Committee) that the risk of losing the Genesis offer was too high to commence discussions with Omnicare based on their highly contingent letter, which, among other things, required certain unspecified due diligence (which could potentially result in Omnicare lowering its indication of interest below $3.00 per share). (Sells Ex. 2 Tab 22 at NCS 8265; Mencher 229 ("[I]f you have two parties both willing to pay the bondholders in full and one has no contingencies and one has a contingency, the safer bet would <u>always</u> be to go forward with the one with no contingencies"); Osborne 143-45; Sells 92-93)) The NCS Board also understood the terms and operation of the various deal protection provisions contained in the NCS/Genesis Merger Agreement at the time it was approved.[29]

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28. Plaintiffs disingenuously claim that Omnicare's July 26 Letter "contained precisely the commitment that Sells claims to have been seeking." (OB at 20) In fact, Omnicare's July 26 letter contained no commitment whatsoever, as Plaintiffs have admitted. (Marti 90, 95-96; Miles 54-55, 59)

29 The Board was informed by its counsel that "under the terms of the merger agreement and because NCS shareholders representing in excess of 50% of the outstanding voting power would be required by Genesis to enter into stockholder voting agreements contemporaneously with the signing of the merger agreement, and would agree to vote their shares in favor of the merger agreement, shareholder approval of the merger would be assured even if the NCS Board were to withdraw or change its recommendation. These (continued...)

Thus, after having familiarized itself with the terms,[30] the NCS Board unanimously voted to approve the Voting Agreements and the NCS/Genesis Merger, and recommended that NCS shareholders vote in favor of the NCS/Genesis Merger Agreement. (Sells Ex. 2 Tab 22 at NCS 8265) A definitive merger agreement between NCS and Genesis (and thereafter, the Voting Agreements) were executed later that day. (Sells Ex. 5; Outcalt 75, 89-90; Shaw 67, 70-71)

H. The NCS/Genesis Merger Agreement And The Voting Agreements

Among other things, the NCS/Genesis Merger Agreement provided the following:

- NCS Shareholders would receive 1 share of Genesis Common Stock in exchange for every 10 shares of NCS Common Stock held (Merger Agreement § 2.2, Sells Ex. 5);

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29 (...continued)
facts would prevent NCS from engaging in any alternative or superior transaction in the future." (Pollack Ex. 38 at 41) Given its active canvassing of the market; its sometimes contentious negotiations with various bidders over the past two years (including Omnicare); as well as the various risks it faced on July 28 which necessitated that the exploration of alternative transactions come to an end, the NCS Board believed these provisions made eminent sense under the circumstances.

REDACTED

30 Outcalt received numerous drafts and made sure he understood any changes to the final version before signing it. (Outcalt 91; REDACTED

It is no breach of fiduciary duty that the NCS Board did not read the NCS/Genesis Merger Agreement word-for-word. See, e.g., Smith v. Van Gorkom, 488 A.2d 858, 883 n.25 (Del. 1985).

- NCS Shareholders could exercise appraisal rights under 8 Del. C. § 262 (Merger Agreement § 2.5, Sells Ex. 5);

- Genesis would redeem NCS's Notes in accordance with their terms (Merger Agreement § 5.1(e), Sells Ex. 5);

- NCS would submit the Merger Agreement to NCS Shareholders regardless of whether the NCS Board continued to recommend the agreement (Merger Agreement § 5.3(a), Sells Ex. 5);

- NCS would not enter into discussions with third parties concerning an alternative acquisition of NCS, or provide non-public information to such parties, unless: 1) the third party provided an unsolicited, bona fide written proposal documenting the terms of the acquisition; 2) the NCS Board believed in good faith that the proposal was or was likely to result in an acquisition on terms superior to those contemplated by the NCS/Genesis Merger Agreement; and 3) before providing non-public information to that third party, the third party would execute a confidentiality agreement at least as restrictive as the one in place between NCS and Genesis (Merger Agreement § 5.3(c), Sells Ex. 5); and

- If the Merger Agreement were to be terminated, under certain circumstances NCS would be required to pay Genesis a \$6 million termination fee and/or Genesis' documented expenses, up to \$5 million (Merger Agreement § 7.2, Sells Ex. 5).

Further, Outcalt and Shaw (in their capacity as NCS shareholders) entered into Voting Agreements with Genesis. Significantly, these agreements provided, among other things, that:

- Outcalt and Shaw were acting in their capacity as NCS shareholders in executing the agreements, not in their capacity as NCS directors or officers (Voting Agreement § 3, Shaw Ex. 3/Outcalt Ex. 3);

- Neither Outcalt nor Shaw would transfer their shares prior to the shareholder vote on the Merger Agreement (Voting Agreement § 2(a), Shaw Ex. 3/Outcalt Ex. 3);

- Outcalt and Shaw agreed to vote all of their shares in favor of the Merger Agreement (Voting Agreement § 2(b), Shaw Ex. 3/Outcalt Ex. 3); and

- Outcalt and Shaw granted to Genesis an irrevocable proxy to vote their shares in favor of the Merger Agreement (Voting Agreement § 2(c), Shaw Ex. 3/Outcalt Ex. 3).

The Merger Agreement further provided that if either Outcalt or Shaw breached the terms of the Voting Agreements, Genesis would be entitled to terminate the Merger Agreement and potentially receive a $6 million termination fee. (Merger Agreement §§ 7.1(i), 7.2(b), Sells Ex. 5)

I. Subsequent Events

On August 1, 2002, Omnicare filed a lawsuit[31] attempting to enjoin the NCS/Genesis Merger, and announced that it intended to launch a tender offer for NCS's shares at a price of $3.50 per share (the "Tender Offer"). (OMN 9634, Ex. 23; G 2549, Ex. 24) Omnicare commenced the Tender Offer on August 8, 2002. (OMN 3192-3253, Ex. 25)

Thereafter, on August 20, 2002, the NCS Board recommended that its shareholders not tender into the Tender Offer after determining that the Tender Offer was predatory, "illusory," "conditional" and "uncertain." (Sells Ex. 1 at 10-12)

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[31] This lawsuit was subsequently dismissed in its entirety by two decisions of this Court. See Omnicare v. NCS Healthcare, Inc., C.A. No. 19800 (Del. Ch. Oct. 25, 2002); Omnicare v. NCS Healthcare, Inc., C.A. No. 19800 (Del. Ch. Oct. 29, 2002). Those decisions are currently the subject of an expedited appeal to the Delaware Supreme Court.

Further, the NCS Board was unable to determine that Omnicare's expressions of interest were likely to lead to a "Superior Proposal," as that term was defined in the NCS/Genesis Merger Agreement, and thus the NCS Board was contractually prohibited from discussing Omnicare's expression of interest with Omnicare. (Sells Ex. 1 at 10-11)

On September 10, 2002, Genesis granted a waiver of the provisions in Sections 5.3(c) of the NCS/Genesis Merger Agreement, which (consistent with the NCS Board's fiduciary duties) permitted NCS to enter into discussions with Omnicare, and further inform itself about Omnicare's Tender Offer and merger proposals. (LaNasa Ex. 10)

Finally, over <u>two months</u> after filing its lawsuit, on October 6, 2002, Omnicare irrevocably committed itself to a transaction with NCS. (October 7, 2002 Press Release, Ex. 26) Pursuant to the terms of its proposal, Omnicare agreed to acquire all of the outstanding NCS Class A and Class B shares at a price of $3.50 per share in cash (the "Irrevocable Offer"). As a result of the Irrevocable Offer, on October 21, 2002, the NCS Board withdrew its recommendation that shareholders vote in favor of the NCS/Genesis Merger Agreement. (October 22, 2002 NCS Press Release, Ex. 27)

ARGUMENT

I. PLAINTIFFS HAVE NOT SATISFIED THE ESSENTIAL PREREQUISITES FOR THE EXTRAORDINARY RELIEF THEY SEEK.

A preliminary injunction is extraordinary relief that may be granted only where a party demonstrates: (1) a reasonable probability of success on the merits at a final hearing; (2) that the failure to issue a preliminary injunction will result in immediate and irreparable injury; and (3) that the balance of hardships weighs in its favor. See Unitrin v. American Gen. Corp., 651 A.2d 1361, 1371 (Del. 1995); see also In re IXC Communications, Inc. S'holders Litig., C.A. Nos. 17324, 17334, 1999 WL 1009174, at *4 (Del. Ch. Oct. 27, 1999) (stating "[t]his [preliminary injunctive] relief is extraordinary and the test is stringent"). Plaintiffs bear the burden of establishing each of these necessary elements. See Roberts v. General Instrument Corp., C.A. No. 11639, 1990 WL 118356, at *7 (Del. Ch. Aug. 13, 1990).

Plaintiffs cannot make this showing simply by claiming that a dispute exists and that they might be injured; rather, they must clearly establish each element because injunctive relief "will never be granted unless earned." Lenahan v. National Computer Analysts Corp., 310 A.2d 661, 664 (Del. Ch. 1973). Preliminary injunctive relief "is always to be avoided, if possible, because controversies should only be determined after all the parties have had a full opportunity to present the facts." Van de Walle v. Unimation Litig., C.A. No. 7046, 1983 WL 8947 (Del. Ch. Feb. 14, 1983). For the reasons expressed below, Plaintiffs have not (and cannot) satisfy these required elements for preliminary injunctive relief.

II. PLAINTIFFS HAVE FAILED TO ESTABLISH A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

A. The NCS Board Acted In The Best Interests Of All NCS Stakeholders By Executing The NCS/Genesis Merger On July 28.

As directors of a Delaware corporation, members of the NCS Board bear the ultimate responsibility for managing the "business and affairs" of NCS. See 8 Del. C. § 141(a); Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1142 (Del. 1990). In fulfilling their managerial responsibilities, and derivative of the statutory mandate of Section 141(a), the NCS directors owe a triad of fiduciary duties – due care, loyalty and good faith – to the NCS shareholders. See, e.g., Emerald Partners v. Berlin, 787 A.2d 85, 90 (Del. 2001).

Moreover, as directors of a corporation in the "zone of insolvency," the NCS Board owes fiduciary duties to creditors. See, e.g., Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., C.A. No. 12150, 1991 WL 277613, at *34 (Del. Ch. Dec. 30, 1991) (finding directors did not breach their fiduciary duties by considering corporation's interest as well as 98% shareholder's interest in sale of assets); Geyer v. Ingersoll Publ'n Co., 621 A.2d 784, 787-90 (Del. Ch. 1992) ("[t]he existence of fiduciary duties at the moment of insolvency may cause directors to choose a course of action that best serves the entire corporate enterprise rather than any single group").[32] (See also OMN 14399, Ex. 29 (admitting that the NCS Board owed fiduciary duties to NCS's debtholders); Osborne 38; Outcalt 47-48)

Delaware courts normally afford great deference to the decisions of a corporation's board of directors. See, e.g., Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). This deference is embodied in the business judgment rule, which presumes that directors make business decisions on an informed basis,[33] in good faith, and with an honest belief that the decision will serve the best interests of the

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[32] A company is considered insolvent when it has liabilities in excess of the reasonable market value of its assets. See Geyer, 621 A.2d at 789. As reported in NCS's 10-K for the period ending June 30, 2002, NCS's total assets were $277,793,000, and its current liabilities were $385,233,000. (NCS HEALTHCARE, INC., 2002 ANNUAL REPORT ON FORM 10-K 35-36 (filed Aug. 22, 2002), Ex. 28; Sells Ex. 1 at 6 (in early 2002, NCS "remained in default on approximately $350 million of obligations"); Sells Ex. 7 at 14, 16 (listing shareholder deficit of $18,062,000, and Historical Book Value as of June 30, 2002 as negative $4.56 per share)) Pollack testified that NCS was insolvent or in the zone of insolvency during his entire representation of NCS. (Pollack 241)

[33] As explained in the Statement of Facts, supra, there is no question that the NCS Board was well-informed when it made its decision on July 28, and Plaintiffs fail to undermine the relentless efforts taken by the NCS Board to inform itself about the Genesis transaction. Although, they attempt to belittle the NCS Board for relying on its financial advisor, it is well-settled that directors are entitled to rely upon their advisors to carry out the board's strategic direction. See, e.g., Cinerama Inc. v. Technicolor, Inc., 663 A.2d 1134, 1142 (Del. Ch. 1994), aff'd, 663 A.2d 1156 (Del. 1995). For example, as the minutes of the May 23, 2002 meeting make clear, the NCS Board was made well aware of Omnicare's failure to contact Pollack or any other NCS representatives since Pollack last solicited them in January 2002. (Sells Ex. 2 Tab 19 at NCS 7354) Further, on July 28, 2002, Pollack presented a fairness opinion to both the NCS Board and the Independent Committee, which discussed Genesis' emergence from bankruptcy, its revenues, cash, net debt and low and high closing stock prices in the previous 52 weeks. (Sells Ex. 2 Tab 22; Sells Ex. 2 Tab 23; Sells Ex. 10 at NCS 168-69)

corporation. See Time, 571 A.2d at 1142 (holding business judgment rule applicable to stock-for-stock merger not resulting in a change of control); In re IXC, 1999 WL 1009174, at *4 (applying business judgment rule to uphold deal protection devices in merger agreement, holding that "[u]nder Delaware law a breach of fiduciary duty analysis in the context of a merger begins with the rebuttable presumption that a company's board of directors has acted with care, loyalty, and in 'good faith'").[34]

The effect of this presumption is powerful: unless rebutted, the Court will not substitute its judgment for that of the board. In re J.P. Stevens & Co. S'holders Litig., 542 A.2d 770, 780 (Del. Ch. 1988) ("[C]ourts have long been reluctant to second-guess such decisions when they appear to have been made in good faith").

1. The NCS Board was not constrained simply to accept the highest price reasonably available.

Plaintiffs mistakenly suggest that the board had a duty to obtain the highest price reasonably available. (OB at 40, citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (establishing standard in cash-out transaction with dissolution of company)) It is well-settled, however, that so-called

[34] Former Chancellor Allen has described the business judgment form of review as encompassing three elements: (1) an objective review of the process by which the board reached its decision (due care); (2) a review of the board's objective financial interests (loyalty); and (3) a review of the board's subjective motivation (good faith). See In re RJR Nabisco, Inc. S'holders Litig., C.A. No. 10389, 1989 WL 7036, at *13 (Del. Ch. Jan. 31, 1989). Since Plaintiffs have essentially abandoned their loyalty and good faith claims (OB at 55), the Court needs only to focus on the first element here.

Revlon duties do not apply where (as here) a board enters into a stock-for-stock merger that does not result in a change of control. See, e.g., Arnold v. Society for Sav. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994) (finding Revlon standard not applicable where target shareholders received stock in combined company); Paramount Communications, Inc. v. Time, Inc., C.A. Nos. 10866, 10670 & 10935, 1989 WL 79880, at *23 (Del. Ch. July 14, 1989) (holding that where control remains "in a large, fluid, changeable and changing market," the target board can properly consider strategic advantages to a merger and need not obtain simply the highest price available).[35]

Under the terms of the NCS/Genesis Merger, NCS shareholders will receive 0.1 shares of Genesis stock for every share of NCS stock. (NCS/Genesis Merger Agreement § 2.1, Sells Ex. 5) Genesis has no controlling shareholder, and no controlling shareholder will result from the NCS/Genesis Merger. Thus, control will reside "in a large, fluid, changeable and changing market after the NCS/Genesis Merger takes place." See Time, 1989 WL 79880, at *23; Krim, 744 A.2d at 525. Plaintiffs have failed to allege any facts that show a change of control would have

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[35] See also In re Santa Fe Pacific Corp. S'holder Litig., 669 A.2d 59, 71 (Del. 1995) (concluding Revlon standard inapplicable because plaintiff failed to allege any facts showing change of control after stock-for-stock merger); Krim v. ProNet, Inc., 744 A.2d 523, 525 (Del. Ch. 1999) (holding Revlon inapplicable because it "does not apply to stock-for-stock strategic mergers of publicly traded companies, a majority of the stock of which is dispersed in the market").

occurred after the NCS/Genesis Merger is approved. As a result, the Court must presume, consistent with Time, that the NCS Board's decision to approve the NCS/Genesis Merger was a valid exercise of business judgment. See Arnold, 650 A.2d at 1290; Time, 517 A.2d at 1142; see also Odyssey Partners, L.P. v. Fleming Cos., Inc., 735 A.2d 386, 416 (Del. Ch. 1999) (holding Revlon duties do not arise where board did not approve transaction resulting in change of control). Even Plaintiffs admit that NCS shareholders are in a "[w]in-win situation [with the NCS/Genesis Merger], [be]cause if Genesis prevails their stock will go much more higher!!!" . . . (Guillermo Marti Lycos Post 1315, Ex. 30 (emphasis added); see also Marti 100-01 (confirming that any post by "gjmv" was one Marti authored))

In addition to fulfilling its duty to creditors by executing a transaction that completely satisfied NCS's creditors, the NCS Board was entitled to consider the strategic benefits to a stock merger with Genesis. Time, 571 A.2d at 1142. The NCS Board's decision to authorize the NCS/Genesis Merger Agreement was not rash; it came only after two years of painstakingly canvassing the market for a restructuring alternative. Once Genesis emerged as a realistic option, the NCS Board had a suitor willing to provide recovery to all NCS stakeholders (and a transaction that would permit NCS shareholders to remain owners of the combined company). (Shaw 45-46) By this time, the "stalking horse" approach once advocated by Pollack and the Independent Committee was no longer a viable option – NCS simply could not find its "stalking horse" – and the NCS Board decided to pursue a favorable strategic merger with Genesis. (Osborne 107-08; Pollack 166; Hager 24; LaNasa 37)[36]

Thus, NCS was not conducting an "active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company" when it executed the NCS/Genesis Merger. Time, 571 A.2d at 1150; Arnold, 650 A.2d at 1290; Odyssey Partners, 735 A.2d at 416; Pollack 86 ("I don't believe NCS ever put itself up for sale"). None of the "limited set of circumstances as defined under Revlon" are present here, and the NCS Board acted in an informed manner and was "not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover." Time, 571 A.2d at 1150.[37] Ultimately, the NCS Board was under no obligation to abandon its strategic association with Genesis to pursue the highly conditional Omnicare offer to negotiate, and the decision to rebuff Omnicare's negotiation proposals in the face of the firm Genesis

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36 In any event, and despite the lack of a "stalking horse," this strategy worked; Omnicare was able to take its "best shot" (OB at 37) – which before July 28 never amounted to anything more than bankruptcy offers or its highly conditional offer to negotiate. There simply is no record support for Plaintiffs' argument that the NCS Board abdicated its oversight authority over NCS's search for a restructuring alternative. For this reason, Plaintiffs' reliance on Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261 (Del. 1989) and similar cases is misplaced.

37 Further, Plaintiffs' emphasis on the NCS Board's purported lack of a true long-term strategic plan for a combined NCS and Genesis is misplaced. (OB at 42) As explained by the Time Court: "the question of 'long-term' versus 'short-term' values is largely irrelevant because directors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon." Time, 571 A.2d at 1150.

proposal was a valid exercise of business judgment. See Time, 571 A.2d at 1150; Emerson Radio Corp. v. International Jensen, Inc., C.A. Nos. 15130, 14992, 1996 WL 483086, at *13-15 (Del. Ch. Aug. 20, 1996) (neither the company nor its board "owes a duty to an interested potential acquiror to deal with the acquiror").

2. Regardless of the applicable standard of review, the NCS directors fulfilled their fiduciary duties to all NCS stakeholders by executing the NCS/Genesis Merger.

Even assuming, arguendo, that the NCS Board was constrained to seek out the highest reasonably available price, they easily satisfied this enhanced standard of review by executing the firm NCS/Genesis Merger – which, under the circumstances, was a reasonable and well-informed decision on behalf of all stakeholders.[38]

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[38] Nor does Williams v. Geier require application of the Unocal standard to the NCS Board's decision to enter the merger agreement. 671 A.2d 1368, 1377 (Del. 1996). In Williams, the Supreme Court held that the Unocal standard did not apply to a board's decision to recommend that the shareholders approve amendment of the company's certificate of incorporation. Id. Because independent and disinterested directors made the recommendation and a majority of the shareholders approved the amendment, the Court upheld the directors' recommendation under the business judgment rule. Id. This reasoning applies with similar force here. Like the shareholders in Williams, NCS shareholders will have the opportunity to approve or disapprove of the deal protection provisions. The fact that a majority of the shares have already been pledged in favor of the NCS/Genesis Merger Agreement (by majority shareholders Outcalt and Shaw) evidences this fact. See id. at 1380-81 (finding presence of controlling majority shareholder did not invalidate shareholder vote); Stroud v. Grace, 606 A.2d 75, 83 (Del. 1992) (finding shareholder vote where "vast majority" of shares were controlled by directors was valid in absence of inadequate disclosures, fraud or other misconduct).

It is well-settled that a board faced with competing offers is not solely constrained to considering price when particular circumstances warrant otherwise. See, e.g., In re RJR Nabisco, 1989 WL 7036, at *19 (holding that where deadline on firm deal was looming, if the board "exercises informed judgment in the circumstances, considers the risks posed by the deadline imposed, and concludes that it is prudent to act and acts with care, it has satisfied its duty"); Golden Cycle, LLC v. Allan, C.A. No. 16301, 1998 WL 892631, at *16 (Del. Ch. Dec. 10, 1998) (finding directors did not breach their fiduciary duties where they approved offer for lower price that was "fully financed, fully investigated and able to close by the end of the year"). Even one of the three principal cases relied on by Plaintiffs recognizes this point. See QVC Network, Inc. v. Paramount Communications Inc., 635 A.2d 1245, 1268 (Del. Ch. 1993) (noting there is "no single blueprint" directors must follow; noting also that "[o]rdinarily as between two competing all cash offers, the board will be required to choose the higher one, but even that is not always the case if the higher offer is subject to uncertainties that create a significant risk of nonconsummation.") (emphasis added), aff'd, 637 A.2d 34 (Del. 1994) (cited by Plaintiffs, OB at 40).

Indeed, a board may favor a particular transaction where "in good faith and advisedly it believes shareholder interests would be thereby advanced." In re Fort Howard Corp. S'holders Litig., C.A. No. 9991 1988 WL 83147, at *14 (Del. Ch. Aug. 8, 1988); Rand v. Western Air Lines, Inc., C.A. No. 8632, 1994 WL 89006, at *7 (Del. Ch. Feb. 25, 1994) (upholding board's decision to "lock up" deal with "no shop" provision after the market of potential acquirors had been fully canvassed and efforts to negotiate a transaction with the only other potential suitor had failed), aff'd mem., 659 A.2d 228 (Del. 1995). "The board of directors is the corporate decision-making body best equipped to make these judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision." QVC Network, Inc. v. Paramount Communications, Inc., 637 A.2d 34, 45 (Del. 1994) (emphasis added); see also In re Pennaco Energy, Inc. S'holders Litig., 787 A.2d 691, 704 (Del. Ch. 2001) (issue is whether "directors have undertaken reasonable efforts to fulfill their obligation ... not to determine whether directors have performed flawlessly").

Among other things, when assessing an offer, a board may consider the existence of financing, the likelihood of the transaction closing and timing. See, e.g., Golden Cycle LLC v. Allen, C.A. No. 16301, 1998 WL 892631, at *16 (Del. Ch. Dec. 10, 1998); Time, 571 A.2d at 1153; In re J.P. Stevens & Co. S'holders Litig., 542 A.2d 770, 781 n.6 (Del. Ch. 1988); Kontrabecki Group, Inc. v. Triad Park, LLC, C.A. No. 16256, 1998 WL 1809924, at *15-16 (Del. Ch. Mar. 18, 1998). As this Court explained in Golden Cycle:

> Where faced with competing offers to acquire a company, directors must: "analyze the entire situation and evaluate in a disciplined manner the consideration being offered. . . . In addition, the board may assess a variety of practical considerations relating to each

> alternative, including: [an offer's] fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; . . . the risk of nonconsum[m]ation; . . . the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests."

See 1998 WL 892631, at *13 (emphasis added) (citing QVC, 637 A.2d at 44); Pennaco Energy, 787 A.2d at 705 ("[t]here are many business and financial considerations implicated in investigating and selecting the best value reasonably available").

Here, the NCS Board was required to (and did) consider factors in addition to price when evaluating the quality and validity of Omnicare's negotiation proposal on behalf of all NCS stakeholders. First, given its past experience with companies that downwardly adjusted their offer price after conducting due diligence, the NCS Board reasonably feared that Omnicare, once Genesis was removed from the picture, would lower its price after completing due diligence. (Sells 186) Indeed,

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REDACTED [39] Further, the NCS Board was justifiably concerned about providing Omnicare with the few remaining pieces of discrete, competitive information that NCS had already refused to provide in the interest of keeping its proprietary information out of the hands of its largest direct competitor. Compare Omnicare's Response to Interrogatory No. 4, Ex. 31, with OMN 707, Ex. 12; (see also Hodges 184-86) Given Omnicare's refusal to sign NCS's standard confidentiality agreement with a standstill provision, providing this information would have likely eroded whatever bargaining power NCS might have had with Omnicare.[40]

Second, the NCS Board was faced with the risk that if it did not execute the merger agreement on July 28, and Genesis walked away, Omnicare would be incentivized to return to low-ball bankruptcy offers the moment that the Exclusivity Agreement expired. (Sells 222-23 (noting the possibility of "a wonderful

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[39] See also Miles 59 (recognizing July 26 Letter was contingent on due diligence, Omnicare could lower its offer or walk away altogether); Marti 90 (recognizing July 26 Letter could result in nothing).

[40] Thus, the NCS Board did not breach its fiduciary duties by refusing to turn over this competitive information to Omnicare. See, e.g., Golden Cycle, 1988 WL 892631, at *16 ("If a potential purchaser chooses to disregard [the normal process for executing a confidentiality agreement], the Board can make a good faith decision to treat it differently, providing doing so is in the best interests of the stockholders.") (citing Fort Howard, slip op. at 35); Alliance Gaming Corp. v. Bally Gaming Int'l, Inc., C.A. No. 14440, 1995 WL 523543, at *3 (Del. Ch. Aug. 9, 1995) ("[I]t is no breach of fiduciary duty for a board to condition a bidder's access to confidential information" on the bidder's execution of an appropriate confidentiality agreement); see also Emerson Radio Corp. v. International Jensen, Inc., C.A. Nos. 15130, 14992, 1996 WL 483086, at *16 (Del. Ch. Aug. 20, 1996) (noting reasonable exercise of board's power to oversee process by which corporate control is transferred, in order to safeguard against misuse of that information).

merger agreement" with Omnicare, based on "Omnicare's behavior prior to that" was extremely unlikely))

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Thus, the NCS Board had a "justifiable concern that calling [Omnicare] would risk losing the transaction with [Genesis]," with whom they had an exclusive negotiating agreement. Golden Cycle, 1998 WL 892631, at *16; Sells 219.[41]

Third, the NCS Board was reasonably concerned that Omnicare had not secured its financing by July 26, as it made its July 26 negotiation proposal conditioned upon receiving consent approvals from its credit facility banks. See Kontrabecki Group, Inc., 1998 WL 1809924, at *9 (granting TRO after party demonstrated a colorable claim that alternative proposal did not constitute a superior proposal, in part, because alternative proposal did not yet have its equity financing firmly committed); (Sells 201 (indicating that Sells viewed this as important in evaluating its July 26 indication of interest);

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[41] Although Plaintiffs speculate in hindsight that the "Irrevocable Offer" evidences that discussions with Omnicare on July 26 would have resulted in a firm offer (OB at 48), there was "no way [anyone] would have predicted that." (Sells 223) That it took Omnicare over two months to put forth such an offer amply illustrates that a return phone call on the weekend of July 26 would not have proven fruitful. (Sells 92)

Fourth, unlike Omnicare's negotiation proposals, Genesis had agreed to satisfy all of NCS's creditors in full, which Omnicare did not (and could not) agree to do in its July 26 Letter. REDACTED

Accordingly, and in light of the NCS Board's duty to NCS creditors, Omnicare's July 26 indication of interest was inferior to the NCS/Genesis Merger.

Fifth, the NCS Board could not, consistent with its fiduciary duties, ignore its tumultuous history of bankruptcy deal negotiations with Omnicare, and Omnicare's strategic decision to suspend discussions with NCS and negotiate directly with REDACTED – NCS's debtholders. (NCS 1044-54, Ex. 32) Only when those negotiations failed to push NCS into bankruptcy did Omnicare re-emerge six months later with its July 26 "offer to negotiate." (Froesel 195-98) In effect, Omnicare went "AWOL" on the NCS Board, and Plaintiffs should not be heard to criticize the NCS Board for Omnicare's refusal to participate in discussions with NCS. See Golden Cycle, 1998 WL 892631, at *15.

Ultimately, this case is closely analogous to the situations confronted by the Court in RJR Nabisco and Golden Cycle, where board conduct strikingly similar to the case at hand was upheld. First, in RJR Nabisco, after a heated bidding war, this Court held that the Nabisco board – subject to a duty to obtain the best value reasonably available, but (as here) faced with the risk of losing a firm offer –

did not breach its fiduciary duties by failing to explore an alternative, facially superior bid (with material terms left undefined). 1989 WL 7036, at *4 (further efforts on the part of the target board to determine whether some additional amount could be extracted from the alternative bidder "entailed risks that one could prudently decide in the circumstances should be avoided," including losing the firm offer).

In so holding, the Court cited approvingly to the following reasoning from an advisor to the Nabisco Special Committee: "I think we believed that there was the risk of losing one bidder and having the other one alter the terms of its bid significantly enough so that whatever potential benefit on the one hand, I think there was a much bigger risk involved on the downside than the likelihood of really getting a better bid." Id. at *17. As to the issue of the alternative bidder's facially higher offer, the Court noted that "the decision to prefer [the bid in hand] with $3 less cash and with less nominal or face value per share [cannot] be seen as so beyond the bounds of reasonable judgment as to raise an inference of bad faith in my opinion." Id. at *18.

Similarly, the Independent Committee here reasonably believed that if they pursued the Omnicare proposal, they would lose the firm Genesis deal. (Sells 219) ("The biggest consequence [of contacting Omnicare during the July 26th weekend] would be losing [the] Genesis deal, which I couldn't stand the thought.") In fact, both Osborne and Sells feared Omnicare's July 26 Letter was simply an attempt to break up the Genesis deal. (Osborne 125 (concerned that Omnicare's "highly conditional and uncertain" indication of interest so close to deal with Genesis was "simply an effort to break up" Genesis deal); Sells 187-88 (testifying "that if Omnicare could get the Genesis deal blown up, because of the very big holes they left in their offer, including due diligence and including this deal about the debt, that they could grab NCS for a much lower price.")) No "reasonable and prudent businessman" would blow off the definite Genesis deal for a "hypothetical" deal with Omnicare. (Sells 223; Osborne 128-29 (worried that, without Genesis, Omnicare would change deal))

This Court was also confronted with a similar situation in Golden Cycle, 1998 WL 892631. There, the defendants, directors of Global Motorsport Group, had rejected a $20 bid from Cycle in favor of a merger agreement offering $19.50 per share. See id. at *1. In upholding the Global Motorsport Board's decision, the Court addressed circumstances strikingly similar to the case at hand:

- The Court ruled that the board had no "duty to call Cycle to inquire if it was ready to raise its bid . . . [out of] justifiable concern that calling Cycle would risk losing the transaction with Stonington, with whom they had an exclusive dealing agreement." Id. at *16. Here, given Genesis' ultimatum that it would pull its offer if not accepted by midnight, July 28, the NCS Board was justly concerned that contacting Omnicare about proposed negotiations could jeopardize the firm Genesis deal, with whom they had an exclusive dealing agreement. (Sells 219)

- Cycle's bid "remain[ed] conditioned on satisfactory results of due diligence and the invalidation of the termination fee and reimbursement provisions in the Stonington Merger Agreement. As things [stood], the Board [was] unable to satisfy either of those conditions, which are controlled by terms of the Stonington Merger Agreement." Golden Cycle, 1998 WL 892631, at *17.

- Cycle criticized Global's "selective, preferential and exclusive dealing with Stonington, citing the Board's failure to contact Cycle after Cycle issued the October 27 press release and before it approved the Stonington Merger Agreement." Id. at *15. Here, Omnicare has criticized NCS's dealings with Genesis and the NCS Board's failure to contact it. But, as in Golden Cycle, "these decisions were importantly influenced by [Omnicare]'s own decision to disengage from the Board. In effect, [Omnicare] went AWOL but now seeks leave to criticize the actions taken by the Board to compensate for [Omnicare]'s refusal to participate." Id. at *15 (emphasis added). There, as here, "these considerations seriously undermine the credibility of [Omnicare]'s arguments on this preliminary injunction motion." Id.

Ultimately, it is telling of the extreme risks inherent in Omnicare's "offer to negotiate" that NCS's two largest, most knowledgeable inside shareholders (Outcalt and Shaw) chose the firm Genesis offer over the scant prospects (at the time) for almost $7 million more in a deal with Omnicare. See, e.g., Emerson Radio Corp. v. International Jensen, Inc., C.A. Nos. 15130, 14992, 1996 WL 483086, at *17 (Del. Ch. Aug. 20, 1996) (majority shareholders "entitled to vote [their] shares as [they] choose").[42] That they did so further supports the NCS Board's assessment that

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42 Similarly, in IXC, Vice Chancellor (now Justice) Steele focused on the economic interests of certain director/stockholders to dispose of Revlon claims, noting that: "Only in the mind of the most aggressive legal advocate could the claim be made, with a straight face and absent any serious factual support, that a board of directors, consisting, in part, of three of the largest individual shareholders in the corporation . . . would completely ignore the best economic interests of the shareholders in order to avoid so-called 'onerous' Revlon

(continued...)

the July 26 Letter was nothing more than a proposal to negotiate, which could have led to a bankruptcy deal or, even worse, no deal at all.

B. At All Times, The NCS Board Acted Loyally And In Good Faith To All NCS Stakeholders.

Plaintiffs claim that the NCS Board acted disloyally and in bad faith boils down to one conclusory sentence in their brief. (OB at 55) "[T]he question of when director self-interest translates into board disloyalty is a fact-dominated question . . . [which focuses on] whether an officer or director's interest in a challenged board-approved transaction is sufficiently material to find the director to have breached his duty of loyalty and to have infected the board's decision." Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 363 (Del. 1993); see also In re Sea-Land Corp. Sec. Litig., 642 A.2d 792, 804 (Del. Ch.), aff'd mem., 633 A.2d 371 (Del. 1993) (the receipt of indemnification not normally deemed to taint direction action with self-interest); Nebenzahl v. Miller, C.A. No. 13206, 1993 WL 488284, at *3-4 (Del. Ch. Nov. 8, 1993) (provision in the merger agreement guaranteeing special benefits for directors upon termination not a breach of loyalty where provision reflected employ-

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42 (...continued)
duties found in Delaware common law. To say that this claim is a serious factual stretch is as understated as I can be. I simply cannot accept a scenario that suggests that such a twisted self-interest could even exist; namely, so intense a desire to avoid an artifice of perceived legal duties (duties which in actuality this Court determines from the context, *after the fact*) that the directors would actively shirk their fiduciary obligations *and* in the process ignore their own economic self-interests. Plaintiffs need a serious reality check." 1999 WL 1009174, at *7.

ment agreements already in place and activated upon any merger resulting in loss of directors' jobs).

Here, Plaintiffs are unable to make any showing that any interest of an NCS director qualifies as a disabling interest.[43] See Grobow v. Perot, 539 A.2d 180, 188 (Del. 1988) (director payments insufficient to establish financial interest), overruled on other grounds sub nom. Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000). Plaintiffs do make some noise about the "$1.3 million" worth of payments Outcalt will receive under the NCS/Genesis Merger (albeit couched in their brief as a "duty of disclosure" claim, which was not raised in their Complaint). (OB at 61) Critically, however, Outcalt would have received a large part of those payments under a merger agreement with any entity (including a potential transaction with Omnicare). As a result, they do not render him specifically beholden to Genesis. See, e.g., Nebenzahl, 1993 WL 488284, at *3. Nor is the size of the payments material in comparison to the incremental increase (about $5.1 million) Outcalt would have received in a potential Omnicare transaction at $3.00 per share.[44]

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[43] Plaintiffs have apparently abandoned their claim that Sells' $10,000 monthly consulting payments from NCS somehow renders him "beholden" to Outcalt. This makes sense, given that Sells' consulting agreement is strictly limited to assisting NCS's restructuring efforts, and that under the NCS/Genesis Merger (or any other transaction), these consulting payments would cease, and Sells had no expectation that they would continue. (Sells 15, 19); Nebenzahl, 1993 WL 488284, at *4.

[44] And given his large ownership position of NCS stock, and the amount he stood to gain or lose by choosing one transaction over another, Outcalt's interests (as well as Shaw's) (continued...)

C. The NCS Independent Committee Functioned Properly By Recommending The NCS/Genesis Merger Agreement.

Plaintiffs' attack on the Independent Committee's lack of independence from Outcalt and Shaw (OB at 55-57) is ironic, given that the Independent Committee was formed

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This baseless attack on the functioning and effectiveness of the Independent Committee (essentially) rests on the Independent Committee's failure to hire separate financial and legal advisors, and is premised on wholly inapplicable case law involving squeeze-outs by controlling shareholders. (OB at 56, citing Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997) (review of independent committee in context of purchase or assets between two companies controlled by a single individual)) See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 950 (Del. 1985)

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44 (...continued)
were aligned with the rest of NCS and its shareholders. See, e.g., IXC, 1999 WL 1009174, at *6 ("Plaintiff has not demonstrated how the rational economic self-interest of those large shareholders differs from all IXC shareholders, nor that they would receive anything more for their shares than even the numerically smallest IXC shareholder); Cinerama v. Technicolor, 663 A.2d 1134, 1139 (Del. Ch. 1994) ("This fact that major shareholders ... who had the greatest insight into the value of the company, sold their stock to MAF at the same price paid to the remaining shareholders also powerfully implies that the price received was fair."), aff'd, 663 A.2d 1156 (Del. 1995); Yanow v. Scientific Leasing, Inc., C.A. Nos. 9536, 9561, 1988 WL 8772, at *5 (Del. Ch. Feb. 5, revised Feb. 8, 1988) (stating largest shareholder that tenders its shares with "full information by virtue of its representation ... on the Board ... is prima facie evidence that offering price is fair").

(finding no fault with independent directors using same financial and legal advisors as the entire board).

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The Independent Committee members well understood this function. (Osborne 31; Sells 44-45; see also Shaw 48-49; Outcalt 51-52) The Independent Committee was also fully aware of its fiduciary obligations to constituencies other than NCS shareholders. (Sells 86; Osborne 38) For this reason, the NCS Independent Committee was charged to be "independent ... from any concentration on any particular constituency." (Sells 44)

Once NCS's creditors were assured a full and complete recovery via the NCS/Genesis Merger, the need for the Independent Committee in this case was largely obviated. There is no question that the Independent Committee and the Board of Directors, in approving the NCS/Genesis Merger Agreement, satisfied their fiduciary duties to NCS's creditors.[45] At issue is whether the NCS Board satisfied its

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[45] Indeed, because of Omnicare's failure to commit to complete pay off NCS's creditors in full in its July 26 Letter, there was a significant probability that NCS and its directors would have breached their fiduciary duties to NCS's creditors if they had let Genesis walk away. (Sells 187)

duties to its NCS shareholders, with whom Outcalt and Shaw's interests, by virtue of their significant stock ownership, were strongly aligned.

Against this backdrop, Plaintiffs erroneously argue that the Independent Committee was a sham because it did not have separate advisors from the Board, and relied too heavily on Pollack, its financial advisor. First, Plaintiffs offer no evidence that <u>any</u> of NCS's advisors had a conflict of interest. The interests of the NCS Board, the Independent Committee, Benesch Friedlander, Brown Gibbons and Candlewood Partners were all aligned. Second, given Pollack's substantial experience in valuation efforts involving troubled companies, the Independent Committee's reliance on his advice was more than justified. (<u>See</u> <u>supra</u>, footnote 4)

Undoubtedly, the record shows that the Independent Committee was well-informed.

(Sells Ex. 2 Tab 20 at NCS 8302)

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Pollack also informed the Independent Committee that

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Finally, Pollack reviewed the terms of the Voting Agreements and Merger Agreement with the Independent Committee. (Sells Ex. 2 Tab 22 at NCS 8265) Accordingly, the NCS Independent Committee made every effort to be, and was in fact, well-informed about the transaction at issue.[46]

For all of these reasons, the decision of the Independent Committee to approve the NCS/Genesis Merger is protected by the business judgment rule. <u>See, e.g.</u>, <u>Nomad Acquisition Corp. v. Damon Corp.</u>, C.A. Nos. 10173, 10189, 1988 WL 96192, at *6 (Del. Ch. Sept. 16, revised Sept. 20, 1988) (applying business judgment rule to the decision of a committee of independent directors to grant severance payments in the event of a change of control); <u>In re Formica Corp. S'holders Litig.</u>, C.A. No. 10598, 1989 WL 25812, at *10 (Del. Ch. Mar. 22, 1989) (applying to business judgment rule to an independent committee's approval of a management leveraged buyout proposal, even though the process involved was not totally free of imperfections).

[46] Plaintiffs also argue that the Independent Committee did not function properly because Sells was purportedly unaware of certain modest benefits Outcalt stood to receive in arrangements with Genesis. (OB at 61) As for Sells' testimony, he was simply mistaken; the Independent Committee was well aware that Outcalt was negotiating the terms of a "consulting relationship," and considered those purported interests. (Shaw 117-18; Sells Ex. 2 Tab 23 at NCS 8258)

D. The Deal Protection Provisions In The NCS/Genesis Merger Agreement Are Reasonable And Should Be Upheld.

1. The deal protection provisions are reviewable as business judgments, and must be granted deference.

It is not, as Plaintiffs claim, "plainly" obvious that the Unocal standard of review applies to the NCS directors' decision to approve the deal protection provisions in the NCS/Genesis Merger Agreement. (OB at 46) The Unocal standard of review only applies to defensive measures unilaterally taken in response to a threat to corporate policy. See, e.g., Williams v. Geier, 671 A.2d 1368, 1377 (Del. 1996) ("A Unocal analysis should be used only when a board unilaterally ... adopts defensive measures in reaction to a perceived threat"); Gilbert v. El Paso Corp., 575 A.2d 1131, 1143 (Del. 1990). In claiming that the NCS Board approved the deal protection provisions as defensive measures in response to Omnicare's indication of interest, Plaintiffs completely ignore the fact that these provisions were being negotiated well before Omnicare stumbled its way back on the scene on July 26, after six months of radio-silence. By that time, NCS had no reason to believe that Omnicare was a viable alternative.

This Court has routinely applied the business judgment rule to uphold deal protection provisions crafted in advance of another emerging bidder, and should do so here. See, e.g., Brazen v. Bell Atlantic Corp., 695 A.2d 43, 48 (Del. 1997) (not applying Unocal to termination fee provisions, but modifying lower court's application of business judgment rule validating that provision by analyzing it as a "liquidated damages" provision), State of Wisconsin Inv. Bd. v. Bartlett, C.A. No. 17727, 2000 WL 238026, at *4 (Del. Ch. Feb. 24, 2000) (applying business judgment to deal protection provisions not adopted in response to any perceived threat); In re IXC Communications, Inc. S'holders Litig., C.A., Nos. 17324, 17334, 1999 WL 1009174, at *6 (Del. Ch. Oct. 27, 1999) (applying business judgment rule to uphold deal protection devices).

Indeed, there is nothing inherently illegal about a contractual provision making it more difficult for a third party to disrupt a strategic combination. See, e.g., Time, 571 A.2d at 1152-54 (holding that informed board can take actions to "lock-in" a strategic merger); IXC, 1999 WL 1009174, at *11 (noting that deal protection provisions may result in higher negotiated prices, benefitting the shareholders). Here, by agreeing to the various deal protection provisions requested by Genesis (including approving the Voting Agreements), the NCS Board was able to ultimately negotiate a better merger price from Genesis. Further, the NCS Board's decision to approve the deal protection provisions was also reasonable "under the circumstances," given the extreme risks faced by the NCS Board over the July 26 weekend, and the fact that commencing negotiations with Omnicare could have left NCS with no deal at all. See IXC, 1999 WL 1009174, at *10 (deal protection provisions "are most properly evaluated in the context of the merger agreements under which they arise"). As here, "in the absence of a showing of disloyalty or lack of care in agreeing to the [deal protection provisions], these provisions are reviewable as business judgments and are, thus, granted deference." Id.; see also Williams, 671 A.2d at 1377 (because majority of shares – here, this includes Outcalt and Shaw – have opportunity to approve or disapprove deal protection provisions in NCS/Genesis Merger Agreement, Unocal standard should not apply).

2. To the extent Unocal review applies, the deal protection devices were reasonable and proportionate and must be upheld.

In any event, even if the Court determines that Unocal should apply, the NCS Board easily satisfied this standard. The Board's compelling concern about losing the valuable Genesis proposal can be viewed as a perceived threat, and the deal protection provisions were reasonable in relation to the threat posed. See, e.g., Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361, 1389-90 (Del. 1995) (remanding case for determination of whether repurchase program was within range of reasonable defensive measures rather than whether it was necessary); Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1152 (Del. 1990) (finding target's directors enacted reasonable defensive measures in relation to threat posed by hostile offeror); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956-57 (Del. 1985) (holding board enacted defensive measures that were reasonable in relation to threat posed by inadequate two-tier tender offer). Indeed, this Court will not hesitate to sustain contractual deal protection provisions that are appropriately proportionate under the circumstances faced by the board. See, e.g., Time, 571 A.2d at 1154-55 (upholding defensive measures including no-shop clause); McMillan v. Intercargo Corp., 768 A.2d 492, 505 (Del. Ch. 2000) (upholding termination fee and no shop clause); Goodwin v. Live Entm't, Inc., C.A. No. 15165, 1999 WL 64265, at *23 (Del. Ch. Jan. 25, 1999) (upholding termination fee), aff'd mem., 741 A.2d 16 (Del. 1999).[47]

Here, the NCS Board also reasonably believed that Omnicare's belated offer to negotiate posed a serious concern, as it was contingent on satisfactory completion of due diligence, regulatory approval, third-party consents and the successful negotiation of a mutually acceptable merger agreement. The NCS Board was also mindful of the fact that, had it pursued Omnicare's offer to negotiate, Genesis would have pulled its offer, leaving NCS shareholders (potentially) with nothing. See Time, 571 A.2d at 1153 (concluding directors reasonably believed purported offer laden with conditions posed threat); Unocal, 493 A.2d at 955 (when assessing a threat, board was entitled to consider factors such as "inadequacy of the

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[47] Delaware courts will sustain reasonable deal protection provisions in the Revlon context as well. See, e.g., In re Pennaco Energy, Inc. S'holders Litig., 787 A.2d 691, 707 (Del. Ch. Feb. 5, 2001) (upholding termination fee); Golden Cycle, 1998 WL 892631, at *17 (upholding termination fee and window-shop provisions); Matador Capital Mgmt. Corp. v. BRC Holdings, Inc., 729 A.2d 280, 291 (Del. Ch. 1998) (upholding termination fee and no-shop clause); Rand v. Western Air Lines, Inc., C.A. No. 8632, 1994 WL 89006, at *6-7 (Del. Ch. Feb. 25, 1994) (upholding "no shop" and "lock up" provisions), aff'd mem., 659 A.2d 228 (Del. 1995).

price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally) [and] the risk of nonconsummation"); In re Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 478 (Del. Ch. 2000) (upholding board's assessment of "traditional threats posed by over-the-transom" acquisition offers).

Moreover, the contested deal protection provisions were appropriate considering the circumstances and risks faced by the NCS Board. See Argument, Part A, supra. See also Gaylord Container, 753 A.2d at 480 (finding defensive measures were not draconian because they did not preclude acquisition of company or coerce shareholders); Unitrin, 651 A.2d at 1388. As explained in the Statement of Facts, supra, the record here establishes that the NCS Board was well-informed and conducted an appropriate process.[48] First, in approving the NCS/Genesis Merger, the NCS Board was fully aware of the terms and significance of the deal protection devices. Second, Genesis insisted on these deal protection devices and threatened to walk away from the deal if the NCS Board did not agree to them. Third, by consenting to the deal protection devices, the NCS Board obtained the best available deal for NCS shareholders and creditors. Fourth, as noted above, Genesis credibly threatened

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[48] See generally Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 Bus. Law. 919, 940-41 (May 2001) (listing five factors courts should consider when evaluating deal protection devices).

to withdraw its offer if it were not approved prior to the end of the day on July 28, 2002. Fifth, had the NCS Board truly wished to merge with Genesis at the expense of its fiduciary duties as Omnicare contends, it would not have aggressively negotiated with Genesis, and would have accepted Genesis' initial June proposal offering $7.5 million in recovery to NCS shareholders.

Ultimately, although Plaintiffs make half-hearted arguments about Section 7.2 (the termination fee)[49] and Section 5.3(c)[50] (the "no-talk" provision) of

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[49] Unlike most cases (such as the ones cited by Plaintiffs (OB at 53)), the NCS Board owed fiduciary duties to both shareholders and creditors. Accordingly, the Court should take the debt portion of the transaction value into account when evaluating reasonableness of the termination fee. See, e.g., In re Pennaco Energy, Inc. S'holders Litig., 787 A.2d 691, 702 n.16 (Del. Ch. 2001) ("While Delaware cases have tended to use equity value as the benchmark for measuring a terminations fee, no case has squarely addressed which benchmark is appropriate. Each benchmark has analytical arguments in its favor."). Consideration of the combined value of the equity and debt is especially appropriate here given that the amount of debt Genesis would retire was a hotly contested issue in the negotiations. See, e.g., IXC 1999 WL 1009174, at *10 (stating "[t]ermination fees are most properly evaluated in the context of the merger agreements under which they arise"). Here, the termination fee ($6 million) represents less than 2% of the total transaction value, which is by no means coercive or preclusive; Kysor Indus. v. Margaux, Inc., 674 A.2d 889, 897-98 (Del. Super. Ct. 1996) (approving termination fee by considering value of merger price plus assumption of liabilities).

[50] As for Section 5.3(c) (the "no talk provision), such provisions "are common in merger agreements and do not imply some automatic breach of fiduciary duty." IXC, 1999 WL 1009174, at *1. This Court has questioned the validity of no-talk provisions only where a board of directors has not informed itself or "completely foreclosed the opportunity" to negotiate with a third party. Phelps Dodge Corp. v. Cyprus Amax Minerals Co., C.A. Nos. 17398, 17383, 17427, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999). Here, as previously explained, the NCS Board was well-informed before agreeing to the no-shop provision. Further, NCS did not foreclose itself from negotiating with Omnicare, as it recently received a waiver from Genesis to do just that. This no-talk clause is not at all similar to the no-talk provision in Ace, under which the board could not speak to another
(continued...)

the NCS/Genesis Merger Agreement, their primary complaint concerns the combined effects of the Voting Agreements and Section 5.3(a) (which requires the NCS Board to submit the NCS/Genesis Merger to NCS shareholders for approval, whether or not the NCS Board changes its recommendation, which it has done here).[51]

First, there is nothing inherently wrongful with Section 5.3(a), which does nothing more than contractually state what the NCS Board is otherwise permitted to do under statute. Indeed, the NCS Board's decision to honor its contractual commitments, but at the same time withdraw its recommendation for a current merger proposal, is expressly authorized by statute. See 8 Del. C. § 251(c) (applicable to the NCS/Genesis Merger Agreement through 8 Del. C. § 252(c)). Critically, Section 251(c) provides that: "[t]he terms of the [merger] agreement may require that the agreement be submitted to the stockholders whether or not the board of directors determines at any time subsequent to declaring its advisability that the agreement is no longer advisable and recommends that the stockholders reject it."

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50 (...continued)
offeror without first obtaining counsel's written opinion that such discussions were necessary. Ace Ltd. v. Capital Re Corp., 747 A.2d 95, 106 (Del. Ch. 1999). Unlike that provision, Section 5.3 of the NCS/Genesis Merger Agreement does not require the NCS directors to receive counsel's written opinion before negotiating with a third party, but rather merely to consult with their financial and legal advisors. (Merger Agreement § 5.3(c)(iv), Sells Ex. 5)

51 For this reason, Plaintiffs' reliance on QVC to support its claim that the NCS Board "contracted away" its fiduciary duties (OB at 64), is misplaced. Indeed, the NCS Board has continued to exercise its fiduciary responsibilities to its shareholders pursuant to both Sections 141(a) and 251(c). (See Sells Ex. 1 at 10-12; LaNasa Ex. 10)

Moreover, as this Court is well aware, a measure is coercive only "when it operates to force management's preferred alternative upon the stockholders." Gaylord Container, 753 A.2d at 480 (emphasis added); cf. Weiss v. Samsonite Corp., 741 A.2d 366, 372 (Del. Ch. 1999) (concern is not whether action is coercive, but "actionably" or "wrongfully" coercive). Here, any coercive or preclusive effect of the Voting Agreements results from shareholder action taken by Outcalt and Shaw, not board or management action. As shareholders, both Outcalt and Shaw had the right to vote their shares as they so desired, without breaching their duties to other shareholders. See, e.g., Emerson Radio Corp. v. International Jensen, Inc., C.A. Nos. 15130, 14992, 1996 WL 483086, at *17 (Del. Ch. Aug. 20, 1996) (majority shareholders "entitled to vote [their] shares as [they] choose"); 8 Del. C. § 218 (authorizing stockholders to enter voting agreements).[52] That they did so is a powerful testament to the risks they perceived in the Omnicare "offer to negotiate," as they turned away (potentially) millions of dollars more for their shares from Omnicare. (Shaw 66-67 ("I signed this agreement as a shareholder, because I wanted to."))

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[52] See also Thorpe v. CERBCO, Inc., 676 A.2d 436, 444 (Del. 1996) (dismissing liability premised on theory requiring majority shareholders to vote against their personal interests); Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 894 (Del. 1987) ("[s]tockholders in Delaware corporations have a right to control and vote their shares in their own interest.... It is not objectionable that their motives may be for personal profit, or determined by whim or caprice....").

Even assuming that the board's decision to approve the Voting Agreements coupled with Section 5.3(a) effectively locked up the deal with Genesis, the NCS Board's actions were reasonable under the circumstances. As this Court explained in Ace, deal protection provisions that effectively ensure that a strategic deal is consummated are appropriate in the Unocal/Unitrin context under certain circumstances, such as the ones present here. See 747 A.2d at 107 n.36 (identifying one such circumstance as "where a board has actively canvassed the market, negotiated with various bidders in a competitive environment, and believes that the necessity to close a transaction requires that the sales contest end").[53] Here, the NCS Board has done exactly that, by actively canvassing the market for potential restructuring opportunities for more than two years prior to entering into the NCS/Genesis Merger. Moreover, NCS and Genesis engaged in vigorous negotiations for months before entering into the NCS/Genesis Merger Agreement. And given the risks posed by Genesis' July 28 ultimatum, and Omnicare's July 26 offer to negotiate, the NCS

[53] This language in Ace contrasts sharply with the quote from Ace cited by Plaintiffs in their brief. (OB at 44) In the hypothetical situation raised in the quote cited by Plaintiffs, Vice Chancellor Strine contemplated that "another available transaction . . . more favorable to the stockholders" existed at the time the Board agreed to the contested deal protection provisions. Ace, 747 A.2d at 107-08 (emphasis added). Here, no such alternative "available" transaction existed for the NCS Board on July 28. Indeed, Omnicare's highly conditional offer on July 26 was nothing more than an "offer to negotiate" a potential deal.

Board was clearly justified in foregoing any further exploration of possible alternatives.[54]

For all these reasons, Plaintiffs have not shown a reasonable probability of success on the merits on this issue, and their motion for a preliminary injunction should be denied.

E. NCS's Directors Have Acted Within Their Authority Under 8 Del. C. § 141(a).

Plaintiffs also incorrectly argue that the NCS Board exceeded the statutory zone of their managerial authority under 8 Del. C. § 141(a), because they have (effectively) prevented themselves from terminating the NCS/Genesis Merger Agreement before a shareholder vote. This claim must be rejected for several reasons.

In essence, Plaintiffs' Section 141(a) argument does nothing more than restate their breach of fiduciary duty claims, which – as explained above – are without merit. Indeed, Section 141(a) is merely the statutory codification of fundamental corporate fiduciary principles, namely that directors owe a triad of fiduciary

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[54] Moreover, Omnicare is not precluded from making an offer for the combined NCS/Genesis entity, which means the deal protection devices are not preclusive. See Time, 571 A.2d at 1154 (bidder not precluded from acquiring combined post-merger entity).

REDACTED There is also a substantial doubt as to whether Plaintiffs can plausibly show they would be precluded from obtaining fair value for their NCS shares, given their right to seek appraisal under 8 Del. C. § 262. (See Merger Agreement § 2.5(a), Sells Ex. 5) duties to shareholders that must be exercised at all times. See, e.g., Emerald Partners, 787 A.2d at 90. In other words, Section 141(a) and common law fiduciary duties in the corporate context are the flip-side of the same coin. Whether by statute or by common law, when assessing directorial conduct the question remains the same: has the board of directors exceeded the permissible zone of its managerial authority? Because (as explained above) the NCS Board acted reasonably under the circumstances, the answer to that question is a resounding no.[55]

Admittedly, there are a few cases that could be interpreted as supporting application of Section 141(a) to invalidate certain board actions whether or not the directors have breached their fiduciary duties. See, e.g., Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1292 (Del. 1998) (invalidating "slow hand" pill); Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1190-91 (Del. Ch. 1998) (finding "dead hand" pill was invalid as a matter of law under a number of theories, including an analysis pursuant to Section 141(a)).[56] These cases, however, should not be broadly

55 Even as a matter of statutory interpretation, Plaintiffs cite no authority for their overreaching claim that Section 141(a) somehow trumps the right of the NCS Board under Section 251(c) to agree to put the NCS/Genesis Merger Agreement to a stockholder vote despite changing its recommendation, or Outcalt and Shaw's right as stockholders to decide how to vote their shares and enter voting agreements to that effect under Section 218. See Grimes v. Alteon, Inc., 804 A.2d 256, 265 n. 35 (Del. 2002); Cede & Co. v. Technicolor, Inc., 758 A.2d 485, 494 (Del. 2000).

56 To the extent the Court believes that the NCS Board exceeded the statutory zone of its authority, it may do so without finding that the NCS directors breached their fiduciary duties, in much the same way as the North Carolina Court did in First Union Corp. v.
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construed to support Plaintiffs' claim here, and are essentially limited to circumstances involving utilization of oppressive poison pills. Indeed, the only Delaware Supreme Court decision arguably on point – Quickturn – can be read only as an invalidation of a "slow hand" poison pill under Section 141(a) – (and, thus, common law fiduciary principles as well) – as a matter of law.

In Quickturn, the Supreme Court considered a "slow hand" poison pill – a rights plan preventing a subsequently elected board of directors from redeeming any rights to permit a transaction with an unwanted suitor for a six month period. The practical result of this provision was that the current Quickturn board had prevented itself and a future board (presumably elected by the unwanted acquiror) from negotiating a possible sale of the company for six months, an "area of fundamental importance to the shareholders." Quickturn, 721 A.2d at 1291-92. Thus, the Court concluded that the "slow hand" pill impermissibly restricted the directors from directing their full authority under Section 141(a). Id.

Quickturn, however, is inapposite to the case at hand. In Quickturn, the existing Quickturn board abdicated its fiduciary responsibilities (and similarly tied the hands of a future board for six months) "in an area of fundamental impor-

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[56] (...continued)
Suntrust Banks, Inc., C.A. Nos. 01-CVS 10075, 01-CVS-8036, 01-CVS-4486, 2001 WL 1885686, at *37-39 (N.C. Super. Aug. 10, 2001) (holding board exceeded its statutory authority in approving a "life-after-death" merger provision even though board did not breach its fiduciary duties).

tance to the shareholders – negotiating a possible sale of the corporation." Id. at 1291-92. Here, however, the NCS Board has done the exact opposite. Indeed, the NCS Board exercised its fiduciary duties at a time when NCS stakeholders needed it most – after searching and negotiating with potential suitors for almost two years to find a transaction offering fair value, and given the extreme risks it faced on the weekend of July 26 – by approving the firm Genesis deal and rejecting Omnicare's belated "offer to negotiate." Indeed, under Plaintiffs' overbroad reading of Quickturn and strained interpretation of Section 141(a), a board of directors would never be able to enter a merger agreement in the face of a facially superior bid (thereby obviating the principles set forth in Time and its progeny) or, indeed, any other contract that "tied a company's hands" for any length of time.[57] The Court simply

[57] Indeed, construing Quickturn broadly would create a host of problems, such as the potential invalidation of a long-term supply contract tying the hands of a current board that was entered into by a previous slate of directors who no longer hold their positions. Certainly, this was not the intent of the Quickturn Court. See, e.g., John C. Coates & Bradley C. Faris, *Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives*, 56 Bus. Law. 1323, 1331 (Aug. 2001) ("If taken literally, the court's language renders any bylaw (or contract!) that limits the board's authority in any way presumptively void. . . . No intent to effect such a dramatic reshaping of basic contract, corporate and agency law doctrines is evident from the Quickturn opinion, which otherwise focuses on the case at hand"); see also Grimes v. Donald, C.A. No. 13358, 1995 WL 54441, at *11 (Del. Ch. Jan. 11, 1995) (refusing to invalidate employment contract as abdication of director duties), aff'd, 673 A.2d 1207 (Del. 1996).

should not extend Quickturn in this manner, and Plaintiffs have not shown a reasonable probability of success on this claim.[58]

III. PLAINTIFFS ARE UNABLE TO SHOW IMMINENT IRREPARABLE HARM.

Plaintiffs cannot show imminent irreparable harm supporting issuance of a preliminary injunction because they will not suffer any legally cognizable damages in the absence of a preliminary injunction. The fact that Omnicare may abandon NCS REDACTED if the Court refuses to grants its motion for a preliminary injunction is a self-inflicted injury. See Time, 571 A.2d at 1154-55 (affirming finding that bidder, by virtue of existing merger agreement, was not precluded from making an offer for combined post-merger entity); see also Phelps Dodge Corp. v. Cyprus Amax Minerals Co., C.A. Nos. 17398, 17383 & 17427, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999) (finding no irreparable injury where offeror's "contention that it will walk away after a merger is consummated between Cyprus and Asarco is a self-inflicted harm").

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[58] Not surprisingly, Plaintiffs have all but abandoned their argument that the NCS Board failed to use its "waiver" power under Section 203 as leverage to extract a better fiduciary out provision before executing the NCS/Genesis Merger Agreement. The NCS Board had vigorously negotiated the terms of the transaction, but in order to receive the benefits it had to waive the protections of Section 203.

REDACTED . In any event, Plaintiffs have an adequate remedy in appraisal rights. See 8 Del. C. § 262 (applicable under Merger Agreement § 2.5(a), Sells Ex. 5).

CONCLUSION

For all of the foregoing reasons, the NCS Defendants respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction.

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CERTIFICATE OF SERVICE

I, Katherine J. Neikirk, hereby certify that on this 15th day of November, 2002, I caused to be served one copy of the foregoing public version of the NCS Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, by hand, upon the following counsel of record:

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