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

MEMORANDUM OF DEFENDANTS GENESIS HEALTH VENTURES, INC. AND GENEVA SUB, INC. IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Defendants Genesis Health Ventures, Inc. and Geneva Sub, Inc. (jointly, "Genesis"), pursuant to Supreme Court Rule 42(c)(ii), hereby submit this memorandum in opposition to the application for certification of an interlocutory appeal of this Court's memorandum opinion and order of November 22, 2002 (the "Opinion," and cited as "11/22 Op. at __"), filed by the class plaintiffs ("Plaintiffs") on November 25, 2002. For the reasons set forth below, Genesis respectfully submits that an interlocutory appeal is unwarranted both on the law and under the peculiar circumstances of this case, and that the Plaintiffs' application should therefore be denied.

I. INTRODUCTION

On November 22, 2002, after nearly four months' worth of unjustified attacks at the hands of Plaintiffs and Omnicare, Inc. ("Omnicare"), the Court's opinion and order denying Plaintiffs' motion for preliminary injunction gave the directors of NCS HealthCare, Inc. ("NCS"), Messrs. Jon Outcalt, Kevin Shaw, Boake Sells, and Richard Osborne (collectively, the "NCS Directors"), a measure of vindication for their thoughtful and deliberate work in the two years leading up to and including the weekend of July 26-28, 2002.

Plaintiffs mischaracterize the Opinion as resolving legal issues. The Opinion actually accepted the legal standards Plaintiffs proffered, but found, on the basis of an extensive factual record, that the conduct of the NCS directors complied with their duty of care, was reasonable under *Unocal* and clearly satisfied *Revlon*'s "enhanced scrutiny" (had that test been applicable). In short, any interlocutory appeal necessarily will involve an effort by Plaintiffs to persuade the Supreme Court to substitute Plaintiffs' version of the facts for the facts preliminarily found by the Court, as already evidenced from Plaintiffs' application, which largely reargues the facts. Appl. at 1-3, 5-9. However, this Court, in its Opinion, clearly and succinctly found, based on the extensive factual record, that the NCS directors had fulfilled their duties under Delaware law:

> *Given the dynamic existing on July 28, the record before the court does not support even a preliminary finding that the NCS directors failed to fulfill their fiduciary duties* when they "shopped" Omnicare's proposal to Genesis, obtained a substantial improvement in the terms of that offer and then approved the transaction without contacting Omnicare. The process they followed was certainly a rational one, given the circumstances they then confronted. Beyond that, the record supports a finding that, even applying the more exacting *Revlon* standard, the directors acted in conformity with their fiduciary duties in seeking to achieve the highest and best transaction that was reasonably available to them. *After looking for more than two years for a transaction that offered fair value to all NCS stakeholders, the board acted appropriately in approving the Genesis merger proposal, including the "deal protection" devices demanded by Genesis.*

11/22 Op. at 41 (emphasis added). In reaching these conclusions, the Court noted that the motion for preliminary injunction failed, not because of the law, but *because of the facts*:

> This court is always solicitous of the rights of stockholders of Delaware corporations, and it will act to enjoin the operation of terms of merger agreements that unreasonably coerce or preclude stockholders from deciding whether or not to approve or ratify a merger agreement. In the circumstances of this case, however, it cannot be said that director approval of the voting agreements, even in conjunction with the Section 251(c) provision in the merger agreement, acted as an unreasonable "lock-up" of the Genesis transaction. On the contrary, the perceived threat NCS faced was the potential loss of the

> Genesis deal followed by a downward spiral in the price offered for NCS. The record shows that the directors questioned the need for these provisions and agreed to them only because Genesis was unwilling to commit itself to the transaction without them. Moreover, the board was aware that Outcalt and Shaw had expressed a willingness to enter into the voting agreements only as a means of achieving the Genesis transaction and without material conflicting interests. *There is also no suggestion in this record that the directors authorized these terms or agreements in order to preclude what they knew or should have known was a superior transaction. On the contrary, at the time the directors acted to meet the Genesis deadline,* ***the only proposal reasonably available to them was the one they adopted.*** Finally, Omnicare certainly is not precluded from making a bid for the combined NCS/Genesis entity, as Gemunder admitted in his testimony. Indeed, Omnicare's financial advisors have already begun to analyze such a transaction.

11/22 Op. at 43-45 (emphasis added).[1]

Plaintiffs now come before this Court seeking certification of an interlocutory appeal to the Delaware Supreme Court. While they pay lip service to the elements for certification set forth in Supreme Court Rule 42(b), Plaintiffs' application rests upon fundamental, repeated mischaracterizations of the Opinion — as it must, since this Court's fact-intensive, discretionary denial of the motion for a preliminary injunction is not an appropriate candidate for extremely accelerated interlocutory review.

In short, Plaintiffs' application fundamentally fails to meet Supreme Court Rule 42(b)'s requirements, and their application must therefore be denied, because:

(i) the Opinion does not determine a substantial legal issue or establish a legal right, because it is a *preliminary*, non-final assessment of the merits of Plaintiffs' case;

(ii) the Opinion is based on a straightforward, common-sense application of Plaintiffs' own view of the legal standards set forth in *Revlon, Inc.*

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[1] Equally significant, the Court noted the extraordinarily strong factual record of the directors' diligence: "The overall quality of testimony given by the NCS directors is ***among the strongest this court has ever seen***. All four NCS directors were deposed, and each deposition makes manifest the care and attention given to this project by every member of the board." 11/22 Op. at 39 n.46 (emphasis added).

v. MacAndrews & Forbes Holdings[2] and *Unocal Corp. v. Mesa Petroleum Co.*[3] to the extensive factual record before the Court – and therefore is not, Plaintiffs' contrary assertions notwithstanding, based upon any issue of first impression or unsettled or conflicting law;

(iii) the decision to grant or deny a motion for preliminary injunction is a matter within this Court's discretion, and when, as here, that decision *arises entirely out of factual findings* (as opposed to legal rulings), any review will, under settled Supreme Court precedent, be subject to the stringent "abuse of discretion" standard of review;

(iv) interlocutory review of the Opinion will encourage piecemeal appeals and cannot result in a termination of this litigation, because this Court decided only one of the three required elements in any preliminary injunction analysis, and any interlocutory review by the Supreme Court, even if successful, will therefore require additional action by this Court; and

(v) the application should be denied because the urgency upon which Plaintiffs base their claim is, as this Court has noted on multiple occasions, entirely of their own making; quite simply, Plaintiffs waited too long in seriously pursuing their motion.

II. THE COURT'S OPINION DOES NOT MERIT INTERLOCUTORY REVIEW

The Delaware Supreme Court has repeatedly stated that applications for interlocutory appeal which are committed to the "sound discretion" of the Court of Chancery should be granted only in "exceptional circumstances." *See, e.g., Derdiger v. Tallman*, 765 A.2d 950, 2000 Del. LEXIS 356, at *1 (Aug. 29, 2000) (Order); *Duthie v. Kohls*, 765 A.2d 950, 2000 Del. LEXIS 355, at *1 (Aug. 29, 2000) (Order); *Berman Real Estate Dev., Inc. v. Berdel, Inc.*, 1995 Del. LEXIS 455, at *3 (Dec. 6, 1995) (Order). These "rigorous criteria"[4] recognize that "interlocutory appeals have caused unnec-

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[2] 506 A.2d 173 (Del. 1986) ("*Revlon*").

[3] 493 A.2d 946 (Del. 1985) ("*Unocal*").

[4] Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice In The Delaware Court Of Chancery* (hereinafter, "*Corporate & Commercial Practice*"), § 14-4 at 14-5.

essary delay and there is substantial danger of abuse of a right to file interlocutory appeals." Committee Comment, Supr. Ct. R. 42.

Under Supreme Court Rule 42, a trial court, in this case the Court of Chancery, may not certify an interlocutory appeal unless it determines that the order from which the interlocutory appeal is sought (i) determines a substantial issue, (ii) establishes a legal right, and (iii) satisfies at least one of the five alternative criteria set forth in subsection (b). Plaintiffs' application fails on all three elements. This Court's denial of preliminary injunctive relief neither determined a substantial issue nor established a legal right, and it did not meet any of the five criteria set forth in Rule 42(b).

A. The Opinion Did Not Determine A Substantial Issue Or Establish A Legal Right

An order of the Court of Chancery "determines a substantial issue" when the issue "relates to the merits of the case," *i.e.*, when it is "the underlying issue in the case at bar." *See Castaldo v. Pittsburgh-Des Moines Steel Co., Inc.*, 301 A.2d 87, 88 (Del. 1973) ("Generally speaking, the substantive element of the appealability of an interlocutory order must relate to the merits of the case."); *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, 1993 Del. LEXIS 420, at *2 (Nov. 16, 1993) (refusing appeal as not meeting the criteria of Rule 42 because "the issue presented does not relate to the merits of the case").

An order "establishes a legal right" when the order actually decides the merits of the case (*i.e.*, the underlying issue). *See, e.g., In re Hybrilonics, Inc.*, 514 A.2d 413, 1986 Del. LEXIS 1203, at *6 (Aug. 16, 1986) (refusing interlocutory appeal where trial court's order "does not establish legal rights on the underlying issue of law"); *Wilmington Medical Center, Inc. v. Coleman*, 298 A.2d 320, 322 (Del. 1972) (interlocutory appeal improper when trial court's order "did not decide the underlying issue in the case at bar"). *See also Tortuga Cas. Co. v. National Union Fire Insur. Co.*,

604 A.2d 419, 1991 Del. LEXIS 374, at *4 (Nov. 14, 1991) (Order); *DVI Fin. Servs. v. Imaging Mgmt. Assocs.*, 1995 Del. Super. LEXIS 162, at *3-4 (Apr. 13, 1995) (Order). As a leading treatise notes:

> The analysis thus continues to be driven by the nature of, and the extent to which the trial court has ruled on, the underlying substantive claims. *Only if the Court of Chancery has ruled on the merits of the controversy is it likely that the requirements of Rule 42 will be met.*

Corporate & Commercial Practice, § 14-4[d] at 14-10 (emphasis added).

In this case, there is no question but that the Opinion does *not* determine a substantial issue or establish a legal right. A decision on a motion for a preliminary injunction, by definition, constitutes a preliminary finding by this Court, no more and no less — it is *not* a final determination on the merits and, as such, generally does not meet the first two requirements of Supreme Court Rule 42(b). *See, e.g., Emerson Radio Corp. v. International Jensen Inc.*, 683 A.2d 58, 1996 Del. LEXIS 311, at *2 (Aug. 23, 1996) (refusing interlocutory appeal and agreeing with Court of Chancery's determination that the denial of the motion for a preliminary injunction "did not establish a legal right or meet any of the requirements of Supreme Court Rule 41"); *In re Hybrilonics*, *supra*, 1986 Del. LEXIS 1203, at *6-7 (denial of a preliminary injunction "does not determine a substantial issue simply because [it involves] a contest for control. . . . Denial of injunctive relief was not based on a ruling on the merits of the underlying issue but on the application of equitable principles involving judicial discretion.") (citing *Outdoor Sports Indus., Inc. v. Telvest, Inc.*, Del. Supr., No. 73, 1979, Quillen, J. (May 2, 1979) (Order)); *Monsanto Co. v. Aetna Cas. & Ins. Co.*, 1991 Del. Ch. LEXIS 154, at *3 (Sept. 25, 1991) (denial of preliminary injunction motion did not determine a substantial issue because it "merely reflect[s the Court's] discretionary decision" on the motion, and does not establish a legal right because it "neither create[s] nor diminish[es] any party's rights with respect to the underlying substantive issues"); *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1990 Del. Ch. LEXIS

150, at *3 (Sept. 27, 1990) (denial of motion for preliminary injunction "did not determine a substantial issue or establish a legal right [because it] was preliminary, not final, and it [did] not foreclose any claims. The Court ruled as it did based upon the record presented to it."); *Reading Co. v. Trailer Train Co.*, 1984 Del. Ch. LEXIS 496, at * 4 (June 7, 1984) (no legal right determined where "[i]n deciding that the business judgment rule is applicable at the preliminary stage, the Court does not hold that that choice will necessarily control its final decision."); *Stepak v. Pioneer Texas Corp.*, 1982 Del. Ch. LEXIS 562, at *2 (July 7, 1982) ("[E]ither party may yet prevail at the trial level. Hence, the instant order does not establish a legal right.").[5]

The authorities cited in Plaintiffs' application in purported support of their position in fact support the opposite conclusion. *First*, Plaintiffs' citations to the *Starkman* and *American Business Information* cases are misleading, failing as they both do to bring to this Court's attention the subsequent history of those cases, in which the Supreme Court *refused* to accept the interlocutory appeals. *Starkman v. United Parcel Serv. of Amer., Inc.*, 741 A.2d 1028, 1999 Del. LEXIS 352, at *2 (Oct. 21, 1999) (refusing interlocutory appeal because it "does not meet the requirements of Supreme Court Rule 42"); *American Business Information, Inc. v. Faber*, 711 A.2d 1227, 1998 Del. LEXIS 137, at *6 (Apr. 2, 1998) ("In the exercise of its discretion, this Court has concluded that the application for interlocutory review does not meet the requirements of Supreme Court Rule 42(b) and should be refused.")

The linchpin of Plaintiffs' contention on this criterion under Rule 42 is that the terms of this merger "forever prevent NCS stockholders from considering or obtaining a more favorable transaction." Appl. at 11. But that assertion is blatantly false. This merger results in NCS shareholders becoming Genesis shareholders. As this Court recognized, Omnicare has already admitted that it is

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[5] The concept is not new. *See, e.g., Nebeker v. Berg*, 115 A. 310, 311-12 (Del. Ch. 1921) ("The refusal of a preliminary injunction, of course, determines nothing.").

capable of acquiring the combined entity and is in fact already evaluating that potential transaction. 11/22 Op. at 45. And, if not Omnicare, some future acquiror may do so. Also, Plaintiffs' assertion glosses over the fact that NCS stockholders who believe that NCS, alone, is worth more than NCS merged with Genesis may elect to seek appraisal of their shares. This fevered rhetoric simply ignores the facts.

B. The Opinion Does Not Meet Any Of The Criteria Set Forth In Subsections Rule 42(b).

The five criteria set forth in subsection (b) of Rule 42 are: (i) the order addresses an issue of first impression in this jurisdiction, involves matters upon which the lower courts of this State have issued conflicting decisions, or involves unsettled questions of law relating to the constitutionality, construction or application of a statute of this State; (ii) the order sustains the controverted jurisdiction of the Court of Chancery; (iii) the order reverses or sets aside a prior decision of this Court; (iv) the order vacates or reopens a prior judgment of this Court; or (v) the Supreme Court's review of the Court of Chancery's order may terminate the litigation, substantially reduce further litigation, or will otherwise serve the considerations of justice. *See* Supr. Ct. R. 42(b)(i)-(v).

In their application, Plaintiffs do not claim that the Opinion "sustains the controverted jurisdiction of the Court of Chancery," "reverses or sets aside a prior decision of this Court," or "vacates or reopens a prior judgment of this Court." *See* Supr. Ct. R. 42(b)(ii)-(iv). Plaintiffs rely solely upon subsections (b)(i) and (b)(v) to establish the third prerequisite to certification of an interlocutory appeal. *See* Appl. at 12-15. Plaintiffs satisfy neither subsection.

1. Rule 42(b)(i) – The Opinion Does Not Meet The Criteria Applicable To Proceedings For Certification Of Questions Of Law.

Under Supreme Court Rule 42(b)(i), an interlocutory order that determines a substantial issue and establishes a legal right may be certified for appellate review if the decision meets "any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41." Certification of a question of law is permissible if the question addresses an issue of first impression in this jurisdiction, involves matters upon which the lower courts of this State have issued conflicting decisions, or involves unsettled questions of law relating to the constitutionality, construction or application of a statute of this State. *See* Supr. Ct. R. 41.

In an attempt to manufacture a basis for interlocutory review, Plaintiffs incorrectly claim that the Opinion, which is in reality a *fact-driven* opinion applying *Revlon* and *Unocal* (as Plaintiffs urged), involves questions of first impression under Delaware law upon which the lower courts of this State have issued conflicting decisions. In essence, while Plaintiffs and Defendants differed on whether *Unocal* or *Revlon* applied at all, Plaintiffs won for purposes of the motion, but this Court found, on the particular facts of this case, that the tests articulated in *Unocal* and *Revlon* were met. Thus, Plaintiffs' appeal necessarily cannot take exception to the legal standards applied by this Court, but only to the Court's preliminary factual findings. The purpose of an interlocutory appeal is *not* to litigate (or relitigate) preliminary factual findings of the Court below. Rather, an interlocutory appeal is to resolve legal issues which may be dispositive — of which in this case there are none. A careful examination of the issues posed by the Plaintiffs in their Application reveals the real nature of this appeal.

a. No Issue of First Impression Is Raised By The Complaint Or Addressed In The Opinion.

Plaintiffs claim, at pages 12-14 of the application, that the Opinion was based upon issues of first impression under Delaware law. On the contrary, the Court's rulings are based on a straightforward, common-sense application of *Plaintiffs'* requested interpretation of the legal standards applicable to claims of a due care violation and the standards set forth in *Revlon* and *Unocal* to the incontestable findings of fact. *See* 11/22 Op. at 38 ("even if the court were applying the *Revlon* standard of enhanced scrutiny, the directors' actions and decisions would pass muster."); 41 ("the record supports a finding that, even applying the more exacting *Revlon* standard, the directors acted in conformity with their fiduciary duties in seeking to achieve the highest and best transaction that was reasonably available to them."); 42 ("The court agrees [with Plaintiffs] that these aspects of the Genesis merger agreement require special scrutiny."). The Opinion applies legal standards urged by Plaintiffs to the factual record before the Court — *it decided no issue of first impression.*

Plaintiffs contend that the applicability of *Revlon* to a stock-for-stock merger is an issue of first impression which needs to be resolved on an interlocutory basis. Appl. at 12. While this Court noted *Revlon*'s well-settled inapplicability to stock-for-stock mergers, *see* 11/22 Op. at 27, it nonetheless took pains to note that its conclusions would be the same even applying *Revlon*'s "enhanced scrutiny." To reverse, the Supreme Court must substitute Plaintiffs' facts for those found by this Court.

Plaintiffs further contend that this case raises unresolved issues under *Unocal* and *Unitrin*. Appl. at 12. While Defendants argued that *Unocal* and *Unitrin* have no applicability in this case, this Court ruled otherwise and evaluated the conduct of the NCS directors and the terms of this merger agreement under *Unocal* and *Unitrin*. Again, on the facts of this very peculiar case, the Court found the conduct of the NCS Directors and the terms of the merger agreement and Voting

Agreements to be reasonable in relation to the threat which the Court preliminarily found to exist as a matter of fact. 11/22 Op. at 44-45. To reverse, the Supreme Court must again substitute Plaintiffs' facts for those preliminarily found by this Court.

Plaintiffs argue (once again) that the terms of this Merger Agreement and the conduct of the NCS directors constituted an unlawful "abdication" of directorial responsibilities under 8 *Del. C.* § 141(a). Appl. at 12. Yet this Court found the NCS directors met their responsibilities in a manner that fully complied with their fiduciary obligations, *even under the "enhanced scrutiny" of Revlon.* This, again, was a factual finding. *See, e.g.*, 11/22 Op. at 41. To the extent that Plaintiffs argue that § 141(a) prohibits directors from including in a Merger Agreement a provision expressly allowed by 8 *Del. C.* § 251(c), this so-called "legal issue" is so plainly absurd on its face that it does not merit an interlocutory review.

In short, what the Plaintiffs hope to accomplish with their interlocutory appeal is to persuade the Supreme Court that this Court misapprehended the facts of this case. This Court did not. This Court made extensive findings of facts, based in part on its own review of the deposition testimony and the documentary record. Even under the appropriate appellate standard (abuse of discretion), it is inappropriate to ask, and unfair to expect, the Supreme Court to review this extensive factual record in but a few days in order to make its own preliminary fact finding. In short, this case, as decided by this Court, lacks a legal issue to be resolved by the Supreme Court.

b. The Decision of the Trial Court Does Not Create Conflicting Decisions.

Plaintiffs argue that this Court's opinion contrasts with the Supreme Court's decision in *Quickturn Design Systems, Inc. v. Shapiro*.[6] However, as previously noted, this Court found, on the unassailable facts of this case, that the NCS Directors met their fiduciary duties in an exemplary fashion. To the extent Plaintiffs argue that a term in a merger agreement expressly allowed under § 251(c) (*i.e.*, that a merger may be submitted to a vote despite the withdrawal of the board's recommendation) can constitute an abdication under § 141(a) and the Supreme Court's decision in *Quickturn*, that argument ignores both that the inclusion of such a provision in a merger agreement is expressly allowed under § 251(c) (and therefore cannot possibly violate § 141(a)), and that *Quickturn*, which dealt with the "dead-hand" poison pill takeover defense, did not relate to or address the 1998 amendment of § 251(c). In short, there is no conflict whatsoever.

Plaintiffs also argue that the Opinion conflicts with the Court's opinion in *ACE Ltd.* v. *Capital Re Corp.*[7] However, this Court applied *Unocal* to the "deal protection" terms of this merger agreement, as the *dictum* in *Ace* envisioned. There is no conflict in the law as applied by this Court and the *dictum* from *Ace* upon which Plaintiffs rely.

In short, this case, as decided by this Court, lacks a legal issue to be resolved by the Supreme Court. *See, e.g., Reading Co. v. Trailer Train Co., supra*, 1984 Del. Ch. LEXIS 496, at * 3 (where the "question of law is not one of first instance" or where "the reported opinions of this court are not conflicting on this issue," then "the case is not in a proper posture for certification."); *cf. Monsanto Co., supra*, 1991 Del. Ch. LEXIS 154, at *3 (interlocutory appeal inappropriate where denial of motion for preliminary injunction did not conflict with settled precedent).

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[6] 721 A.2d 1281 (Del. 1998)

[7] 747 A.2d 95 (Del. Ch. 1999).

2. Rule 42(b)(v) – Interlocutory Review Will Not Terminate the Litigation, Substantially Reduce Further Litigation, or Otherwise Serve The Considerations Of Justice.

a. Interlocutory Review Will Not Terminate the Litigation or Substantially Reduce Further Litigation

From a practical perspective, the application should be denied because it contravenes a significant public policy rationale underlying Rule 42 — the avoidance of piecemeal litigation. *See, e.g.*, Supr. Ct. R. 42(b)(v); *Reading Co.*, *supra*, 1984 Del. Ch. LEXIS 496, at * 4 ("fragmentation through the appellate process is undesirable"). While Plaintiffs caption this section of their application (in part) as "Review Of The Opinion May Terminate The Litigation," curiously missing from the text of this section is any reference to this element of Rule 42(b)(v). It is of no moment, as any argument by Plaintiffs would be unavailing, because the Court of Chancery, in denying Plaintiffs' motion, addressed *only* the likelihood of success on the merits, which is but one of three prerequisites to the issuance of a preliminary injunction.

Even assuming, *arguendo*, the Supreme Court were to grant interlocutory review, and even assuming, *arguendo*, the Supreme Court were to find that this Court abused its discretion in finding that Plaintiffs had not demonstrated a likelihood of success upon the merits, the Supreme Court would then have to remand the case back to this Court for proceedings consistent with that determination – necessarily including consideration in the first instance of the required elements of irreparable harm and the balance of the equities. Where, as here, interlocutory review by the Supreme Court, even if successful, will require additional action by this Court, interlocutory review will not, indeed, cannot, by definition, terminate litigation or substantially reduce its scope.

b. Interlocutory Review Will Not Serve The Interests of Justice.

Certification should also be denied because interlocutory review will not serve the interests of the justice. The Opinion in this case was based on this Court's determination that the facts, not the law, failed to show a likelihood of success on the merits of Plaintiffs' claims. The Court, as previously noted, accepted Plaintiffs' interpretation of the law, and held that even under that analysis the facts simply did not establish a likelihood of success on the merits.

Indeed, Plaintiffs' claim that the interests of justice favor their application rests upon a fundamental misunderstanding of the substantial discretion this Court has in deciding whether to issue a preliminary injunction, and the substantial burdens which must exist before such an injunction can issue, or before this Court will grant an application to certify an interlocutory appeal of the exercise of such discretion. *See, e.g., Wilmington Savings Fund Society, FSB v. Covell*, 577 A.2d 756, 1990 Del. LEXIS 215, at *1 (May 16, 1990) (Order) ("Interlocutory appeals are addressed to the discretion of this Court and are accepted only in exceptional circumstances.") This discretion, of course, has been a fundamental part of this Court's injunctive powers since the earliest days of equity. *See, e.g., Gimbel v. Signal Cos.*, 316 A.2d 599, 602 (Del. Ch. 1974) ("An injunction, being the 'strong arm of equity' should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the court of its urgent necessity."); *Consolidated Film Indus., Inc. v. Johnson*, 192 A. 603, 605 (Del. 1937) ("An application for a preliminary injunction is addressed to the sound discretion of the court.") (quoting *Nebeker v. Berg*, 115 A. 310, 311 (Del. Ch. 1921)).

Where, as is presented here, review of Plaintiffs' appeal would be based *solely* on the Court of Chancery's factual determinations, the only standard of review the Supreme Court can apply is "abuse of discretion." *Frank W. Diver, Inc. v. General Motors Corp.*, 718 A.2d 527, 1998 Del. LEXIS 327, at *3 (Aug. 26, 1998) ("This Court reviews the denial of a preliminary injunction for

abuse of discretion, without deference to the legal conclusions of the trial court."); *SI Mgmt., L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998) (holding same); *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996) (holding same, and noting that the "[f]ederal appellate courts follow the same approach.") (citing cases).

The inappropriateness of interlocutory review of factual findings is heightened where the interlocutory appeal must be completed within a week. Not only is Plaintiffs' effort to rush the Supreme Court to judgment ill-advised, it is inequitable because the existing time constraints are a product of Plaintiffs' failure to press their motion for a preliminary injunction on a schedule which would have permitted an interlocutory appeal (if otherwise appropriate) on a schedule which would have allowed for meaningful consideration of the extensive factual record by the Supreme Court.

* * *

V. CONCLUSION

At bottom, what Plaintiffs seek with this application is the same thing they have sought since they filed this action. Plaintiffs have always hoped that the disparity between the immediate value of the NCS/Genesis merger and the now-binding (but only since October 6) offer by Omnicare would motivate this Court to ignore the facts of this case, which unequivocally demonstrate that the NCS Directors complied with their fiduciary duties in full measure. Because this Court wisely refused to do so, Plaintiffs now hope to enlist this Court's assistance in their hope to rush the Supreme Court into a highly-expedited and ill-advised interlocutory review.

Plaintiffs' application for certification of interlocutory appeal should be denied.

Respectfully submitted,

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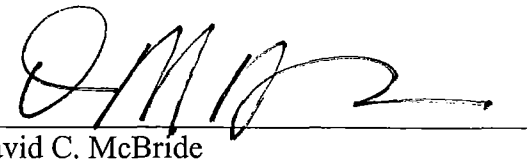

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