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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 **CONFIDENTIAL FILED UNDER SEAL**

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

To read Defendants' briefs, one would think that this was primarily a case alleging breaches by the Director Defendants of their duty of loyalty to NCS stockholders through self-dealing on the part of Messrs. Outcalt and Shaw and/or a lack of independence on the part of Messrs. Sells and Osborne. One might also conclude that Plaintiffs' entitlement to a preliminary injunction was somehow dependent on whether *Omnicare* acted with sufficient diligence in pursuing NCS to be deemed worthy to acquire the Company. But those are not the issues before this Court.

This case turns not upon the independence or disinterestedness of the NCS Board of Directors, but rather upon its lack of competence, experience, reliable advice and basic information necessary to assess the relative merits of the transaction it chose to enter into and the one it chose to preclude. It turns not on Omnicare's purported lack of diligence in pursuing NCS, but rather upon the NCS Board's lack of diligence in pursuing alternative proposals to the Genesis Merger Agreement and the best interests of NCS's stockholders. In short, it is a case alleging a breach of the NCS Board's duty of care and a violation of 8 Del. C. § 141(a) stemming from its self-imposed inability to exercise its statutory obligations.

By focusing on the wrong issues, Defendants gloss over, or fail even to address (much less to refute), certain irreducible facts establishing that the NCS Board should have known back in July 2002 what has since become obvious to NCS (which has withdrawn its recommendation in favor of the Genesis Merger Agreement), the vast majority of its public stockholders (over 70% of whom have tendered their shares in favor of Omnicare's tender offer) and every other objective observer: that the NCS Board's decision to bow to Genesis's demand for a locked up agreement was contrary to the best interests of NCS and its stockholders.

First, the lock-up effectively began not on July 27 or 28, 2002, but back on July 3, 2002, when the NCS Board entered into an Exclusivity Agreement that precluded NCS not just from soliciting, but from even *considering* -- let alone accepting -- *any* alternative proposal, whether or not it was deemed by the Board to be superior to the proposed Genesis merger.

Second, at the time the NCS Board entered into that Exclusivity Agreement, the offers then on the table from Omnicare and Genesis were, in terms of total dollars, virtually indistinguishable (Omnicare's was actually somewhat higher), but no one from NCS (or the bondholders) ever bothered to let Omnicare know that it was in a bidding war. Just the fact that Omnicare's offer had gone up several times when it thought it was bidding against *itself* should have been a clear signal that Omnicare could and would have increased its offer further if it had only been informed that it was in competition with Genesis. Indeed, what Defendants now seek to characterize as Omnicare's "11th hour" July 26, 2002 offer -- an all-cash offer Omnicare made without hesitation once it began to suspect that it was in competition with another suitor -- is the proof in the pudding.

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Third, the NCS Board proceeded knowingly -- indeed, "enthusiastically" -- to acquiesce in Genesis's ultimatum that the proposed Genesis merger be locked up in order to eliminate any possibility that Genesis might be outbid by Omnicare. Thus, the NCS Board of Directors *intentionally* locked up the Genesis merger in order to *preclude* the possibility that NCS might receive a *better* offer.

Fourth, notwithstanding the assertions of Defendants' attorneys, the Director Defendants themselves acknowledge that NCS was auctioning itself off to the highest bidder. But while NCS had unquestionably put itself up for sale for *Revlon* purposes, Defendants are right that there was no real auction in at least these two respects: (1) Omnicare was never informed that it was participating in an auction process, and was thus never given the opportunity to bid against the competition; and (2) NCS summarily ended the auction before it had reached its natural conclusion, *i.e.*, before the highest bidder had been identified.

Finally, when, the NCS Board was presented with a clear chance to redeem itself -- in the form of Omnicare's July 26, 2002, $3.00 per share, all-cash offer -- the Board did not even investigate the offer but rushed to capitulate to Genesis's "demand" that its $1.60 per share deal be inked by midnight on Sunday, July 28, 2002, without even properly examining whether that lower price was fair to NCS stockholders. As a result, the NCS Board permanently disabled itself, via the Voting Agreements and REDACTED in the Genesis Merger Agreement, from *ever* entertaining another alternative or superior proposal. In so doing, the NCS Board not only breached its fiduciary duty of care to NCS stockholders, but wholly abdicated its statutory obligations as well.

ARGUMENT

I. PLAINTIFFS' CLAIMS HAVE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS

A. The Director Defendants Breached Their Duty of Care

The gist of Defendants' responses to Plaintiffs' duty of care claims is that Omnicare has no one but itself to blame for the fact that NCS has entered into a merger agreement with Genesis instead of Omnicare. This focus on Omnicare's conduct misstates the question before this Court, which is not whether Omnicare "deserves" to acquire NCS but whether the Director Defendants acted with due care, on a fully informed basis, to protect and promote the interests of the owners of 80% of NCS in the process leading up to the execution of the Genesis Merger Agreement. To the extent that Defendants do address this question, they do so selectively, by discussing at length the largely undisputed steps that the Director Defendants did take, and ignoring most of the critical omissions and procedural flaws that lie at the heart of Plaintiffs' claim. At the same time, the Defendants' attorneys attempt to recast the flawed process that the NCS Special Committee and the NCS Board followed, even though they have to ignore or contradict the sworn testimony of their own clients to do so. In fact, as shown below, a careful analysis of the testimony of these witnesses (and particularly the testimony of defendant Boake Sells, the Chairman of the Special Committee) demonstrates that the NCS Directors proceeded with inadequate information, without asking necessary questions, at the two critical junctures (July 3, 2002 and July 26-28, 2002) in their auction process, and thereby breached their duty of care to plaintiffs and the other public stockholders of NCS who own 80% of the Company.

1. The Director Defendants Precluded Themselves From Adequately Evaluating Alternatives, Including The Superior Omnicare Offer

a. The Directors Squander The Opportunity To Use Their "Stalking Horse" Strategy Before Executing An Exclusivity Agreement With Genesis On July 3, 2002

To begin with, in an attempt to avoid the consequences of a duty to obtain the highest available price, the NCS Defendants make the stunning claim that "NCS was not conducting an 'active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company' when it executed the NCS/Genesis Merger." NCS Br. at 41. Defendant Boake Sells, the Chairman of the Special Committee and the Board member entrusted with responsibility for oversight of the negotiations and sale process had a completely different understanding, for in response to a question about whether on July 28, 2002 the Board had discussed its fiduciary obligations to entertain other proposals after executing the proposed Genesis Merger Agreement, Sells testified as follows:

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Perhaps NCS's point is that by July 28, 2002, there was no longer a true auction because of the Exclusivity Agreement with Genesis. But that Exclusivity Agreement does not absolve the NCS Directors of a duty to evaluate adequately the existence of alternatives; at most, it raises the question of why they did not do so before first executing the agreement on July 3.

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As Plaintiffs observed in their opening brief (POB 17-18), here was the ideal time for NCS to implement its "stalking horse" strategy by using the existence of the Genesis proposal and Genesis's demand for exclusivity to secure a higher bid from Omnicare.[1] Tellingly, however,

[1] Defendants make much of Genesis's repeated statements that it would not allow itself to be used as a stalking horse. But prior to July 3, 2002, nothing prevented the directors of NCS *from* using Genesis's offers in this manner, regardless of what Genesis wanted.

Defendants *have no answer to this point.* The NCS Defendants simply state, without elaboration, that:

> 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.

NCS Br. at 20. At the time, however, the NCS directors knew that:

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- Omnicare had already made three proposals to acquire NCS, each significantly higher than the last. Letter to K. Shaw from J. Gemunder, dated July 20, 2001 ($225 million) (Keener Ex. 15); Letter to K. Shaw from J. Gemunder, dated August 29, 2001 ($270 million) (Keener Ex. 16); Draft Asset Purchase Agreement, dated March 25, 2002, ($313,750,000) (Keener Ex. 20).
- Omnicare had raised its bids without knowing about any competing offers.

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In light of these facts, the failure of the Director Defendants to contact Omnicare and test its interest before signing the Exclusivity Agreement was a serious dereliction of duty. Nor is it any answer that the Director Defendants retained the ability to "reject[ ] a Genesis proposal (if warranted) when the agreement lapsed." NCS Br. at 20. The NCS Directors understood that the entire purpose of the Exclusivity Agreement was to put NCS in a position where Genesis could confront it with a take it or leave it proposal at a time when NCS would be contractually precluded from investigating superior alternatives REDACTED In fact, that is precisely what happened, as Genesis threatened to withdraw its proposal if a definitive agreement was not executed by the end of the day on July 28, 2002.

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2 Defendants repeatedly argue that NCS had no reason to expect that Omnicare would top a Genesis bid because NCS had asked Omnicare to raise its bid in the past to a point where equity would have a recovery and Omnicare had refused. But NCS's naked desire for more money provided no reason for Omnicare to bid more. Rather, the point of a "stalking horse" is that a bidder will offer more if he knows that another bidder is competing with him. This basic principle of supply and demand was apparently lost on NCS—but not on Genesis which, REDACTED raised *its* bid when confronted with Omnicare's July 26 proposal.

There is no reasoned explanation for the NCS Directors' failure to contact Omnicare before embarking on this path. Sells realized the importance of including Omnicare in an auction process; as he testified, "we did our best to set up an auction that included Omnicare.... I personally had the greatest desire in the world to get them into the game." Sells 174:16-24. Sells also recognized that he had succeeded in attracting Omnicare's interest:

> Q. Had the NCS board attempted to engage Omnicare in discussions of an auction of the company over the preceding year?
>
> A. Yes.
>
> Q. Had it been successful in doing so?
>
> A. To the extent that they kept showing up with something, yes. I mean they showed up with various proposals, so they were still around, but they hadn't joined the party at the level where we wanted them.

Sells 208:18-209:5.

The Director Defendants' failure to pursue that interest at this critical juncture -- to attempt to get them to "join the party at the level where NCS wanted them" -- contravened their fundamental duties in an extraordinary corporate transaction. As Sells testified:

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In fact, Mencher never disclosed the existence of the Exclusivity Agreement to Omnicare (Mencher 172:5-9) and if Sells was indeed relying on her to do so, his reliance was unreasonable. As Defendants note (NCS Br. at 37 n.33), directors are entitled to rely upon advisors "as to matters the [director] reasonably believes are within such [advisor's] professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation." DGCL § 141 (e). Mencher, however, was a representative of the creditors—with her own interests and REDACTED REDACTED not an NCS advisor, and Sells had no reason to believe that Mencher would adhere to his requests or act in the best interests of NCS's shareholders.

Deluded by his mistaken assumptions about the line of communications with Omnicare, Sells failed to implement the "stalking horse" strategy that he, Pollack and the Special Committee had all embraced. Thus, Sells and the rest of the NCS Board labored under the critical misapprehension that the stalking horse gambit had been tried with Omnicare and failed:

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As a result of Sells's misapprehension, NCS lost its opportunity to entice Omnicare into a bidding war before committing itself to Genesis.

The record makes clear that the NCS Directors were wholly misinformed about Omnicare's continuing level of interest.

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b. **The NCS Directors' Failures Over The July 26, 2002 Weekend**

The Director Defendants committed a series of additional mistakes over the July 26, 2002 weekend. *First*, Sells either did not read, paid no attention to, or did not understand the text of Omnicare's July 26, 2002 offer, for Sells mistakenly believed that the letter hedged on Omnicare's willingness to assume or pay off NCS's debts, and in his deposition, Sells repeatedly stressed this

[3] Defendants go to great lengths to suggest that this absence of communication was Omnicare's fault. *See, e.g.*, NCS Br. at 22; Genesis Br. at 15, Outcalt/Shaw Br. at 10, 16. In doing so, they miss the point, because Omnicare's conduct is not at issue. Rather, the question is whether the NCS Directors took appropriate steps to inform themselves of Omnicare's interest and it is no defense for those directors or Pollack to claim, like shy schoolgirls, that they were waiting for Omnicare to call first.

non-existent equivocation about satisfying creditors as a primary reason why he did not consider Omnicare to have made a serious proposal worth pursuing. Sells 186: 18-25; 187: 1-10.[4]

Second, the NCS Directors failed to inform themselves about the Omnicare offer before accepting Genesis's final proposal. Although Omnicare's $3.00 per share July 26 offer was almost double the Genesis proposal, the NCS Directors did not investigate it. Sells 89:14-26, 90:1-92:24. Although Defendants' attorneys argue at times that the Exclusivity Agreement prevented the NCS Directors from doing so,[5]

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As Sells explained, the Board's decision was based entirely on the alleged defects in the Omnicare offer:

> As far as I know, no one contacted Omnicare. We were -- we decided it was inappropriate to contact Omnicare because Omnicare's very inferior proposal was not capable of being cured in the time frame we were talking about. We were sure of that.

Sells 92:3-8.

There is, however, no explanation in Sells's testimony or in Defendants' papers of how the NCS Directors possibly could have been "sure of that" without inquiring. In that regard, Defendants' emphasis on Omnicare CEO Joel Gemunder's deposition testimony regarding Omnicare's *internal* views at the time about the necessity of some due diligence before executing a merger agreement does not squarely address the point. The July 26 letter was an offer and, to the extent that it contained a condition (such as due diligence) that NCS viewed as unacceptable, NCS could have made a counteroffer. Among other things, NCS could have (and, if it were employing its "stalking horse" strategy, should have) shown Omnicare the merger agreement that Genesis was

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4 The NCS Defendants attempt to cover up this embarrassing gaffe by claiming that Sells "astutely recognized" that Omnicare's letter did not mean what it said and that his observations were confirmed by the fact that in its tender offer—a different proposal than a negotiated merger—Omnicare described its plans for NCS's debt as its current intentions. NCS Br. at 29-30. Suffice it to say that here, as in other important places (e.g., NCS was not for sale), Sells's transcript says one thing and the NCS Defendants say another in their brief.

5 *See* Genesis Br. at 17 (Exclusivity Agreement barred NCS from returning Omnicare calls); Outcalt/Shaw Br. at 37 n.10 (speculating about possible liability for breach of Exclusivity Agreement).

prepared to sign (including the price and Lock-Ups) and told Omnicare of the July 28 deadline. Ultimately on October 6, 2002, Omnicare proffered a signed merger agreement to NCS, at $3.50 per share based principally on Omnicare's reliance on the evidence of Genesis's diligence. Letter to NCS Board of Directors from J. Gemunder, dated October 5, 2002. Indeed, given that the necessary schedules for the Genesis Merger Agreement were undoubtedly assembled over that weekend and that a data room already existed, there is no reason why NCS could not have allowed Omnicare to complete its expedited due diligence over that weekend had it wanted to do so. Of course, Sells and the other NCS Directors could not have known for certain that they could not consummate a transaction with Omnicare before the end of the weekend, but that is not the point. Their failure was the failure to inquire—a breach of the duty to fully inform themselves about the Omnicare offer that, as subsequent events have shown, caused them to forego an admittedly superior transaction.[6] Sells 92:9-12; 94:3-6 (terming Omnicare's proposed merger agreement "superior").

Third, the NCS Directors failed to inform themselves about (or even consider) their other alternatives or the fairness of the Genesis offer before approving it. As discussed in Plaintiffs' opening brief, the single telephonic Board meeting to discuss this issue on the morning of July 28 took a REDACTED Mehalko Notes from the July 28, 2002 Board Meeting (Keener Ex. 38). Moreover, in this most critical meeting, the Director Defendants deliberately *avoided* the crucial question of whether the Genesis transaction would provide NCS stockholders with fair value. In this regard, it is telling that no Defendant even addresses—much less attempts to justify—

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[6] Once again, Judy Mencher's call to Joel Gemunder warning that Omnicare would lose unless it put forward a superior proposal with no due diligence requirement before the end of the weekend is no substitute. First, Mencher did not speak for NCS and the NCS Directors did not even know she placed the call. (Mencher 88-97.) Second, once Mencher's noteholders were to be paid in full, she had no incentive to maximize stockholder value and thus neither NCS nor Omnicare had any particular reason to rely on her. Third, she only conveyed a limited message to Gemunder (Gemunder 218:10-221:19; Mencher 91:17-92:6) and thus Omnicare did not know the price of the Genesis deal or that it was to be the subject on an unprecedented total lock-up.

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Q. Between early 2000 and May 2002, had the company's financial condition improved significantly?

A. It had stabilized and improved, both.

Shaw 103:24-104:21.[7]

Rather than ignoring this alternative, the NCS Directors should have considered whether the Genesis offer was fair to NCS stockholders under all the circumstances. Instead, Pollack's fairness opinion not only ignored management's evaluation REDACTED it explicitly stated that it "does not address the relative merits of the merger [with Genesis] as compared to any alternative business strategies that might exist for [NCS] or the effect of any transaction in which [NCS] might engage." Fairness Op. (Keener Ex. 41) at 2. As a result, the NCS Directors simply had no basis to conclude that the Genesis transaction was fair to the NCS stockholders, and, not surprisingly, because of this breach of the duty of care, the NCS Directors irrevocably committed

[7] Sells, too, agreed that NCS's financial position had changed and testified that "there was no need to consider bankruptcy any more, because the company had improved to the point where that was completely out of the question." Sells 190:16-19.

themselves to a transaction which they can no longer support and which even Pollack can no longer term fair. Form S-4/A at 50, 51 (Keener Ex. 48).

2. The Director Defendants Failed To Obtain The Highest Price Reasonably Available For The NCS Shares

As explained in Plaintiffs' opening brief (at 39-44), the Director Defendants also breached their obligations under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). and its progeny to "act[] reasonably to seek the transaction offering the best value reasonably available to the stockholders." *See Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 (Del. 1993).

Defendants, however, first argue that the Court should not apply the enhanced scrutiny mandated by *Revlon* because the Genesis Merger involves a "stock-for-stock" merger. *Revlon* duties, however, are not triggered solely by reference to the ultimate structure of the transaction. Rather, a board's responsibilities under *Revlon* also are triggered (among other circumstances) where the board "initiates an active bidding process seeking to sell itself...." *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989); *see also Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1287 (Del. 1989).

Defendants assert that NCS was not "for sale" and, therefore, that *Revlon* is inapplicable. But Defendants contradict themselves. For example, Genesis asserts that, for two years, NCS was "openly shopping the company in an effort to avoid bankruptcy." Genesis Br. at 65. Similarly, Messrs. Outcalt and Shaw assert that NCS and its advisors were "marketing the Company for over two years with no bidders." Outcalt/Shaw Br. at 35. In their brief, the Director Defendants state that NCS invited "several parties to conduct due diligence, and negotiated extensively with some of those parties." NCS Br. at 9. Simply put, the NCS Defendants cannot simultaneously argue that they actively shopped NCS (in an attempt to satisfy their duty of care), but that NCS was not up for sale (in an attempt to avoid enhanced scrutiny under *Revlon*).

Moreover, overwhelming evidence establishes that NCS was up for sale. The Special Committee was formed for the express purpose of reviewing, evaluating and negotiating a possible acquisition. Form 14D-9 (Keener Ex. 45); Shaw 51. By May 14, 2002,

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Moreover, NCS asserts that it encouraged Omnicare (albeit only in October 2001) to raise its bid and include a payment to NCS stockholders. As the foregoing makes clear, Defendants' conduct cannot be reconciled with their after-the-fact assertion that NCS was not for sale.

The Director Defendants alternatively argue that, even if *Revlon* applies, they met their burden because they sought and secured the deal that offered the NCS stockholders the best available price. This argument is meritless. As explained above, the Director Defendants cannot establish that they acted with the requisite due care, much less satisfy the enhanced judicial scrutiny mandated by *Revlon*. The Director Defendants made absolutely no attempt to ask Omnicare if it would increase its offer before entering into the Exclusivity Agreement and, prior to its expiration, locking-up the deal with Genesis. In fact, the NCS Defendants failed even to advise Omnicare that Genesis also was interested in acquiring NCS, notwithstanding the **undisputed facts** that:

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- Genesis requested a lock-up specifically in order to prevent Omnicare from topping its offer (POB at 16-17);
- Omnicare already had increased its offer several times (by almost $100 million), even though no other bidder was identified (POB at 6-7);
- NCS last negotiated with Omnicare in October 2001, and last contacted Omnicare in January 2002 (POB at 14-15);
- At no time, did Omnicare suggest that it was no longer interested in a transaction with NCS, or that it was unwilling to increase its offer (Keener Ex. 32; Mencher Ex. 3); and
- Once Omnicare learned (albeit indirectly) for the first time that another bidder was interested in NCS, Omnicare immediately increased its offer. (POB at 18-19.)

Faced with these facts, the Director Defendants suggest that their inexplicable failure to contact Omnicare is excused by the fact that Omnicare, although unaware of NCS's negotiations with Genesis, failed to contact NCS and bid against itself by unilaterally increasing its prior offers. This argument fails as a matter of law, fact and common sense. First, it is the Director Defendants (not Omnicare) who have a duty to act reasonably and to protect the interests of NCS's stockholders. Here, the Director Defendants never even advised Omnicare that another bidder (Genesis or anyone else) was interested in NCS. Rather, the Director Defendants apparently believed that Omnicare had a "duty" to continue to bid against itself, and that they were entitled to ignore the offeror that all agreed was the most attractive and financially capable suitor, unless it (fortuitously) contacted NCS.

Second, the Director Defendants' argument ignores the fact that, in April 2002, NCS was asked to provide Omnicare with comments regarding Omnicare's proposed Asset Purchase Agreement or a term sheet that reflected a deal that would be acceptable to NCS. Pollack 102-105; Mencher at 113-122; Mencher Ex. 7. NCS failed to provide either to Omnicare, and made no attempt to contact Omnicare to negotiate a transaction that was acceptable to NCS. Pollack 102-105; Mencher 122:5-17. In fact, NCS's financial advisor was under the misguided belief that it was not his "responsibility" to contact Omnicare and, instead, that he was obligated only to wait for Omnicare to call him - REDACTED

Third, the Director Defendants' suggestion that they were entitled to ignore Omnicare because its proposals in October 2001 and January 2002 did not include a payment to the NCS stockholders is specious. It is undisputed that, at the time that Omnicare made its proposals, NCS had received no offers that provided for a payment to its stockholders -- and that Omnicare's offers were higher than any others received by NCS at the time. Omnicare could not be expected unilaterally to increase its offer to include a payment to the NCS stockholders given that: (i) NCS had not attempted to negotiate with Omnicare since October 2001; and (ii) as far as Omnicare knew, no other bidders were interested in NCS and Omnicare had already made three offers for successively higher amounts..

Fourth, the Director Defendants' suggestion that it was reasonable to approve and lock-up the Genesis Merger (on July 28, 2002) because they were concerned that Genesis might withdraw its offer misses the point. The Director Defendants could have contacted Omnicare to attempt to negotiate a better deal (or at least inquire if Omnicare was willing to increase its offer) long before they entered into the Exclusivity Agreement with Genesis. The Director Defendants, however, made no attempt to contact Omnicare. Instead, without inquiring if a better deal was available, the Director Defendants entered into the Exclusivity Agreement, which precluded NCS from seeking other offers. Worse yet, the Director Defendants agreed to the Exclusivity Agreement notwithstanding the fact that Genesis stated that any subsequent offer would contain lock-ups that would preclude Omnicare from topping Genesis's offer. Therefore, the Director Defendants created the purported "emergency" that they now claim justifies their decision to lock-up the deal with Genesis without even talking to Omnicare.

Finally, the cases relied upon by the Director Defendants to suggest that they fulfilled their *Revlon* duties are inapposite. In the cases Defendants cite (and in stark contrast to the Directors' conduct here), the target boards actually engaged in a process designed to obtain the best deal reasonably available. For example, in *Golden Cycle*, upon which Defendants heavily rely, the Board contacted each of "the parties that had previously expressed interest [to] determin[e] if they were interested and able to propose a price within the Board's reasonable range." *Golden Cycle, LLC v. Allan*, 1998 Del. Ch. LEXIS 237, at *11; *see also In re RJR Nabisco, Inc. Shareholders Litig.*, 1989 Del. Ch. LEXIS 9, at *3-4 (noting that the Board's approval of the merger was "made following the board's instigation of a public auction for the Company"). Significantly, in *Golden Cycle*, the plaintiff-bidder, although invited, refused to participate in the bidding process established by the board. *Golden Cycle*, at *22. Here, in contrast, NCS made no attempt to include Omnicare in (or advise Omnicare of) the bidding process or advise Omnicare that there was another bidder -- even though NCS knew that Omnicare was still interested in acquiring NCS and was able to pay the highest price. As this Court explained in *Golden Cycle*, "it seems incongruous to conclude that directors can fulfill their Revlon duties without contacting a known interested party who might be willing to pay more." *Id.* at *44. Yet, that is exactly what NCS did here. Moreover, in *Golden Cycle*, the board did not lock-up the deal, but rather required that the merger agreement "include a fiduciary out [that] allows the Board to consider and negotiate a bona fide acquisition proposal from a third party." *Id.* at *16 Ultimately, Defendants have not cited (and cannot cite) any Delaware case in which a Court has held that directors satisfied their obligations under *Revlon* (or otherwise) by locking-up a deal without even attempting to contact a "known interested party who might be willing to pay more." *Id.* at *44.

B. The Deal Protection Devices Are Draconian, Unreasonable And Unenforceable

1. *Unocal/Unitrin* is the Applicable Standard of Review

Defendants' primary response to plaintiffs' assertion that the Lock-Up provisions violate *Unocal/Unitrin* is the assertion that the doctrine simply does not apply. Instead, they suggest the Board's actions in locking up the Genesis Merger should be evaluated pursuant to the business judgment rule. This argument fails in the first instance because, as explained above, the NCS directors quite obviously violated their duty of care, thus rendering the presumptions of the business judgment rule inapposite to any judicial assessment of their decision to approve preclusive Lock-Ups.

Defendants' assertion fails as well by virtue of the several and specific authorities which pointedly hold that the *Unocal/Unitrin* analysis is applicable to the judicial review of deal protection devices. As the Supreme Court explicitly stated in *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d at 1151:

> Plaintiffs argue that the use of a lock-up agreement, a No-Shop Clause, and so-called "dry-up" agreements prevented shareholders from obtaining a control premium in the immediate future and thus violated *Revlon*.
>
> We agree with the Chancellor that such evidence is entirely insufficient to invoke *Revlon* duties . . . . The adoption of structural safety devices alone does not trigger *Revlon*. Rather, as the Chancellor stated, such devices are properly subject to a *Unocal* analysis.

And as cogently stated in *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 108 (Del. Ch. 1999):

> When corporate boards assent to provisions in merger agreements that have the primary purpose of acting as a defensive barrier to other transactions not sought out

> by the board, some of the policy concerns that animate the *Unocal* standard of review might be implicated. In this case, for example... approval of the Merger Agreement is as formidable a barrier to another offer as a non-redeemable poison pill. Absent an escape clause, the Merger Agreement guarantees the success of the merger vote and precludes any other alternative, no matter how much more lucrative to the Capital Re stockholders and no matter whether the Capital Re board itself prefers the other alternative.[8]

See also, McMillan v. Intercargo Corp., 768 A. 2d 492, 506 n.62 (Del. Ch. 2000); *Paramount v. QVC*, 637 A.2d at 41-42 (declaring *Unocal*[9] analysis applicable to review of no-shop provision, termination fee and stock option agreement contained in merger agreement as applied to competing offer); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59 (Del. 1995) (finding *Unocal* analysis applicable to defensive provisions contained in stock-for-stock merger agreement); *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994) (same); Hon. Vice Chancellor Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919 (May 2001).

Defendants opt simply not to take on these authorities directly. Instead, they assert that the *Unocal/Unitrin*[10] doctrine does not apply to the particular deal protection devices because they do not arise from "unilateral board action designed to preclude or coerce shareholder choice." (Genesis Br. at 54) In this instance, they contend, "any coercive or preclusive effect of the Voting Agreements results from *shareholder* action taken by Outcalt and Shaw, not board or management action." (NCS Br. at 65) (emphasis in original). In support of this previously unheralded "exception" to the *Unocal/Unitrin* analysis, Defendants rely primarily on a phrase lifted from the Supreme Court's decision in *Williams v. Geier*, 671 A.2d 1368 (Del. 1996).

Williams was a very different case indeed. It involved a challenge to a charter amendment that had received stockholder approval pursuant to 8 Del. C. § 242 and that implemented a tenured

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8 The court went on to note that, on the strength of this analysis, one might "make a *plausible* argument that a no-escape merger agreement that locks up the necessary votes constitutes an unreasonably preclusive and coercive defensive obstacle within the meaning of *Unocal*." (emphasis in original). Vice Chancellor Strine's opinion in this regard only appears to have grown stronger over time. *See* Hon. Vice Chancellor Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919 (2001).

9 *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

10 *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (Del. 1995).

voting plan, pursuant to which all shareholders were entitled initially to ten votes per share. Upon transfer, however, each share would carry only one vote per share until such time as the new holder had held the share for a term of thirty-six months, at which point the shares would again become entitled to ten votes per share. The amendment was challenged in part on *Unocal* grounds, though plaintiffs identified no specific threat to which the amendment was purportedly intended to respond. The Court unsurprisingly refused to find *Unocal* applicable, in part on the grounds that the *Unocal* analysis "should be used only when a board unilaterally (*i.e.*, without stockholder approval) adopts defensive mechanisms in reaction to a perceived threat." *Williams*. at 1377. Here, Defendants contend, the approval of the Genesis Lock-Up provisions also did not constitute "unilateral board action" because Outcalt and Shaw controlled a majority of the voting power and they obviously endorsed the Voting Agreements. Thus, "the voting agreements are themselves the action of stockholders," Genesis asserts, and "not the unilateral action of directors." (Genesis Br. at 56.) Defendants conclude that *Unocal* therefore does not apply, presumably leaving the Court with no choice but to apply the business judgment rule to these extraordinarily heavy-handed director actions.

In this regard, Defendants place equally heavy reliance on *Stroud v. Grace*, 606 A.2d 75, 82 (Del. 1992), also declining to apply *Unocal* to a charter amendment that had been subsequently approved by a fully informed stockholder vote ratifying the challenged action. The *Stroud* court relied primarily upon the fact that the amendment was not adopted in response to a threat and therefore was not a defensive act. Moreover, the decision reaffirmed that *Unocal* was applicable "where board action is taken to the exclusion of, or in limitation upon a valid stockholder vote," which the Court found not to have occurred with respect to the ensuing stockholder ratification.

On the strength of these inapposite decisions, Defendants leap to the conclusion that *Unocal* does not apply when preclusive and/or coercive director action is accompanied by ratifying, fully informed stockholder approval. It is not enough, say Defendants, that director approval merely formed a part of the process that put the defensive actions in place, for surely that was the case in both *Williams* and *Stroud*, as well. They urge the Court to hold therefore that where defensive director action is ratified by stockholder approval (even when that approval is not pursuant to a statutory process such as that at work in *Williams* and *Stroud*), *Unocal* cannot apply.

There are, of course, a number of problems with this analysis, not the least of which is that it requires the Court to stretch these inapposite and isolated precedents beyond all recognition. The primary and most obvious of its flaws, however, is its failure to recognize the critical and exclusive role played here by the NCS directors in lending the Voting Agreements their pernicious effect. Even assuming that these Agreements (to which NCS was an important signatory) could be regarded as exclusively constituting unilateral stockholder action, they would not have created a coercive or preclusive condition without the independent action of the NCS Board. Plainly Outcalt and Shaw could not have unilaterally approved the Genesis Merger Agreement on their own and the Voting Agreements alone would not have prevented the NCS Board from rejecting the Genesis proposal. It is only the conjunctive effect of the Voting Agreements *coupled with* the Board's unilateral approval of the "force the vote" provision in the Merger Agreement that, absent judicial intervention, will result in the inevitable and therefore coercive approval of the Genesis Merger, thus forcing some 80% of the outstanding equity owners to accept a manifestly inferior value for their shares. The NCS Board's approval of the Section 251(c) provision was neither jointly undertaken with the stockholders, nor ratified by them, as was the case in *Williams* and *Stroud*. In addition, the further unilateral action of the NCS Board in approving the Voting Agreements pursuant to 8 Del. C. § 203 (however cavalierly) was independent director action indisputably necessary to infuse the Voting Agreements with practical and preclusive effect. Without such director approval, Genesis would have immediately become an "interested stockholder" for purposes of Section 203 upon execution of the Voting Agreements, thereby precluding it from engaging in any business combination, including the proposed merger, for a period of three years thereafter. Without this the Voting Agreements would have been rendered useless.

Moreover, Defendants choose simply to overlook the fact the challenged deal protection devices also include a No-Shop provision, a No-Talk provision and a punitive Termination Fee provision, all resulting from unilateral Board action.[11] Arguably unreasonable under any circumstances, these provisions are rendered utterly preclusive in this instance, not by the mere unilateral operation of the Voting Agreements, but by the Board's unilateral decision to accede to a merger agreement that ensures that the dispositive voting commitments those agreements contain will be carried out under any and all circumstances. It is now apparent that such circumstances include the explicit admission of the NCS Board that this transaction is not in the best interests of its stockholders, and the refusal of the NCS financial advisor to endorse the Genesis Merger as fair to those stockholders.

In light of the record facts, it can hardly be maintained that the challenged Lock-Ups are attributable solely to stockholder action or that their preclusive effect is not attributable to unilateral action by the NCS Board. Even assuming that the "unilateral board action" exception to *Unocal* exists, it is clearly inapplicable here.

2. The NCS Board Cannot Satisfy the First Prong of the *Unocal/Unitrin* Test

Defendants can satisfy the first prong of the *Unocal/Unitrin* test only if they establish that the NCS Board approved the challenged defensive actions after concluding, in good faith and based upon reasonable investigation, that Omnicare's proposal constituted a threat to NCS corporate policy and effectiveness. Defendants cannot meet this standard. In fact, Messrs. Outcalt and Shaw assert that "[n]o such threat occurred here." (Outcalt/Shaw Br. at 30).

The other Defendants suggest that the Board's "concern about losing the valuable Genesis deal can be viewed as a perceived threat." (NCS Br. at 60; Genesis Br. at 58). This purported

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11 As Plaintiffs have previously noted, this Court has held that no-talk provisions are inherently in conflict with a board's duty to make an informed judgment with respect to "ownership" decisions. *See Phelps Dodge*, 1999 WL 1054255, at *1 ("No-talk provisions ... are troubling precisely because they prevent a board from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party"). Moreover, where, as here, "all of the target board's defensive actions are inextricably related, the principles of *Unocal* require that such actions be scrutinized collectively as a unitary response to the perceived threat." *Unitrin*, 651 A.2d at 1387; *QVC*, 637 A.2d at 49.

concern, however, did not require the Board to foreclose forever a possible transaction with Omnicare. Omnicare's proposal to pay significantly more than Genesis certainly posed no cognizable "threat" to NCS that required defensive measures. Indeed, the defensive measures were not designed to protect NCS and its shareholders (to whom the Director Defendants owed fiduciary duties), but rather to protect Genesis from once again being outbid by Omnicare.

Moreover, the Director Defendants cannot credibly argue that, based on a reasonable investigation, they had a good faith basis to believe that Omnicare would not pursue its offer. That is because the Director Defendants, despite Omnicare's repeated invitations, determined not even to contact Omnicare to discuss or investigate its offer. Instead, the Director Defendants opted to tie their own hands, as well as those of NCS' shareholders, and to contract away their ability and fiduciary obligation to consider superior alternatives. By virtue of the Defendant Directors' unwarranted action, the Board is required to proceed with the Genesis Merger -- although now conceding it is not in the best interests of NCS or its stockholders.

3. The NCS Directors Cannot Satisfy the Second Prong of the *Unocal/Unitrin* Test

The Defendant Directors must also demonstrate that their response was "reasonable in relation to the threat posed." *Unocal*, 493 A.2d at 955. To do so, they must show that their response was (a) not "coercive" or "preclusive" and (b) otherwise within "a range of reasonable responses" to the threat perceived. *Unitrin*, 651 A.2d at 1387-88. A response is "coercive" if it is aimed at forcing upon stockholders a management-sponsored alternative, and is preclusive if it deprives stockholders of the ability to accept a third-party offer. *Id.*

It is undisputed that, as a result of the Lock-Ups, NCS and the holders of 80% of its stock will be forced to accept the Genesis Merger. It is also undisputed that, as a result of the Lock-Ups, the NCS stockholders are deprived of the ability to accept Omnicare's far superior offer of $3.50 per share -- notwithstanding the fact that over 70% of NCS's Class A shares have now been tendered into Omnicare's offer. *See* Ex. A attached hereto. Thus, the Lock-Ups are collectively both preclusive and coercive.

While it is manifest that neither NCS nor its stockholders can prevent the consummation of the inferior Genesis Merger, Defendants suggest that the Lock-Ups are nonetheless neither preclusive nor coercive. This argument is premised on the erroneous assertion that the Voting Agreements (only one of the challenged Lock-Ups) constitute "stockholder action" -- not Board action. This argument must be rejected for the reasons set forth above.

Relying on *Paramount v. Time*, Genesis suggests that the Lock-Ups are not preclusive because Omnicare may purchase a combined Genesis/NCS enterprise. (Genesis Br. at 59.) *Time*, however, involved the board's attempt to protect a strategic transaction that was part of a "deliberately conceived corporate plan." *Time*, 571 A.2d at 1154. Here, as plaintiffs have already demonstrated, NCS, unlike *Time*, was for sale.[12]

Defendants must also demonstrate that the Lock-Ups were limited in degree or magnitude in relation to the threat they were intended to protect against. *Unitrin*, 651 A.2d at 1387-89. Here, the purported "threat" was that Genesis would walk away. Defendants' response, however, was not just to protect the negotiations with Genesis, but to lock-up the Genesis Merger to the absolute preclusion of any other offers arising either before or after the execution of the Merger Agreement no matter how far superior. In the language of *Unitrin*, the Lock-Ups made it "mathematically impossible" and "realistically unattainable" for Omnicare (or anyone else) to succeed. This is not a reasonable response to the perceived threat – it is a "draconian response." *Unitrin*, 651 A.2d at 1389.

Where, as here, deal protection devices are unlimited in degree or magnitude and foreclose the possibility that any competing offer could ever succeed, the devices are unreasonable. For example, in *Robert M. Bass Group, Inc. v. Evans*, 552 A.2d 1227 (Del. Ch. 1988), the Court scrutinized a defensive restructuring proposed by management and concluded it was unreasonable, noting "[n]ot only does it offer inferior value to the shareholders, it also forces them to accept it." *Id.* at 1242. The Court went on to state that:

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[12] Defendants do not cite any authority to support their argument that the Lock-Ups are not "coercive."

> The directors certainly were free to propose the restructuring to their shareholders. However, as fiduciaries they were not free to "cram down" that transaction in order to "protect" their shareholders from a noncoercive, economically superior one. Under *Unocal* the directors were obligated to give the shareholders a choice. The restructuring, because it deprives them of that choice, is manifestly unreasonable.

Id., 552 A.2d at 1243-44.

Neither the NCS Board nor Candlewood continue to recommend the Genesis Merger, but, as a result of the Lock-Ups, the Director Defendants and the NCS shareholders are powerless to stop the transaction and are precluded from accepting the superior Omnicare offer. *See Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1195 (Del. Ch. 1998)(where "a defensive measure ... makes a bidder's ability to wage a successful proxy contest and gain control either 'mathematically impossible' or 'realistically unattainable' ... [it is] disproportionate and unreasonable under *Unocal*"). Accordingly, the Defendants should be enjoined from giving effect to the Lock-Ups.

C. The Exclusivity Agreement, Genesis Merger Agreement and the Voting Agreements Violate DGCL § 141(a)

As shown in Plaintiffs' opening brief, the Lock-Ups resulted in the NCS Board abdicating its statutory obligation to manage the business and affairs of NCS in violation of 8 Del. C. § 141(a). The statute, according to the NCS, imposes no separate obligations on a board of directors, but is merely a "statutory codification of fundamental corporate fiduciary principles." NCS Br. at 67. Genesis and the NCS Defendants also argue that, since the "force the vote" lock-up is authorized by 8 Del. C. § 251(c) and the Voting Agreements are permitted under 8 Del. C. § 218, 8 Del. C. § 141(a) cannot be read so as to invalidate these agreements. NCS Br. at 68 n.55, Genesis Br. at 35, 37. Both of these arguments are fundamentally flawed.

To the extent that the NCS Defendants argue that there can be no violation of 8 Del. C. § 141(a) without a breach of fiduciary duty,[13] they ignore *Quickturn*[14], where the Supreme Court

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[13] The NCS Defendants' argument on this point is far from clear. They also point out that, if the Court believes 8 Del. C. § 141(a) has been violated, it need not find that the Director Defendants breached their fiduciary duties. *See* NCS Br. at 68 n.56 ("To the extent the Court believes the NCS Board exceeded the statutory zone of its authority, it may do so without a finding that the NCS Directors breached their fiduciary duties. . . ."). Plaintiffs agree.

[14] *Quickturn Design Systems, Inc. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255 (Del. Ch.).

specifically declined to follow the Chancery Court's holding that a delayed redemption feature of a rights plan could not withstand *Unocal* scrutiny, and held instead that the provision was invalid under 8 Del. C. § 141(a). *Quickturn*, 721 A.2d at 1291-93. The Delaware Supreme Court found that the delayed redemption feature would prevent a new Quickturn board of directors from discharging its fiduciary duties to protect fully the interests of Quickturn and its stockholders. *Id.* at 1291. Put another way:

> The Delayed Redemption Provision would prevent a new Quickturn board of directors from managing the corporation by redeeming the Rights Plan to facilitate a transaction that would serve the stockholders' best interests, even under circumstances where the board would be required to do so because of its fiduciary duty to the Quickturn stockholders. Because the Delayed Redemption Provision impermissibly circumscribes the board's statutory power under Section 141(a) and the directors' ability to fulfill their concomitant fiduciary duties, we hold that the Delayed Redemption Provision is invalid.

Id. at 1292-93.

Nor does the fact that the "force the vote" lock-up finds sanction under § 251(c) and the fact that the Voting Agreements are likewise permissible under § 218 avoid the conclusion that these agreements taken together constitute an impermissible abdication of the NCS Directors' responsibilities under 8 Del. C. § 141(a). *See, Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) ("... [I]nequitable action does not become permissible simply because it is legally possible.") Rights plans are permissible and find support under several provisions of the Delaware General Corporation Law, *e.g.*, 8 Del. C. § 122(13), 157. *See Moran v. Household International, Inc.*, 490 A.2d 1059 (Del. Ch. 1985); *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909, at *5 (Del. Ch.), *aff'd*, 780 A.2d 245 (Del. 2001). This, of course, does not mean that a board can craft and use a rights plan to circumscribe its statutory powers under 8 Del.C. § 141(a). *See Quickturn*, 721 A.2d at 1292 ("This Court has held '[t]o the extent that a contract, or a provision thereof, purports to require a board to act *or not act* in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable.'") (citing *QVC*, 637 A.2d at 51) (emphasis added, other citations omitted).

Here, the NCS Board did just that, first approving the Exclusivity Agreement with *no* fiduciary out, then approving the Genesis Merger Agreement with its "force the vote" Lock-Up and draconian "no shop/no talk" provision prohibiting the NCS Board from informing itself about or discussing *any* alternative to the merger with Genesis, not just Omnicare's offer. The NCS Board also approved the Voting Agreements which provided Genesis with sufficient voting power to force the merger.

The facts here are far more egregious than those in *ACE* where, in a stock-for-stock merger, the Capital Re board agreed to a strict "no shop" and where ACE acquired control over 46% of the voting power of Capital Re's stockholders. The issue was whether Capital Re remained free to terminate the merger agreement if a better deal came along. In holding that ACE was unlikely to prevail on its claim that the Capital Re board breached the "no shop," the Court observed, citing 8 Del. C. § 141(a), that the "no shop" was "much more pernicious in that it involves an abdication by the board of its duty to determine what its own fiduciary obligations require at precisely that time in the life of the company when the board's own judgment is *most* important." *ACE,* 747 A.2d at 106, n. 35 (emphasis added). Vice-Chancellor Strine pointedly said this obligation on the part of the board is absolute and is not excused in a stock-for-stock merger, even one *not* implicating *Revlon:*

> But *QVC* does not say that a board can, without exercising due care, enter into a non-change of control transaction affecting stockholder ownership rights and embed in that agreement provisions guaranteeing that the transaction will occur and that therefore absolutely preclude stockholders from receiving another offer that even the board deems more favorable to them. Put somewhat differently, *QVC* does not say that a board can, in all circumstances, continue to support a merger agreement not involving a change of control when: (1) the board negotiated a merger agreement that was tied to voting agreements ensuring consummation if the board does not terminate the agreement; (2) the board no longer believes that the merger is a good transaction for the stockholders; and (3) the board believes that another available transaction is more favorable to the stockholders. The fact that the board has no *Revlon* duties does not mean that it can contractually bind itself to sit idly by and allow an unfavorable and preclusive transaction to occur that its own actions have brought about. The logic of *QVC* itself casts doubt on the validity of such a contract.

747 A.2d at 107-08.

The Court, citing *Quickturn,* which was decided under 8 Del. C. § 141(a), also observed that a ban on considering superior proposals, even with an exception where counsel opines that such consideration is required, "comes close to self-disablement by the board." *ACE*, 747 A.2d at 107 n.37. Here, there is no out -- no exception. The Board of NCS *is* absolutely disabled from considering other offers in violation of 8 Del. C. § 141(a).

Genesis wrongly suggests that *ACE* contemplates circumstances which might validate a deal with no outs. Genesis Br. at 66, citing fn. 36 of the Opinion, 747 A.2d at 107. That footnote makes clear, however, why the Lock-Ups in this case are invalid. As Vice Chancellor Strine states:

> One legitimate circumstance [where lock-ups might survive judicial scrutiny] may be 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. (Emphasis added.)

Here, the Director Defendants did not negotiate with Omnicare, a ready, willing and able bidder, "in a competitive environment." Thus, the Lock-Ups must be enjoined.

D. Genesis Has Aided And Abetted NCS And The Director Defendants In Their Breaches Of Fiduciary Duty

Genesis argues that Plaintiffs' aiding and abetting claims fail because: (i) evidence of "arm's-length negotiation ... negates" a finding of "knowing participation" in a breach of fiduciary duty; and (ii) "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," there can be no finding that Genesis aided and abetted NCS in a breach of fiduciary duty. Genesis Br. at 69. Plaintiffs have already shown that these arguments have no merit. (*See* POB 64-66.) Genesis demanded that NCS enter into an Exclusivity Agreement and other Lock-Ups to which the Director Defendants acceded in all respects in violation of their fiduciary duties. Thus, the negotiations between Genesis and NCS were anything but "arm's-length." (*See* POB at 65-66) As explained in *In re Fredericks of Hollywood, Inc. S'holder Litig.*, 1998 WL 398244 (Del. Ch.), upon which Defendants rely, "an offeror who does participate in a target board's breach of fiduciary duty, cannot be said to be conducting arm's-length negotiations." *See Frederick's* at * 4 (*quoting Gilbert v. El Paso, Co.*, 490 A.2d 1050, 1058 (Del. Ch. 1984)). To repeat Vice-Chancellor Strine's apt ruling in *ACE*:

> Such a suitor cannot importune a target board into entering into a deal that effectively prevents the emergence of a more valuable transaction or that disables the target board from exercising its fiduciary responsibilities.

747 A.2d at 105.

The only structural difference between *ACE* and this case is that in *ACE*, ACE was the plaintiff seeking to enforce its invalid bargain, whereas here the owners of 80% of NCS seek the injunction. Nonetheless, the legal principles are the same in both cases.

II. THE STOCKHOLDER PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE MERGER IS NOT ENJOINED

Defendants in their briefs fail to address (let alone refute) any of the authorities cited by Plaintiffs that the lost opportunity to participate in a superior transaction with Omnicare constitutes irreparable harm to NCS stockholders. *See QVC*, 635 A.2d at 1273 n.50; *see also Revlon*, 506 A.2d at 184 (affirming Court of Chancery ruling that plaintiff demonstrated irreparable harm by, *inter alia*, showing that its opportunity to bid for Revlon would be lost absent injunction of the Lock-Up and other aspects of the agreement between Revlon and Forstmann). While it is manifest that a true properly conducted auction would have produced greater value for NCS's public shareholders, it is impossible to know how high the price would have escalated. NCS's shareholders should not be forced to make an uninformed choice between appraisal and accepting the merger consideration offered here. Accordingly, contrary to Defendants' arguments (*see* NCS Br. at 72; Genesis Br. at 72; Outcalt/Shaw Br. at 43), an appraisal pursuant to 8 Del. C. § 262 does not constitute an adequate remedy at law. *See Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1342 (Del. Ch. 1987).

Equally flawed is the NCS Defendants' suggestion that the Plaintiffs' harm is somehow "self-inflicted." NCS Br. at 71. Plaintiffs were not the bidders here and had no control over the flawed process the NCS Directors employed to sell NCS. The self-inflicted harm theory may be appropriate when a bidder resorts to litigation, but is totally out-of-place in this case.

Defendants Outcalt and Shaw remarkably argue that "NCS will sustain severe and irreparable harm absent the ability to proceed with the merger" (Outcalt/Shaw Br. at 2), notwithstanding the fact they now recommend that their stockholders reject it![15] The reason is crystal clear: Absent the preclusive and coercive Genesis Merger, NCS stockholders (including Messrs. Outcalt and Shaw) would receive approximately $2.00 more per share than they will receive in the deal with Genesis.

III. THE BALANCE OF THE EQUITIES FAVORS THE GRANT OF A PRELIMINARY INJUNCTION

Genesis relies on *ACE* and *True North*[16] for the proposition that it will suffer irreparable harm if it is not allowed to consummate the merger with NCS. Genesis Br. at 72. However, even faced with this scenario, Vice Chancellor Strine concluded that the interests of shareholders outweighed those of ACE. First, Vice Chancellor Strine noted that ACE would receive a termination fee. Similarly, Genesis valued its loss if the Genesis Merger failed at $6 million, far less than the public shareholders will lose if the injunction is denied. Second, the Court noted that ACE could still acquire Capital Re because bidding could continue; the same is true here.

Finally, Vice Chancellor Strine held that ACE knowingly assumed a risk that its deal with Capital Re would not go forward because it entered into a "highly problematic contractual provision it specifically demanded." *ACE*, 747 A.2d at 110. The same logic applies here: Genesis demanded the Exclusivity Agreement and other Lock-Up arrangements with full knowledge that those agreements might be found to be invalid. *Id.* In these circumstances, Genesis should not be permitted to buy NCS for less than one-half its value at the expense of the owners of 80% of the Company.

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15 Indeed, it is telling that these NCS Directors persist in their fundamental misunderstanding that receiving a higher price constitutes "severe and irreparable harm."

16 *True North v. Communications, Inc. v. Publicis S.A.*, 711 A.2d 34 (Del. Ch. 1997).

CONCLUSION

For all of the reasons stated in Plaintiffs' opening brief and herein, Plaintiffs respectfully request that their motion for preliminary injunction be granted.

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Dated: November 13, 2002

Exh. A

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Omnicare Extends Tender Offer for NCS Healthcare Until November 18, 2002

More Than 71 Percent of Shares Held by Public Stockholders Have Been Tendered

COVINGTON, Ky., Nov. 5 /PRNewswire-FirstCall/ -- Omnicare, Inc. (NYSE:OCR), a leading provider of pharmaceutical care for the elderly, today announced that it has extended its $3.50 per share fully financed, all cash tender offer for all of the outstanding shares of Class A common stock and Class B common stock of NCS HealthCare, Inc. (NCSS.OB). The offer, which was scheduled to expire at 12:00 Midnight, New York City time, on Monday, November 4, 2002, has been extended until Monday, November 18, 2002, unless further extended.

Omnicare's offer represents more than twice the value of the proposed transaction between NCS and Genesis Health Ventures, Inc. (Nasdaq:GHVI) and nearly five times the value of NCS's closing stock price of $0.74 on July 26, 2002, the last trading day before Omnicare announced its acquisition proposal. The proposed NCS/Genesis transaction, based on yesterday's closing stock price, is worth approximately $1.46 per share or approximately 26% below the current value of NCS common stock.

As of the close of business on November 4, 2002, a total of 13,178,336 shares of Class A common stock of NCS had been tendered, which represents approximately 71% of the outstanding shares of Class A common stock, and a total of 276,133 shares of Class B common stock had been tendered, which represents less than 1% of the outstanding shares of Class B common stock. Jon H. Outcalt, chairman of the board of NCS, and Kevin B. Shaw, president, chief executive officer and a director of NCS, claim to own approximately 88% of the outstanding shares of Class B common stock. Messrs. Outcalt and Shaw have entered into illegal voting agreements pursuant to which they have agreed, among other things, to support the proposed NCS/Genesis transaction and to vote all of their shares of NCS Class A common stock and Class B common stock in favor of the proposed transaction.

Dewey Ballantine LLP is acting as legal counsel to Omnicare and Merrill Lynch is acting as financial advisor. Innisfree M&A Incorporated is acting as Information Agent.

About the Company

Omnicare, based in Covington, Kentucky, is a leading provider of pharmaceutical care for the elderly. Omnicare serves approximately 746,000 residents in long-term care facilities in 45 states, making it the nation's largest provider of professional pharmacy, related consulting and data management services for skilled nursing, assisted living and other institutional healthcare providers. Omnicare also provides clinical research services for the pharmaceutical and biotechnology industries in 28 countries worldwide. For more information, visit the company's Web site at http://www.omnicare.com .

Statements in this press release concerning the relative value of Omnicare's offer, together with other statements that are not historical, are forward-looking statements that are estimates reflecting the best judgment of Omnicare based on currently available information. Such forward-looking statements involve actual known and unknown risks, uncertainties, contingencies and other factors that could cause actual results, performance or achievements to differ materially from those stated. Such risks, uncertainties, contingencies and other factors, many of which are beyond the control of Omnicare, include overall economic, financial and business conditions; trends for the continued growth of the businesses of Omnicare; the ability to implement productivity, consolidation and cost reduction efforts and to realize anticipated benefits; the impact and pace of pharmaceutical price increases; delays and further reductions in governmental reimbursement to customers and to Omnicare as a result of pressure on federal and state budgets due to the continuing economic downturn and other factors; the overall financial condition of Omnicare's customers; Omnicare's ability to assess and react to the financial condition of its customers; the impact of seasonality on the business of Omnicare; the ability of vendors to continue to provide products and services to Omnicare; the continued successful integration of Omnicare's clinical research business and acquired companies, including NCS, and the ability to realize anticipated economies of scale and cost synergies; the continued availability of suitable acquisition candidates; the ability to consummate an acquisition of NCS; pricing and other competitive factors in the industry; increases or decreases in reimbursement; the effect of new government regulations, executive orders and/or legislative initiatives, including those relating to reimbursement and drug pricing policies and changes in the interpretation and application of such policies; government budgetary pressures and shifting priorities; efforts by payors to control costs; the outcome of litigation; the failure of Omnicare to obtain or maintain required regulatory approvals or licenses; loss or delay of contracts pertaining to Omnicare's contract research organization business for regulatory or other reasons; the ability of clinical research projects to produce revenues in future periods; the ability to attract and retain needed management; the impact and pace of technological advances; the ability to obtain or maintain rights to data, technology and other intellectual property; the impact of consolidation in the pharmaceutical and long-term care industries; volatility in the market for Omnicare's stock, the stock of Genesis Health Ventures, the stock of NCS and in the financial markets generally; access to capital and financing; the demand for Omnicare's products and services; variations in costs or expenses; the continued availability of suitable acquisition candidates; changes in tax law and regulation; changes in accounting rules and standards; and other risks and uncertainties described in Omnicare's reports and filings with the Securities and Exchange Commission.

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SOURCE Omnicare, Inc.

CO: Omnicare, Inc.; NCS HealthCare, Inc.; Genesis Health Ventures, Inc.

ST: Kentucky, Ohio

SU: TNM

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CERTIFICATE OF SERVICE

I, Carmella P. Keener, do hereby certify that on November 13, 2002, I caused the within document to be served by hand delivery on the following counsel of record at the addresses indicated:

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I, James A. Whitney, hereby certify that on this 18th day of November, 2002, I caused to be served one copy of the foregoing public version of the Plaintiffs' Reply Brief in Support of Their Motion for Preliminary Injunction, by hand, upon the following counsel of record:

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