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NATURE AND STAGE OF THE PROCEEDINGS

On November 22, 2002, the Court of Chancery denied Plaintiffs' motion for preliminary injunction, which was based on fiduciary duty claims that had not been dismissed by the Court of Chancery's October 29, 2002 opinion granting summary judgment against Count I of Plaintiffs' Complaint. In denying the preliminary injunction, the Court of Chancery did not decide any issues of law adversely to Plaintiffs. On the contrary, the Court applied the legal standards advocated by Plaintiffs to an extensive factual record and determined in its discretion that preliminary injunctive relief was inappropriate.

On November 25, 2002, Plaintiffs filed their Notice of Appeal, applied to the Court of Chancery for certification of interlocutory appeal, and filed a motion for expedited appeal in this Court. On November 26, 2002, the Court of Chancery heard oral argument on Plaintiffs' application for certification of interlocutory appeal and denied that application in a written order. Order (BG1-9).[1] On November 26, 2002, this Court refused Plaintiffs' interlocutory appeal.

On December 4, 2002, this Court, at a scheduled *en banc* argument in the related Appeal No. 605, 2002 ("Omnicare Appeal"), *sua sponte* vacated the prior refusal of the interlocutory appeal in this case, accepted that interlocutory appeal and consolidated it with the Omnicare Appeal. This Court ordered that briefing in this appeal include the briefs below together with an Opening, Answering and an optional Reply Brief in this Court. Plaintiffs filed their Opening Brief on Friday, December 6, 2002. This is the Answering Brief of Defendants-Below, Appellees Genesis Health Ventures, Inc. and Geneva Sub, Inc. ("Genesis"). Argument before the Supreme Court *en banc* is scheduled for Tuesday, December 10, 2002 at 10 a.m.

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[1] "BG __" refers to the Genesis Defendants' Appendix filed herewith.

SUMMARY OF ARGUMENT

1. Denied.

(a) Under any standard of judicial scrutiny, the NCS directors did not breach their fiduciary duties when they chose the certain, premium transaction offered by Genesis over the mere hope of one suggested by Omnicare. The Court below found, as a matter of fact, that the directors reasonably perceived that pursuit of the Omnicare proposal, which necessarily meant the loss of the Genesis merger, could have resulted in the NCS shareholders receiving *nothing* and NCS being forced into bankruptcy. Unless this Court finds that factual conclusion to be "clearly erroneous," none of this Court's opinions *require* directors, facing such a risk, to incur that risk, as a matter of law. To hold otherwise would convert *Revlon*, *Unocal*, and *Unitrin* into "suicide pacts" for Delaware fiduciaries and upset long-standing principle that the business judgments of informed, unconflicted directors will not be second-guessed after the fact. The decision whether or not to incur such a risk in pursuit of a potentially higher offer is a decision for disinterested and careful directors, as were present here, not a decision mandated by any existing fiduciary precedent.

(b) The inclusion of a term in a merger agreement permitting shareholders to vote on a merger in the absence of a continuing recommendation by the directors, as expressly permitted by § 251(c) of the DGCL, does not violate § 141(a) of the DGCL.

(c) Genesis did not aid and abet a breach of fiduciary duty by negotiating for a merger with terms expressly allowed by § 251(c) or by requesting a voting agreement expressly permitted by § 218.

2. Denied. Plaintiffs have not established either irreparable harm or the balance of the equities. Any determination of these criteria should be remanded to the Court of Chancery.

STATEMENT OF FACTS

The Court of Chancery's denial of Plaintiffs' request for a preliminary injunction was based upon a determination that Plaintiffs had failed to carry their burden of establishing a probability of success on the claims asserted. Op. 45-46.[2] That determination was driven primarily, if not exclusively, by the preliminary factual determinations which the Court made after a "careful[] review and consider[ation]" of the extensive factual record developed below. Op. 2. This brief will not repeat the extensive factual findings made by the Court below, or the even more extensive facts recounted in Defendants' briefs below, which have been filed with this Court.

Rather, this Statement of Facts will focus upon (i) the four factual findings by the Court below that were critical to the disposition of each of Plaintiffs' claims, (ii) the critical "either/or" decision before the NCS board of directors on July 28 and (iii) four factual distortions and misrepresentations of the record advanced below by Plaintiffs, rejected by the Court below, but which Plaintiffs now renew on this appeal.

A. The four critical facts underlying the decision below.

The overarching issue on this appeal concerns the decisions made by the NCS directors on July 28, 2002, when they approved the merger agreement with Genesis ("Merger Agreement") (BG944-1012) and the voting agreements with Messrs. Outcalt and Shaw and Genesis ("Voting Agreements") (BG1013-20, 1021-28). The Court below made four factual determinations that were important to its evaluation of those directorial decisions under whatever standard review would be applicable. These facts were not subject to fair dispute, and certainly not on this appeal.

1. NCS was unable – over a two year period – to generate a single bid that would have provided value to the stockholders (except for Genesis), to cause an "auction" of NCS or find a "stalking horse." Indeed, over that period, NCS had been unable to find any party, including Omnicare, willing even to discuss the possibility of offering anything to the common stockholders of NCS. Op. 5; NCS 14D-9 (BG1044). Genesis was the first and only party willing to enter into such discussions. The reasons for this notable lack of success are simple: NCS was "distressed goods" and the NCS directors were operating in a "buyer's market."

2. Genesis was not willing to serve as a "stalking horse" or participate in an "auction," and any agreement with Genesis had to involve voting commitments from Outcalt and Shaw. From the outset, Genesis clearly and unequivocally advised NCS that it would not undertake or continue negotiations with

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[2] The Court of Chancery's November 22, 2002 opinion is cited herein as "Op. __." The opinion was attached as Exhibit A to Plaintiffs' opening brief.

NCS if it was used by NCS as a "stalking horse." Genesis never changed its position and would have terminated negotiations if NCS attempted to "shop" its interest. Op. 30-31; Hager 24 (BG318); LaNasa 37 (BG525); Pollack 165 (BG785). In addition, since NCS had two stockholders who together held a controlling interest in the company (and who also served upon its board of directors), Genesis was unwilling to negotiate any transaction that was not supported by a contractual commitment from those stockholders. Hager 42-43 (BG323); Pollack 113-15 (BG772-73). In essence, Genesis was not willing to enter into a Merger Agreement that would contractually bind Genesis, but which would merely operate as an "option" for NCS; and, in the absence of voting agreements from Messrs Outcalt and Shaw, those two stockholders would retain the unfettered option to vote down the merger for any reason or for no reason. Those two conditions – the refusal to allow its interest to be "shopped" and the need for voting agreements – were communicated at the outset to NCS and steadfastly maintained throughout the negotiations. *Id.*

3. The NCS board of directors did not have complete control over the fate of the company on whose board they sat. Having defaulted on both its senior bank debt and its publicly-traded debentures, NCS survived on the grace of its creditors, organized as an Ad Hoc Committee, who could have put NCS into bankruptcy whenever it served their purposes. OMN 14300 (BG1443). As Omnicare CEO Joel Gemunder testified, "I was given to understand, *you would have to be deaf, dumb and disabled not to understand* that [Judy Mencher of the Ad Hoc Committee] had the power to command things if she so desired." Gemunder 62-63 (BG202). In most graphic terms, this situation meant that the Ad Hoc Committee had the power to force the sale of NCS, even over the board's objection. Omnicare attempted to exploit this situation by negotiating with the Ad Hoc Committee, not the NCS board. Omnicare only made a virtually last-minute change of course when it learned of an imminent Genesis/NCS transaction.

4. Omnicare's history of behavior made clear that if NCS had lost the Genesis bid at any point in the process, including July 28, Omnicare would not have offered a transaction that would have provided *any* return for NCS's stockholders. For over one year prior to its July 26 "offer to negotiate," Omnicare had attempted to acquire NCS's business in a bankruptcy sale by paying a portion of its defaulted debt, and nothing for its shareholders. Froesel 79 (BG97); Hutton Mem., July 27, 2001 (BG1419-21). Those offers initially were made to NCS in the summer of 2001. Gemunder 13 (BG189); July 20, 2001 Letter (A90); Aug. 29, 2001 Letter (A91-92). NCS responded by attempting to persuade Omnicare to pay something to the equity in recognition that the merger of the two businesses would create synergies, the value of which should be shared between Omnicare and the equityholders of NCS. Op. 7; Pollack 64-68 (BG760-61); Brown Gibbons July 26, 2001 Presentation (A99-102). As is obvious from subsequent developments, Omnicare recognized the possibility of such synergies, but refused to pay anything. Pollack 67-68 (BG760-61). The reason for this refusal was that Omnicare had an alternative means of acquiring NCS that did not require it to deal with the NCS directors. The alternative was the Ad Hoc Committee. If Omnicare could agree on payments that would satisfy the debtholders, albeit leave nothing for the equity, the Ad Hoc Committee would put NCS into bankruptcy and force the sale on terms satisfactory to the debtholders. OMN 14300 (BG1443); Gemunder 62-63 (BG202). Realizing that the NCS board of directors, including the two largest shareholders of NCS (Outcalt and Shaw), were determined to try to recover something for the "under water" equity, Omnicare began to deal exclusively with the Ad Hoc Committee. Op. 8; Pollack 69-71 (BG761-62). Again, as Gemunder testified, "What the [Ad Hoc Committee] told me was that if I paid them enough money they would take all the risk *and deliver the company to me*...From [Judy Mencher's] very lips...." Gemunder 62-63 (BG202). Omnicare only abandoned this strategy when it learned that Genesis, unlike Omnicare, was willing to pursue a merger with NCS that provided value for the equityholders, and even then Omnicare's response was an unfinanced offer to negotiate that was subject to (i) Omnicare's satisfaction with additional due diligence (even though Omnicare had obtained extensive due diligence the prior autumn), (ii) negotiations of the terms of a merger agreement (when Omnicare had a history of being unable to reach an agreement on definitive terms even when agreement in principle had been reached on the economics of a transaction), and (iii) third party consents, including critical, necessary lender consents not requested, much less received by Omnicare when the "offer to negotiate" was made on July 26. Op. 15-16; July 26 Letter (A519-20); Op. 38 n.45; Froesel 126-66 (BG109-19); July 31 Consent (BG1496-1513); August 6 Consent (BG1514-19).

B. The July 28 decision

These three forces, Genesis, Omnicare and the Ad Hoc Committee, all converged on the NCS directors on the weekend of July 26-28, 2002, and that convergence created a critical decision for a disinterested board that included the two largest stockholder of NCS. Without recounting the details of that weekend, as set forth in the opinion and briefs below, the NCS directors had an "either/or" decision. They could either execute the Merger Agreement and approve the Voting Agreements, which were unalterable conditions to Genesis' willingness to proceed, or they could embark upon a new round of negotiations with Omnicare, which offered the allure of a potential transaction with a substantially higher immediate value, but would cause the loss of any Genesis transaction. Op. 17-20. As with any decision in life, either course had certain risks and certain advantages. Fully-informed about those respective risks and advantages, Op. 38-41 & n.46, the NCS board of directors chose the NCS Merger Agreement.

When determining which of these mutually exclusive choices to make, the NCS directors evaluated a multitude of factors, as set forth in the proxy statement, the testimony of the directors and the Court of Chancery's opinion. However, three factors were critically important: would Genesis terminate negotiations if the Merger Agreement was not approved on July 28, what were the prospects that negotiations with Omnicare would actually result in a $3 transaction and what would happen if Genesis terminated negotiations before any definitive and binding agreement was reached with Omnicare.

1. Genesis would have walked away.

The most critical factor was that NCS would lose Genesis if it did not reach agreement with Genesis on July 28. Rather than pursuing Omnicare's highly conditional indication of interest – encumbered as it was by the due diligence "out" as well as other conditions – NCS decided to use the Omnicare proposal to extract a better offer from Genesis. It worked. Op. 17-18. But in proposing improved terms on July 27, Genesis CFO George Hager made clear that the new offer was a "take it or leave it" proposition. If the revised proposal was not accepted and the requisite agreements executed by the end of the day on July 28, Genesis would have withdrawn its offer and terminated negotiations. Op. 18; Hager 149-51, 192 (BG349-50, 360); LaNasa 94-96 (BG540).

NCS and its representatives had no reason to doubt George Hager's unequivocal warning that Genesis would walk away from the table if its deal was not signed by midnight on July 28. Pollack 189 (BG791); Sells 89-90 (BG846-47); Osborne 126-27 (BG673). Genesis had made clear from the outset that it would not be a "stalking horse" or engage in an auction. *See* pp. 3-4, *supra*. Genesis had been down that road before in another transaction and was not willing to repeat the experience.[3]

The NCS directors realized that if Genesis did walk away, there would be nothing to stop Omnicare from abandoning its July 26 indication of interest altogether, reducing its offer, returning to its insistence on a purchase of NCS assets in bankruptcy or taking any number of alternatives harmful or far less attractive to NCS. Op. 17, 35, 44-45; Osborne 128-29 (BG673). Indeed, as Judy Mencher of the Noteholder Committee – who had no reason to favor Genesis over Omnicare – testified: "Omnicare already had shown themselves as being unable to complete a transaction that people had agreed to; hence, I thought there was a huge amount of risk going back to Omnicare, because I was afraid it would chase Genesis away, and a bird in hand is always worth more than two in the bush." Mencher 194 (BG611);

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[3] Specifically, in the fall of 2001, Genesis had signed a merger agreement with American Pharmacy Services. Because APS was in bankruptcy proceedings, the transaction was subject to an auction under the auspices of the bankruptcy court. Omnicare, which had theretofore shown little interest in APS, appeared at the bankruptcy court auction and topped Genesis' deal. Hager 20-21 (BG317). Genesis believed that Omnicare's bid for APS "was defensive in nature, to prevent [Genesis] from acquiring the asset. APS as a company did not fit Omnicare's historical acquisition strategies." *Id.* 189-90 (BG359-60). As a result of that experience, Genesis "was not interested in incurring a lot of expense and becoming a stalking horse in an acquisition opportunity." *Id.* 22 (BG318).

see also id. 229 (BG619) ("if you have two parties both willing to pay the bondholders in full and one has no contingencies and one has a contingency, the safer bet would always be to go forward with the one with no contingencies."); Pollack 235-37 (BG803).

2. There was a very real risk that a transaction with Omnicare would not materialize.

Once Genesis was out of the picture, the principal risk of non-consummation with Omnicare was the danger that the additional due diligence demanded by Omnicare would cause Omnicare, whether in good faith or not, to retreat from or abandon the $3 expression of interest. Op. 16, 34-35, 38-40. The best measure of that risk comes from the testimony of Omnicare's CEO, Joel Gemunder. Gemunder testified that he considered the risk of learning something materially adverse in due diligence to be significant enough that he was prepared to lose NCS to Genesis rather than offer anything to the equity without further due diligence. Gemunder 240-41 (BG246). Gemunder so testified even though Omnicare had conducted extensive due diligence the prior autumn. NCS 14D-9 at 6, 9 (BG1048, 1051). Gemunder's concern that due diligence would require Omnicare to withdraw or modify its offer was the same concern facing the NCS board. Op. 16.

Gemunder testified that on the evening of July 26, after he faxed his proposal to commence negotiations and due diligence to NCS, Judy Mencher of DDJ Capital, who led the Ad Hoc Committee with whom Omnicare had been negotiating for nine months, called him. Gemunder 218-19 (BG241). Mencher warned Gemunder that Omnicare "wouldn't get" NCS if it clung to its due diligence requirement. Mencher 89-90 (BG584-85). She told him that "the only way" he could succeed with his eleventh-hour bid was to get a contract to NCS "without a due diligence requirement." Gemunder 160-71 (BG226-229). Mencher 91 (BG585). Mencher believed that Gemunder understood her point, which was that "having a due diligence out would mean that he [Gemunder] could walk away from the transaction and then the company would be left with no acquirer." Mencher 91 (BG585); *id.* 103 (BG588).

Gemunder heard Mencher loud and clear. Gemunder testified that on July 26, he had been advised by Mencher that an NCS/Genesis deal was going to be signed by the end of that weekend and that Omnicare's "only hope" was to make a proposal without a due diligence condition; that he considered that advice "very real"; and that he and his advisors "talked quite a bit about what Ms. Mencher counseled us." Nonetheless, Omnicare determined to stick to its due diligence condition because Gemunder feared "significant charges of waste of corporate assets and misuse of funds" if he proceeded without due diligence. Gemunder 218-31 (BG241-44). Gemunder consulted his advisors on the subject "and acted in accordance with their judgment, because they have to protect me against doing something foolish." *Id.* 160 (BG226).

The risk of learning something negative during due diligence was so significant that Gemunder believed incurring that risk – proceeding with the transaction that would pay something to the NCS equity without the due diligence – would have meant his job if the resulting transaction was unfavorable. Gemunder 240 (BG246). The risk was so great to Gemunder that he was prepared to lose the opportunity of a deal with NCS rather than proceed without more due diligence. *Id.* 240-41 (BG246). Gemunder explained the "exquisite discomfort" he felt over the July 26-28 weekend:

> I was at this time [the weekend of July 26-28] in a state of exquisite discomfort <u>because I knew what [NCS] wanted</u> and I wanted to give it to them but I also knew that I couldn't because of my responsibility to my own stockholders.

Id. 234-37 (BG245) (emphasis added).

The dilemma Gemunder admits he and Omnicare faced is the other side of the dilemma faced by the NCS directors. The risk that due diligence would cause Omnicare to lower or abandon its offer was significant enough that NCS could not risk losing the Genesis deal to commence due diligence and negotiations with Omnicare. As a result of Omnicare's refusal to drop or even narrow the due diligence request over that weekend[4] and Genesis' determination to terminate discussions on July 28, the directors of NCS were in a position of even greater "exquisite discomfort" than Gemunder, because by pursing Omnicare the directors of NCS would lose Genesis.

Additional risks presented by Omnicare's July 26 indication of interest included the possibility of not being able to reach agreement on the terms of a merger agreement, and the need for Omnicare to obtain consents under its Revolving Credit facility to proceed with its proposed transaction. These risks are discussed below.

3. If Genesis had withdrawn, Omnicare could have resumed its strategy of dealing exclusively with NCS's creditors.

Underscoring these risks was the very real likelihood that, once Genesis withdrew, Omnicare would revert to its strategy of buying NCS from the Ad Hoc Committee. The testimony of the Omnicare witnesses was *unequivocal* that the July 26 proposal never would have been made except for the pendency of the NCS/Genesis merger. *See* Op. 35, 39 n.36; Hodges 252-53 (BG482); Gemunder 94-97, 127 (BG210-18); Froesel 190-91, 195 (BG125-26). NCS had every reason to be

[4] Omnicare continued to demand due diligence *after* it began its tender offer, *see* Amend. No. 1 to Omnicare Tender Offer, Item 5 (Aug. 8, 2002 Letter) (BG1029-37), and did not unequivocally abandon that demand until **August 27**, *see* Amend. No. 8 to Omnicare Tender Offer, Item 5 (Aug. 27, 2002 Letter) (BG1037-41).

concerned that if it lost Genesis by pursuing Omnicare, then Omnicare would quickly revert to its pre-Genesis strategy. Some of those reasons are as follows:

(a) Both Hodges, an Omnicare officer and director, and Gemunder testified that Omnicare would not have made the July 26 proposal to pay something for the equity except for the fact of an imminent agreement between NCS and Genesis. Gemunder 90-91, 120-28, 284 (BG209, 216-18, 257); Hodges 250-53 (BG482). If Genesis terminated its negotiations, the NCS board knew that Omnicare could find sufficient reason in the due diligence it was demanding to lower its price, revert to the bankruptcy transaction it had pursued all along, or walk away. Osborne 128-29 (BG673); did not trust the financial information NCS provided to it in previous due diligence).

(b) Omnicare's motives for demanding due diligence were suspect. In its proposal of July 26, Omnicare claimed that it had not had any "meaningful" due diligence to date, but that assertion was demonstrably false. Omnicare had engaged in extensive due diligence with NCS the prior autumn. *See* Letter from Alan Hartman to Glenn Pollack, dated Aug. 16, 2001 (BG1441-42); E-mails from Michael Faerm to Catherine Greany, dated Oct. 23, 2001 (BG1423-26). NCS had responded to Omnicare's extensive initial due diligence requests. Omnicare Log of Due Diligence (BG1422); Berlin 80-81 (BG30) NCS Schedule 14D-9 at 6, 9 (BG1048, 1051), and additional requests for information and answers to questions raised by the information already received. Pollack 63-64 (BG760); Berlin 81-82 (BG30-31). The renewed demand for due diligence based upon the false assertion that no meaningful due diligence previously had occurred, created a reasonable concern that Omnicare had hidden motives when conditioning its proposal on further "due diligence." NCS Schedule 14D-9 at 9 (BG1051).

(c) Not only had Omnicare attempted to acquire NCS assets in bankruptcy, but it had attempted to steal NCS's customers before it made any proposal to NCS. During 1999 and 2000, Omnicare had considered acquiring NCS, even meeting with Outcalt and Shaw about such a possibility during July 1999. At that meeting, Outcalt and Shaw requested what Omnicare considered to be an excessive premium over market for the NCS equity. Gemunder 8-9 (BG188). After that meeting Omnicare launched what it labeled its "NCS Blitz": a concerted and focused effort, apparently employing NCS customer lists, to capture most, if not all, of NCS's customers. Keefe Mem. re: NCS Blitz (03/23/01) (BG1403-18). This "blitz" lasted, at least, from March 2000 until August 2001, and Gemunder indicated it may have continued even as Omnicare was conducting due diligence of NCS and while Omnicare was seeking the most sensitive, competitive information from NCS. Gemunder 265-80 (BG252-56). While Gemunder attempted to portray this "blitz" campaign as nothing but business as usual, Gemunder 246, 267 (BG252, 253), Omnicare asserted "confidential business strategy" privilege with respect to the documents that evidenced the "blitz." *Id.* 264 (BG252).

In a very real sense, if Genesis had walked away from the table, Judy Mencher and the Ad Hoc Committee would have held all the cards. On July 28, even as the NCS board faced the choice between the definitive Genesis transaction and Omnicare's *conditional indication of interest*, NCS remained insolvent and in default. Op. 31. Thus, if Genesis revoked its offer, and if Omnicare then returned to dealing exclusively with the noteholders, the Ad Hoc Committee could have driven the company into bankruptcy, where the NCS stockholders would have gotten nothing. Mencher 58-59, 231, 237 (BG577, 620-21). NCS had this power of its lenders firmly in mind when it resolved to approve the Genesis merger. As independent committee member Richard Osborne testified:

> [W]e were surrounded otherwise by . . . uncertainty and the realization that without Genesis, we were right back in the zone of insolvency, with all our major lenders – with the default on all of our major lenders.
>
> And we had Omnicare out there and the whole history of Omnicare that we've talked about, where they repeatedly try to put us in bankruptcy, or at least their proposals would have resulted in that. . . .
>
> So for those [and other] reasons, it was very clear that we were doing the best thing – I felt very clear, I was doing the best thing for the – for our stakeholders, the creditors, as well as the shareholders. And so I voted for recommending it to the full board.

Osborne 143-45 (BG677).

The Court below considered the conduct of the NCS directors in evaluating the palpable risks and benefits of the "either/or" choice they faced. The Court "easily conclude[d] that the NCS directors acted with adequate knowledge of all material facts and made a rational judgment as to the risks and rewards of agreeing to the Genesis offer." Op. 38. This conclusion is not simply supported by the record, it is compelled by it.

C. The Plaintiffs' five principal factual distortions.

The Plaintiffs made a number of attacks on the NCS directors that are premised on numerous misrepresentations of the facts of this case. Plaintiffs' effort to distort the record was rejected by the Court below. On this appeal, Plaintiffs renew those attacks, asking this Court to substitute Plaintiffs' version of the facts for those found by the Court below. However, the facts that Plaintiffs' ask this Court to accept are simply untrue.

(1) Plaintiffs' claim that Omnicare was the eager suitor for NCS and the directors of NCS inexplicably refused to engage Omnicare in meaningful negotiations during the seven months preceding the weekend of July 26. These assertions are blatantly false and the Court of Chancery correctly recognized them as such. This is

not a case of a spurned bidder, it is a case of a spurned *seller*. It is undisputed that in October 2001, NCS attempted to convince Omnicare to make an offer that would provide some value for the NCS equityholders. *See* p.4, *supra*. Omnicare expressly rejected those entreaties, refused to provide anything to the NCS stockholders, and began negotiations with the Ad Hoc Committee. *See* Op. 7-8. In other words, those negotiations collapsed not because NCS was uninterested in receiving an offer from Omnicare, but because Omnicare adamantly refused to make an offer. NCS renewed those overtures in January 2002 and June 2002, in the latter case through the Ad Hoc Committee. NCS 14D-9 at 6 (BG1048); Mencher 199-200 (BG612). And there was no confusion on Omnicare's part about why the negotiations collapsed. Gemunder testified that the negotiations with NCS ended, not because of any lack of initiative on the part of NCS, but because Omnicare refused to make an offer that included anything for the NCS stockholders. Gemunder 116 (BG215). Gemunder also testified that Omnicare considered the offer it made to the Ad Hoc Committee in February 2002 as a "preemptive offer," meaning it was fully priced. Gemunder 63 (BG202); Facsimile from Robert Magill to Joel Gemunder, dated Feb. 12, 2002 (BG1446-59). Gemunder even blamed his own advisors, not NCS, for the lack of communications between the parties during those six months. Gemunder at 41-42 (BG196-97). Finally, Omnicare only made its July 26 proposal because of the imminent signing of a merger agreement with Genesis. *See* pp. 4-5, 8, *supra*. No amount of negotiation by NCS would have produced any different response from Omnicare.

(2) Plaintiffs argue that the NCS directors, before entering into the Exclusivity Agreement on July 3, either refused or failed to "shop" the prospect of a transaction with Genesis as a lever to prod Omnicare to make a bid for the equity. OB 10. This alleged failure is the one of the cornerstones of Plaintiffs' appeal. But the implicit factual premise of this argument – that NCS *could* have shopped Genesis' expression of interest without losing it, is false. This premise, never articulated by Plaintiffs but the necessary predicate to their claim, ignores the undisputed fact that Genesis, at the beginning to end of its negotiations with NCS, warned the NCS that any effort to "shop" Genesis' interest would result in the termination of negotiations by Genesis. *See* p. 4, *supra*. Conversely, by entering into the Exclusivity Agreement – and only by entering into the Exclusivity Agreement – NCS induced Genesis to make a firm and definitive offer. Op. 12-14. NCS had another potential bidder, only several months before, who demanded exclusivity before beginning negotiations. When NCS declined, the potential bidder refused to proceed with any due diligence or negotiations and NCS lost that bidder. Registration Statement (Prospectus) on Form S-4 at 34 ("S-4") (BG1102). NCS obviously did not want a repeat of that experience. Plaintiffs distort these facts by simply ignoring them. OB 17. NCS did not have the option of "shopping" the prospect of a Genesis deal without losing that very opportunity, and after two years of fruitless searching, NCS could not afford to lose the only opportunity it had.

(3) Plaintiffs argue that the NCS directors should have explored Omnicare's expression of interest on July 26 before signing the Merger Agreement with Genesis, particularly given the terms of the Merger Agreement and Voting Agreements. OB 15. Again, this argument ignores the facts. NCS did not have the option to explore the Omnicare offer without losing the Genesis offer, and it assumes that the loss of the Genesis offer would not have any impact on Omnicare's sudden willingness to offer something to the NCS shareholders. The undisputed facts, as found by the Court below, Op. 38-41, establish that the choice faced by the NCS directors was not whether to further explore the Omnicare proposal before accepting the Genesis proposal. The choice was whether to execute a contract with Genesis, or lose Genesis in order to explore the possibility of a better deal with Omnicare.

(4) Plaintiffs argue that the NCS directors should not have agreed to a Merger Agreement with the provisions allowed by Section 251(c) of the DGCL ("§ 251(c) provision") or approved the Voting Agreements. OB 22. Once again, this argument ignores another critical fact. NCS did not have the option of signing a Merger Agreement without this provision and without the Voting Agreements. Genesis had made clear from the beginning that if it was to contractually commit to rescue the insolvent equity of NCS, it would require a reciprocal contractual commitment from NCS, not an illusory merger agreement that left Outcalt and Shaw free to vote down the merger at any time. While this expectation of reciprocity is patently reasonable on the part of Genesis, whether reasonable or not, it was the only deal that Genesis was willing to do. Again, the choice for the NCS directors was not the choice that Plaintiffs pretend existed, but the choice between this deal with Genesis or no deal. Op. 38-41. And the NCS directors knew that without the Genesis deal, it would have no prospect of a deal with anyone else that provided value to the shareholders.

(5) The last of Plaintiffs' distortions in that the Exclusivity Agreement had some material effect upon the ability of the NCS directors to pursue a transaction with Omnicare. OB 8-14. On July 28, the Exclusivity Agreement was set to expire a mere 3 days later. Op. 15. Omnicare's July 26 proposal obviously envisioned a "due diligence" period and subsequent negotiations that could not have been completed until *after* the expiration of the Exclusivity Agreement. In other words, if the NCS directors had been prepared to lose Genesis and pursue Omnicare, the NCS directors would have been free to engage in the "due diligence" and "negotiations" Omnicare envisioned, notwithstanding the Exclusivity Agreement. It was not the Exclusivity Agreement that caused the NCS directors not to pursue Omnicare. It was the risk of losing Genesis and the risk of Omnicare's proposal not materializing that caused them to agree to the Genesis Merger Agreement. Those are the facts, they were found to be so by the Court below, and they are true, plain and simple.

ARGUMENT

I. PLAINTIFFS HAVE NOT DEMONSTRATED A PROBABILITY OF SUCCESS ON THE MERITS OF ANY OF THEIR CLAIMS.

A. Standard of Review

While Plaintiffs correctly identify "abuse of discretion" as the appropriate standard of review (OB 4), their interpretation of the standard gives little or no deference to the trial court's exercise of discretion or its findings of fact. Settled precedent dictates that the standard is a highly deferential one. *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954); *Firestone Tire & Rubber Co.*, 541 A.2d 567, 570 (Del. 1988). "[T]he question is not whether the reviewing court agrees with the court below, but rather whether it believes that the judicial mind, in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made." *Pitts*, 109 A.2d at 788. *Cf. Bringhurst v. Harkins*, 122 A. 783, 787 (Del. 1923) ("An exercise of discretion may be erroneous but still be legal and free from abuse.").

Within this discretionary framework, factual findings are reviewed to determine if they are *clearly* erroneous. As this Court recently stated in *Hudack v. Procek*, the "scope of review is narrow and accords considerable deference to the trial judge's factual findings unless they are clearly erroneous." 806 A.2d 140, 144 (Del. 2002). *See also Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987) (applying *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972), and affirming Court of Chancery's denial of preliminary injunction based on *Unocal* analysis of a paper record); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958 ("the Court of Chancery specifically found that the directors' decision to oppose the Mesa tender offer was made in the good faith belief that the Mesa tender offer is inadequate. Given our standard of review under *Levitt* . . . we are satisfied that Unocal's board has met its burden of proof.").

B. Merits

The legal issues framed on this appeal are necessarily a function of the facts as found by the Court below. On July 28, 2002, the NCS directors had to choose between the Merger Agreement with Genesis, including the related Voting Agreements, or the opportunity to pursue further negotiations and due diligence with Omnicare, which was offering the possibility of a higher offer, but the loss of the Genesis transaction. Plaintiffs argue that the directors' decision violated their fiduciary duties. The Court below emphatically found otherwise, finding the directors' testimony explaining the reasons for their decision to be "among the strongest this court has ever seen." Op. 39, n.46.

The Court found that the NCS directors were independent, disinterested, properly (indeed, strongly) motivated to pursue the best course of action for the NCS shareholders, and careful (not merely lacking gross negligence). Op. 3, 19, 25-26, 35-37. More specifically, the Court found, as a matter of fact, that:

(a) the NCS directors had a reasonable basis for believing that there were material risks that Omnicare's July 26 proposal would not be consummated, Op. 19-29, 38-41, n.46;

(b) the NCS directors had a reasonable belief that pursuit of the possibility offered by Omnicare would result in the loss of Genesis, Op. 17, 40;

(c) the NCS directors had a reasonable concern that without the pendency of the Genesis proposal, Omnicare would revert to its strategy of buying the business from the Ad Hoc Committee in a bankruptcy sale, Op. 9, 17, 35, 44-45;

(d) the Ad Hoc Committee would have the means and motive to sell the NCS assets to Omnicare in bankruptcy, so long as Omnicare paid their claims in full, regardless of what , if anything, was received by the equityholders, Op. 32; and

(e) the only transaction certain to provide value to the NCS shareholders was a stock-for-stock merger agreement with Genesis, which required a real – not illusory – commitment from both NCS and its controlling shareholders and which still provided the opportunity to enjoy a future transaction involving a sale of the combined corporations (even an acquisition by Omnicare), Op. 45.

In this compelling, albeit unusual circumstance, the Court of Chancery held that it was not a breach of fiduciary duty for careful and properly motivated directors to make this choice, even realizing that the choice would mean that the Genesis transaction would be consummated regardless of subsequent developments. Op. 38-41. In short, the Court of Chancery concluded on the particular facts of this case that the directors had a reasonable belief that the Genesis transaction was in fact the best option for the NCS shareholders, because pursuing the Omnicare proposal could reasonably be expected to have risked losing everything for the NCS shareholders and plunged NCS into the bankruptcy Omnicare sought. Op. 38.

For this conclusion to constitute reversible error, either of two propositions must be true. Plaintiffs must establish that the factual findings made by the Court below were clearly erroneous, in other words that the risks perceived by the NCS directors were not as the Court below found there to be; or Plaintiffs must establish that even in the face of such risks, Delaware law prohibited well-motivated and careful directors from agreeing to the terms of the Merger Agreement and approving the Voting Agreements. While Plaintiffs make an effort to discredit the factual findings below, that effort fails. Consequently, Plaintiffs also argue that this Court's prior opinions – regardless of the risks perceived both by the NCS directors and the Court below – barred the business decision that the directors made in the face of these risks. OB 7-27.

There are countless flaws (and some nonsense) in the legal arguments advanced by Plaintiffs, but there is one overarching misconception in all of their arguments: They are premised on the idea that this Court's decisions in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (Del. 1995); and *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del.1998), operate to dictate the substance of the business decision directors must make, as opposed to providing the conceptual framework for approaching the necessarily fact intensive analysis of whether a particular decision meets the standard of judicial scrutiny outlined in those decisions. This is the clear import of Plaintiffs' argument because the Court below applied the standard of review advocated by Plaintiffs, and found as matter of fact the standard was met. Op. 41-45. Consequently, if the Court below erred, it must have done so because the cases on which Plaintiffs rely require a business decision on the facts found below. Plaintiffs' position is a serious misuse of those decisions. As this Court made clear in *Unitrin*, the *Unocal* doctrine is not a mechanical formula that dictates the business decision that a board may pursue. 651 A.2d at 1373-74. Rather, it is a framework for analysis, an analysis that necessarily must be driven by the facts of each particular case. See *City Capital Assocs. Ltd. Partnership v. Interco, Inc.*, 551 A.2d 787, 790 (Del. Ch. 1998) (recognizing that *Unocal* provides "framework" for analysis). Directors cannot blindly rely on the approval of a particular type of transaction in one case for use in the potentially different facts of another case. Nor can Plaintiffs rely upon the prohibition or injunction of a particular transaction in one case as a rule that such transactions are impermissible in different circumstances. The decisions of this Court are opinions of law, not business textbooks that dictate the substance of the business decisions to be made by directors. Unless *Revlon* and *Unocal* mean that the NCS directors were obliged as a matter of Delaware law to risk losing everything for the stockholders of the company — as the record is clear would have happened if they had shopped Genesis' offer, whether on July 3 or July 28 in a circumstance in which the debtholders had the undisputed power to put the company into bankruptcy leaving the equity with zero – the decision made by the NCS directors cannot be overturned. Unless this Court determines that the Court of Chancery's factual findings were clearly erroneous, that is the overarching issue on this appeal. Plaintiffs simply blink at reality and deny the overwhelming factual record in arguing that NCS should have shopped Genesis' bid. Had they done that – whether on July 3 or July 28 – the record is unequivocal that Genesis would have walked. No reasonable NCS director would, or should, have done that. No Delaware doctrine can sensibly be thought to compel that result.

Enhanced scrutiny under *Revlon* and *Unocal* – if that scrutiny is warranted (and it is not, for the reasons set forth below) – does not change that result. Enhanced scrutiny was applied by the Court below and found not to warrant overturning the NCS directors' decisions. Appellate review in this Court certainly does not warrant overturning the Court of Chancery's fact-driven decision, under the settled and important prudential limitations on this Court's scope of review. Those long-standing limitations serve the important purpose of providing an appropriate measure of deference and predictability to the Court of Chancery's application of settled legal standards to a particular, and here highly unusual and complex, factual record. With this overview, we turn to the specific arguments.

1. The NCS directors did not breach their fiduciary duties under any standard of review.

Plaintiffs argued below that the Merger Agreement was the product of a breach of fiduciary duties by the NCS directors and should be enjoined. Plaintiffs argued that the directors were grossly negligent under the traditional business judgment standard, but also argued that the directors' conduct should be measured under *Revlon* and *Unocal*. Defendants argued that neither *Revlon* nor *Unocal* were applicable. The Court held that *Unocal* was applicable, *Revlon* was not, but in any event evaluated the directors' conduct under both of these standards. The Court found as a factual matter that both standards were satisfied. There is no basis to reverse that finding.

a. The decisions of the NCS directors are entitled to the presumptions of the business judgment rule.

In the context of mergers and acquisitions (no less than elsewhere), the business judgment rule operates as a procedural presumption that directors of a Delaware corporation act in good faith, with the requisite care and without any conflict of interest. *McMullin v. Beran*, 765 A.2d 910, 916-17 (Del. 2000). The Court below concluded as a matter of fact that the NCS directors acted with care, were properly motivated and acted in good faith. Op. 36-37, 40-41. In reaching these conclusions, the Court considered all of the factual arguments that Plaintiffs repeat on this appeal, and also considered the entirety of the record, including reading the depositions of the NCS directors. Op. 2. To obtain reversal of these findings on this appeal, Plaintiffs must demonstrate that the Court's conclusions were clearly erroneous. *See*, p. 13, *supra*.

i. The NCS directors acted in good faith and were not conflicted.

Plaintiffs do not challenge the determination of the Court below that the NCS directors were not conflicted and acted in good faith. Indeed, in the case of the other two directors, Outcalt and Shaw, their interests were strongly aligned with the interests of all stockholders. More than anyone else -- and immensely more than any of the Plaintiffs – Outcalt and Shaw had a personal financial interest in the July 28 decision. Omnicare's July 26 proposal at its nominal price held out the prospect to

Outcalt and Shaw of some $5.1 and $1.6 million, respectively, over and above the level of Genesis' offer.[5]

ii. The NCS directors exercised the requisite care.

The Court below found the NCS directors complied with their duty of care. Plaintiffs do not dispute that the Court below applied the correct legal standard for evaluating a duty of care claim under the business judgment standard. While Plaintiffs renew the factual arguments made below, they do not even begin to argue that the findings of the Court below were clearly erroneous. Rather, Plaintiffs attempt to distort the record, as already explained.

In addition to the five, fundamental distortions noted at the outset of this brief, Plaintiffs more particularized assertions also are simply wrong as a factual matter. For example:

(a) Plaintiffs contended below that the directors of NCS were grossly negligent "by failing to investigate Omnicare's willingness to pay more" before entering into the Exclusivity Agreement with Genesis. OB 9. The Court below rejected this conclusion. Op. 34-37. The Court was correct, and Plaintiffs are wrong. First, NCS did more than "investigate" Omnicare's "willingness to pay more" before entering into the Exclusivity Agreement. The record is clear that NCS attempted to persuade Omnicare to offer something for the NCS shareholders. Pollack 63-65, 66-69, 71, 95-100 (BG760-62, 768-69); Gemunder 93-94 (BG210). Omnicare refused. Since Gemunder and Hodges, two key Omnicare officers and directors, both testified that Omnicare would not have been willing to offer anything for the NCS shareholders absent the imminent prospect of the Genesis Merger Agreement, no amount of "investigation" would have produced a different response from Omnicare. Gemunder 90-91, 120-28, 284 (BG210, 216-18, 257); Hodges 250-53 (BG482). And as explained above, *see* p. 4, *supra*, NCS could not "shop" Genesis' interest without losing it.

(b) Plaintiffs complain that the NCS directors were grossly negligent because they "compromise[d] their ability to talk to Omnicare or other potential bidders before having to decide on a Genesis proposal by entering into the Exclusivity Agreement." OB 9. The Court below rejected this contention. Op. 34-37. What the Court

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[5] Based on the difference between Omnicare's $3.00 per share July 26 proposal and the $1.60 per share value of the Genesis merger consideration (per the $16.00 closing price of Genesis common stock on that day).

recognized and Plaintiffs ignore is that Genesis would not have negotiated without the Exclusivity Agreement, Hager 67-68 (BG329), and without the Genesis offer there would not have been any other proposals for NCS to consider, including the July 26 proposal by Omnicare. Gemunder 126-28 (BG218); Hodges 250-53 (BG482). Moreover, at the time the Exclusivity Agreement was signed, no one was excluded by it because no one else was interested, and the same was true when the Exclusivity Agreement was extended on July 26 (thanks to Omnicare's (non-)negotiating tactics). Finally, as explained above, *see* pp. 11-13, *supra*, the Exclusivity Agreement did not foreclose the pursuit of Omnicare. It was the risk of losing both Genesis and Omnicare that caused the NCS directors not to pursue Omnicare.

(c) Plaintiffs argue that the NCS directors were grossly negligent because they "failed to explore Omnicare's offer" before executing the Genesis Merger Agreement. OB 8-14. According to Plaintiffs, the NCS directors should have breached the Exclusivity Agreement, an act that most assuredly would have lost Genesis as a bidder, in order to negotiate with Omnicare. OB 15-18. The Court rejected this conclusion. Op. 36-37. Following Plaintiffs' advice would have lost the Genesis transaction. Op. 40. Further, Plaintiffs ignore that discussions with Omnicare on the weekend of July 26-28 would only have confirmed the wisdom of concluding a transaction with Genesis. Omnicare was not able to sign an agreement that weekend because it lacked the necessary consents from its lenders. Froesel 261-65 (BG142-43). NCS also would have learned that Omnicare's due diligence condition was a real condition – as Gemunder's testimony proves. Finally, the NCS directors did not need to breach the Exclusivity Agreement to conduct due diligence and negotiate with Omnicare. As explained above, the Exclusivity Agreement would have expired long before Omnicare's requested due diligence would ever have begun.

(d) Plaintiffs argue that the NCS directors were grossly negligent because they allegedly "failed to consider valuation" when they made their decision on July 28. OB 18-20. The NCS directors navigated their corporation through a two-year process of debt, defaults, insolvency and Omnicare's multi-pronged efforts to bankrupt NCS. The NCS directors produced a definitive offer from Genesis that was a huge multiple over the stock price of $0.24 per share just one month prior (June 28). They obtained real value for the NCS shares, which Gemunder testified were worthless only months earlier. Gemunder 94, 286 (BG210, 258). To suggest these directors "did not consider value" is simply divorced from any reality. This is particularly obvious when one considers that Outcalt and Shaw were the two stockholders with the most at stake from a *financial valuation perspective.*

(e) Finally, Plaintiffs contend that the NCS directors did not understand the importance of the Merger Agreement and Voting Agreements. OB 21. This is another distortion of the record by Plaintiffs. *See* Op. 19. As Sells testified at deposition and the NCS proxy makes clear – and the Court below found – the NCS directors understood the consequences of executing the Merger Agreement and approving the Voting Agreements. Sells 73, 80-81, 88-89, 96-97 (BG842, 844, 846, 848); S-4 at 50-51 (BG1118-19); Op. 19 & n.10.

b. Plaintiffs' invocation of *Revlon* is unavailing; and *Revlon* precedents in any event fully support the NCS directors' decision here.

Plaintiffs argued below that the *Revlon* applied to this case. The Court below rejected that assertion, but nonetheless applied heightened scrutiny both under *Revlon* and under *Unocal*. The Court concluded that under both standards of judicial scrutiny the NCS directors complied with their fiduciary duties. That factual conclusion is amply supported by the record. Consequently, the question of whether a *Revlon* standard of review applied is academic and cannot be the basis of a reversal.

To the extent that Plaintiffs argue that *Revlon* dictates the results of the business decision in this case, as opposed to enunciating the appropriate standard of review, Plaintiffs are badly misapplying *Revlon*. Plaintiffs contend that *Revlon* requires the directors in this case to have pursued the Omnicare proposal, regardless of the risks of doing so, because it nominally offered higher immediate value than the Merger Agreement. OB 7. This assertion is neither consistent with the case law nor logical.

What triggers *Revlon's* focus upon "immediate value" is the sale of a company in a transaction that constitutes a change in control, *i.e.*, either an extinguishing of the stockholders' equity for cash or a transaction that results in creation of a control block. *See, e.g., QVC,* 637 A.2d at 42-43. The reason for this should be obvious. When comparing two cash transactions that are equally probable of being consummated, there is no reasoned basis for preferring the lower over the higher. Also, when a stock-for-stock merger results in the acquisition of control by an acquirer, that transaction represents the stockholders' one and only chance for a control premium.[6]

The *Revlon* inquiry is not triggered by seeking to conduct an auction that might end up with such a transaction.[7] And a stock-for-stock merger, as here, has consistently been held not to implicate *Revlon* duties. *E.g., Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1290 (Del. 1994) (no change of control where control remains "in a large, fluid, changeable and changing market") (quoting *QVC*). The reason for these rulings should be equally obvious. When considering a stock-for-stock merger, there is the inherent prospect of a future change-of-control transaction and a future prospect of appreciation in the value of the stock. Not to consider these possibilities when evaluating a cash merger against a stock-for-stock merger would be illogical. They are relevant, although not necessarily controlling factors. To suggest, as Plaintiffs do, that the directors must be blind to those possibilities is non-sensical.

This case is the *reverse* of a Revlon case, as the Court of Chancery recognized. Op. 27. As matters now stand – as has been true for every second of NCS's existence – NCS is controlled by the Class B ownership of Outcalt and Shaw.[8] Following the Genesis merger, the NCS public stockholders will be stockholders in a company *without* a controlling stockholder, and thus, for the first time, stockholders in a company subject to an open and fluid market for control. *Cf. QVC*, 637 A.2d at 45 (enhanced scrutiny in sale of control mandated by *diminishment* of current stockholders' voting power and control premium never being available again).

But even if *Revlon* scrutiny applied here, there was no breach, as the Court below found. Op 41. Under *Revlon*, the methodology employed to seek the best available value is itself a matter of judgment. *McMullin v. Beran*, 765 A.2d 910, 918 (Del. 2000); *see also QVC*, 637 A.2d at 44-45 ("'no single blueprint' that directors must follow"; court should not "second-guess" a board choice of "one of several

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6 *See* Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 Bus. Law. 919, 927 n.25 (2001) (explaining why *Revlon* applies: "Because after such a transaction, the minority stockholders may only receive a control premium through the grace of the new controlling stockholder.").

7 *See Wells Fargo & Co. v. First Interstate Bancorp*, 1996 Del. Ch. LEXIS 3, at *13 n.3 (Jan. 18, 1996) (talking to a number of possible transaction partners, without actually undertaking a change of control transaction, did not invoke *Revlon* duties); *Arnold v. Society for Savings Bancorp.*, 650 A.2d 1270, 1290 (Del. 1994) (subjective intent of board did not trigger *Revlon).*

8 Outcalt and Shaw together own approximately 65% of the voting power of the NCS common stock. S-4 at 1 (BG1069).

reliable alternatives." This is particularly true, where, as here, NCS tried virtually every possible "blueprint." For two years, NCS tried everything: it tried to get an auction going, but could not. It tried to get a stalking horse, but could not. Desperate to get someone, *anyone*, to offer some value to the equity holders, NCS turned its attention to Genesis. That NCS was able to entice Genesis to make an offer that included value to NCS's equity holders is a testament to how *well* the NCS directors and advisors performed their duties. But the Genesis bid came with a condition – Genesis would not be a stalking horse and would not agree to a transaction to which NCS's controlling stockholders were not committed. What would Plaintiffs' have preferred NCS to do? Ignore Genesis and go back to where it was – which was nowhere?

Moreover, it is well-settled that – even when *Revlon* applies and the board should focus upon "immediate value" – a board should consider the competing proposals' relative risks of non-consummation. "[T]he likelihood that one of [two] alternatives may be less likely to close supplies a rational basis for preferring another proposal, even though it may be at a lower price." *Freedman v. Restaurant Assocs. Indus. Inc.*, 1987 Del. Ch. LEXIS 498, at *23 (Oct. 16, 1987) (reasonable decision not to pursue competing proposal conditioned on due diligence). Bids conditioned on satisfactory results of due diligence or on securing financing have long been held justifiably rejected, even if nominally higher. *See id.*; *Golden Cycle, LLC v. Allan*, 1998 Del. Ch. LEXIS 237, at *50 (Dec. 10, 1998) (board's rejection of bid that "remains conditioned on satisfactory results of due diligence" and other contingencies in favor of firm deal that was already in place was "defensible under *Revlon*"); *Matador Capital Mgmt. Corp. v. BRC Holdings, Inc.*, 729 A.2d 280, 292 (Del. Ch. 1998) (board justified in rejecting proposal that provided no evidence of any equity or debt financing).

As the Court below found, the NCS directors complied with whatever duties *Revlon* imposed. Op. 38. The NCS directors strove over a long and difficult period to obtain the best offers available. They may have preferred a "structured auction" with a "stalking horse" bidder, but no one – not Genesis and not Omnicare – was willing to play that role. There is no suggestion in the record – not even a hint – that NCS or its advisors skewed the process in one direction or another, in favor of one bidder over another, or had any reason to do so. And when Omnicare finally determined to offer the possibility of a transaction that would pay something to the equity (reversing its long-held refusal to do so only because it knew of Genesis' offer), Omnicare chose to burden that offer with the due diligence condition, with eyes wide open to the likelihood that this "out" would cause Omnicare to lose NCS. Gemunder 240-41 (BG246). As a result, the NCS directors reasonably decided not to lose the Genesis bid (as the record is unequivocal and uncontradicted it would have), *i.e.*, not to leave the company and its stockholders subject to Omnicare's good graces. That decision was entirely reasonable, and cannot rationally be thought to violate any fiduciary duty – under *Revlon* or otherwise.

c. **Neither the provisions of the Merger Agreement nor the Voting Agreements are defensive responses subject to scrutiny under the *Unocal* doctrine.**

In the Court below, Plaintiffs and Defendants disagreed as to whether either or both of the Voting Agreements or the § 251(c) provision in the Merger Agreement were "defensive actions" properly subject to heightened scrutiny under *Unocal*. The Court below agreed with Plaintiffs, applied heightened scrutiny and found the decision of the NCS directors to approve the Voting Agreements and Merger Agreement reasonable in relation to the risk of losing both NCS and Omnicare. On this appeal, this Court need not resolve the question of whether the Voting Agreements or the § 251(c) provision in the Merger Agreement were "defensive actions" in order to affirm the denial of the injunction. However, if this Court reaches that issue, it should conclude that the Voting Agreements and a § 251(c) provision are not "defensive action" subject to heightened scrutiny.

The core of the *Unocal* doctrine is to subject "unilateral director action in the face of a claimed threat" to reasonableness scrutiny, *Williams v. Geier,* 671 A.2d at 1377, and to carefully scrutinize such unilateral conduct by directors when that conduct effects the ability of the shareholders either to accept or reject a proposal to acquire the company. *See e.g., Unitrin*, 651 A.2d at 1386-89. Another policy that underlies *Unocal* is the tension between the stockholders' power to sell their shares and the directors' power to manage the affairs of the corporation. Thus, where a board action is not unilateral, and the action facilitates stockholder action, the policy concerns of *Unocal* are not implicated.[9]

It is well-settled that *stockholder* action that may have the effect of making an acquisition of the company more difficult is *not* subject to *Unocal* scrutiny. In *Williams v. Geier,* Plaintiffs challenged a board decision to recommend a charter amendment that would recapitalize the corporation in a manner that had the practical effect of concentrating voting power in the hands of founding stockholders and adversely impacting the possibility of an acquisition not supported by those founding stockholders. The recapitalization, and the recommendation of it by the directors, was challenged as a "defensive action" subject to *Unocal* scrutiny. This Court concluded that neither the recapitalization nor the directors' decision to recommend it was subject to such scrutiny because the action was not *unilateral* board action;

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9 *See also* Strine, *Categorical Confusion, supra,* at 934 n.44 ("closer reading of the cases suggests that the 'unilateral' question turns solely on whether the defensive measures were adopted without involvement by the stockholders," citing *Williams v. Geier*); *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986) (*Unocal* review responds to the concern that "a board may be acting primarily in its own interests").

rather, it was action by the directors and stockholders. 679 A.2d at 1377 n.18. This Court explained that the policy underlying *Unocal* is the "omnipresent specter of the inherent conflict between the board's duty to the stockholders and the board's possible self-interest." *Id.* This Court found that danger absent where the action at issue was not unilateral board action. *Id.*

A similar result was reached in *Stroud v. Grace*, 606 A.2d 75 (Del. 1992). That case also involved a charter amendment that had the alleged effect of concentrating control in the hands of certain stockholders and precluding changes in the control of the company. Nonetheless, this Court held that neither the charter provisions nor the director action recommending the charter provisions were subject to *Unocal* scrutiny:

> Inherent in all the foregoing principles [under *Unocal*] is a presumption that a board acted in the absence of an informed shareholder vote ratifying the challenged action. This significant distinction, in addition to the fact that Milliken faced no threat to corporate policy and effectiveness, or to the board's control, is fatal to plaintiffs' *Unocal* arguments.

Id. at 83. *See also Emerson Radio Corp. v. International Jensen, Inc.*, 1996 Del. Ch. LEXIS 100, at *47-48 (Aug. 20, 1996) (characterizing *Williams v. Geier* as holding that "an antitakeover defensive measure will not be reviewed under the enhanced scrutiny standard of [*Unocal*], when the defensive measure is approved by stockholders, as opposed to being adopted unilaterally by the directors").

The Voting Agreements do not constitute unilateral board action in any sense and they do not preclude or coerce stockholder action. The Voting Agreements are themselves the action of stockholders – not the unilateral action of directors. While the directors did approve the Voting Agreements, the essence of the agreement is stockholder action, not unilateral director action. It would turn *Unocal* upside down to hold that a voting agreement by stockholders to facilitate a merger is a "defensive action," either by the stockholders who execute the agreement or by the board of directors that approves it. **The Voting Agreements are no more "defensive action" than the vote of stockholders at a meeting approving the merger or the execution of a written consent a day after the merger agreement is approved by the board.** Nor does director approval of the voting agreements preclude or coerce stockholder action; it simply permits stockholders who have a majority of the voting interest to exercise their franchise.[10]

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[10] If the directors of NCS had unilaterally acted to *preclude* the holders of a voting majority from exercising their voting power (or agreeing to exercise their voting power to facilitate a merger they supported), *that* board action would have been subject to the strictest scrutiny under *Unocal*. *Unitrin*, 651 A.2d at 1378-79.

A comparable analysis applies to the § 251(c) provision. The 1998 amendment to § 251(c), allowing for the inclusion of such a term in a merger agreement, permits stockholder action where, under pre-existing case law, it might not have been permitted. Prior to that amendment, § 251(c) had been interpreted as precluding a stockholder vote if the board of directors, after approving a merger agreement but before the stockholder vote, had determined no longer to recommend it. *Smith v. Van Gorkom*, 488 A.2d 858, 887-88 (Del. 1985); 71 *Del. Laws* 339 (1998) (synopsis of amendment to § 251). With the amendment, the stockholders are permitted, if the merger agreement so provides, to vote on the merger regardless of whether the directors have changed or withdrawn their recommendation. This statutory amendment, and the merger agreement provision it permits, empower stockholder action, rather than preclude or coerce it. Moreover, in this case, when the Merger Agreement containing this provision was approved by the Board, stockholders holding a majority of the voting power already had acknowledged their approval of the merger in question.

Plaintiffs argued below that the Voting Agreements (and, presumably, the § 251(c) provision in the Merger Agreement) are subject to *Unocal* because both involved director action, as well as stockholder action. But the same was true in *Williams* and *Stroud*. The charter amendments at issue in those cases, no less than the Voting Agreements and Merger Agreement in this case, required both that the directors recommend the amendment and the stockholders approve it. Nonetheless, neither the charter amendments nor the directors' decisions to approve the charter amendments were subject to *Unocal* scrutiny. Board action is not defensive when it is neither unilateral nor interferes with the choice available to the stockholders.

In this case, the gist of Plaintiffs' complaint is that they do not like the decision made by those stockholders who, since the day NCS went public, have held its majority voting power. And their complaint about the directors is not that the directors precluded or coerced stockholder action. Rather, their complaint is that the directors did *not* preserve for themselves the ability to take defensive action, *i.e.*, withdraw their recommendation and preclude the stockholders from voting. *Unocal* does not apply to a board decision *not* to take "defensive action." *Day v. Quotron Systems, Inc.*, 1989 Del. Ch. LEXIS 164, at *14-15 (Nov. 20, 1989); *cf. In re Pure Resources Inc. S'holder Litig.*, 2002 Del. Ch. LEXIS 112, at *69-70 (Oct. 1, 2002).

d. The Court below properly concluded that the Merger Agreement and the Voting Agreements are reasonable under the *Unocal* standard.

The Court below concluded that on the particular facts of this case the decision of the NCS directors to approve the Merger Agreement and Voting Agreements was within the range of reasonableness considering the various risks staring the NCS directors in the face. This conclusion was based upon the facts outlined at the beginning of this brief, and those facts are true and not "clearly erroneous."

Fundamentally unable to refute the facts on which the Court below relied, Plaintiffs instead attempt to convert *Unocal* into a legal requirement that would virtually preclude directors from ever approving a merger agreement with a § 251(c) provision and a parallel voting agreement, regardless of whether the failure to do so could result in the shareholders losing everything, as the Court below found was the factual circumstance here. Plaintiffs' attempt must fail. If *Unocal* applies, it was satisfied here, as the Court of Chancery found.

i. Pursuit of the Omnicare proposal risked injury to NCS and was a "threat."

It is a fundamental blind spot of Plaintiffs' brief that they wholly ignore the risk, or "threat" in *Unocal* parlance, to NCS of pursuing the Omnicare proposal. First, as the Court below found, Genesis would have terminated negotiations with NCS if its definitive Merger Agreement were not signed on July 28. Op. 40. Plaintiffs do not dispute that reality, or the NCS directors' correct perception of it. Thus, pursuit of Omnicare's proposal, at a minimum, risked the loss of the Genesis transaction. Second, as the Court below found, the loss of the Genesis transaction would have ended any leverage NCS had with Omnicare. As the Court below found, and as set forth in the Statement of Facts, it was very possible that Omnicare, after reviewing due diligence information, may have concluded, either in good faith or otherwise, that the assumed synergies that underlaid the July 26 proposal were not present or that, with Genesis gone, there would be no reason to maintain its $3.00 price. Omnicare purposefully and carefully maintained its total freedom to reduce its offer, walk away, or revert to the bankruptcy strategy that it had been following. Third, as the Court below found, the NCS board of directors did not have the control of a normal board over the process of consummating a deal. The Ad Hoc Committee had the leverage to force NCS into bankruptcy and cause a sale of assets at a price that paid the debt in full and left nothing to the equity. Gemunder 62-63 (BG202). Thus, if Omnicare had retreated from its offer, Omnicare had a potential seller, the Ad Hoc Committee, that could have forced a transaction on terms beneficial to the creditors and to Omnicare, but disastrous to the NCS stockholders. ***These are the real risks that NCS faced on July 28 – which Plaintiffs' entire brief, and every argument in it, simply ignores.***

ii. The Merger Agreement and Voting Agreements are not preclusive.

As this Court explained in *Unitrin*, the reasonableness test under *Unocal* begins with a determination of whether the board action at issue is "preclusive" or "coercive." On this appeal, Plaintiffs renew their argument that the § 251(c) provision, coupled with a voting agreement, is both "preclusive" and "coercive." However, that argument fundamentally distorts the meaning of that test, and the policy which underlies it. Moreover, if accepted, it would essentially preclude the use of a § 251(c) provision in conjunction with any meaningful voting agreement, regardless of however beneficial a merger agreement with those terms might be to the shareholders financially.

First, Plaintiffs assert that the combination is "coercive" because, when Outcalt and Shaw vote their shares in accordance with the agreements, the public shareholders will be "coerced" into the merger. However, such "coercion" is the result of *any* majority vote on a merger. That is not the coercion that *Unocal* addresses. *Unocal* is concerned with board action that coerces the *majority* vote, not the results of the vote itself. The NCS directors did nothing that "coerced" Outcalt or Shaw into entering into the Voting Agreements. Plaintiffs' real complaint is with the majority voting power that resides in Outcalt and Shaw, but that voting power is not the product of any NCS board action. It is the nature of the corporation in which the public shareholders invested.

Second, Plaintiffs argue that the arrangement is "preclusive" because it "deprives the stockholders of the right" to receive the Omnicare tender offer and it "precludes [Omnicare] from seeking control" of NCS. OB 25. However, any majority vote on a merger results in the shareholders being unable to pursue another option. Plaintiffs' additional assertion that action is "preclusive" because of its effect on the *bidder* only further distorts *Unocal*. *Unocal* is to protect shareholders, not to protect bidders from action by shareholders having a majority of the voting power. Moreover, the record demonstrates that in this case, the purpose of the Voting Agreements was not to preclude further offers, but to entice and secure the Genesis offer.

Moreover, as the Court below found, the consummation of the Merger Agreement with Genesis will not preclude the possibility of a transaction with Omnicare. The NCS stockholders are not being "cashed out" of their equity investment. They are receiving Genesis shares, which are publicly traded, in exchange for their NCS shares. According to Omnicare's Gemunder, there is nothing to prevent Omnicare from acquiring the combined Genesis/NCS entity. Gemunder 308-09 (BG263). In *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1154-55 (Del. 1989), this Court held that the tender offer of Time for Warner Communications was not "draconian" under *Unocal* because it "did not preclude Paramount from making an offer for the combined Time-Warner company," *i.e.* was not preclusive.[11] *See also Unitrin*, 651 A.2d at 1387. The same is true here.[12]

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[11] In his opinion denying Paramount's motion for a preliminary injunction, Chancellor Allen likewise noted that the revised deal did not preclude Paramount from making an offer for the combined Time-Warner entity. *See Paramount*, 1989 Del. Ch. LEXIS 77, at *65-66.

[12] Indeed, discovery has further confirmed that even as recently as September – long after the Merger Agreement was signed – Omnicare was working with its fi-

(continued...)

iii. The NCS directors acted reasonably in approving the Merger Agreement.

As this Court explained in *Unitrin*, a board's decision to take "defensive action" that is neither preclusive nor coercive is valid if it falls within a "range of reasonableness." *Unitrin*, 651 A.2d at 1387-88. When making a reasonableness inquiry, the Court does not substitute its judgment for that of the directors. Rather, even if the Court determines that a different course of action also would have been reasonable (more reasonable), the action of the board is sustained so long as its action also is reasonable. *See also QVC*, 637 A.2d at 45 ("[A] court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision. If a board selected *one of several reasonable alternatives*, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination.") (emphasis added); *Mentor Graphics Corp. v. Quickturn Design Sys.*, 728 A.2d 25, 40 (Del. Ch. 1998), *aff'd*, 721 A.2d 1281 (Del. 1998). Where the board is unconflicted, its judgment also will be accorded deference for that reason. *Unitrin*, 651 A.2d at 1375.

At bottom, the reasonableness inquiry in this case reduces to a simple question: *whether directors of a Delaware corporation are permitted to approve a merger agreement with a § 251(c) provision, where coupled with voting agreements with majority stockholders, if those directors reasonably believe that not doing so could result in the shareholders losing the opportunity to receive anything for their equity, and where the ability of the corporation to enter into such agreements was necessary in order to attract the bid in the first place?* The Court below answered that such a decision is permitted; the Plaintiffs claim it is not.

To obtain a reversal of the Court below on this ground, Plaintiffs must either (i) convince this Court that the facts found below establishing the risk of losing everything were "clearly erroneous" or (ii) convince this Court that Delaware law dictates that directors not approve such a merger agreement and voting agreements even when the failure to do so could literally bankrupt the company. Neither result can possibly be correct.

(... continued)
nancial advisor, Merrill Lynch, on a potential acquisition of a *combined* Genesis/NCS entity. *See* E-mails from Tom Field to Alan Hartman, dated July 14 and 15, 2002 (BG1427-40); E-mail from Peter Lang to Liem Do, dated July 25, 2002 (BG1461-95); *see also* E-mail from Liem Do to Alan Hartman, dated Sep. 24, 2002 (BG1538). With respect to the documents substantiating those efforts, *see* Hartman 160-65 (BG401-02), which both confirms that this effort is ongoing and that the Court may draw an inference on that point against Omnicare's position, *see Pure*, 2002 Del. Ch. LEXIS 112, at *24 n.8.

The factual underpinnings of the Court's conclusion are beyond dispute. Plaintiffs cannot contest, and did not contest below, any of these conclusions:

(a) NCS is an insolvent company, unable to pay even its major trade creditors and in default on its debt, that had searched for two years for anyone to rescue it from its insolvency;[13]

(b) Genesis was the first, and until the eve of the execution of the Merger Agreement, the only party willing to rescue the NCS equity from insolvency;

(c) Genesis would not execute any merger agreement other than the one approved and would not have executed that agreement if Outcalt and Shaw had retained the ability to subsequently terminate the deal for any or no reason by voting against it;

(d) exploration of the last-minute Omnicare offer would have caused Genesis to terminate any further negotiations;

(e) the Omnicare proposal was conditional and there was risk it could not be consummated;

(f) if Genesis terminated negotiations, Omnicare's only motivation to pay anything to the equity holders would evaporate;

(g) the Ad Hoc Committee had the power and motive to sell the assets of NCS to Omnicare if Omnicare agreed to pay the debt in full; and

(h) the consummation of the Genesis Merger Agreement did not preclude a future transaction with Omnicare or other potential acquirers, while Omnicare's attempted and threatened asset sale in bankruptcy would have foreclosed any possibility of any future value for the NCS shareholders.

The foregoing facts were not "clearly erroneous." Indeed, they were largely conceded. Plaintiffs are reduced to debating the judgment made by the NCS directors and arguing that Delaware law, as embodied in the *Unocal* doctrine, mandates the hindsight judgment Plaintiffs now prefer. It does not, and the Court below did not commit legal error to conclude otherwise.

Considering all of the factors and the extraordinary situation and history of NCS, the decision of the NCS board of directors to enter into the Genesis Merger

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[13] Gemunder testified that the NCS assets, on a standalone basis, were and are worthless to the NCS stockholders. At its current size and configuration, NCS's business is not viable. NCS's assets have value to the NCS stockholders only when and if combined with the assets of another business, such as Genesis or Omnicare. Gemunder 94-95 (BG210).

Agreement was well within the "range of reasonableness." Any other course presented unacceptable risks. While the Plaintiffs make every effort to find fault with the outcome, the Genesis Merger Agreement is an extraordinarily positive result from a process that tottered on the edge of bankruptcy for over a year, and the process continues because the NCS stockholders, as future Genesis stockholders, will hold a continuing equity interest vastly superior to the one being exchanged.

2. The terms of the Merger Agreement and Voting Agreements do not violate § 141(a) of the DGCL.

Plaintiffs contend that the Merger Agreement and Voting Agreements are void as violative of 8 *Del. C.* § 141(a). OB 62-64. Plaintiffs argue that the directors have abdicated their management duties because they are not able to terminate the Merger Agreement even though they are no longer recommending it. OB 28-30. OB 28. Plaintiffs' argument is factually flawed, legally incorrect, and not supported by the very distinguishable "dead hard pill" holdings in *Quickturn* and *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180 (Del. Ch. 1998).

The argument is factually flawed because it assumes that the NCS directors did not (and could not) consider the Omnicare proposal before entering into the Merger Agreement. On July 28, 2002, the NCS board had a clear-cut decision to make: whether to execute the definitive agreement with Genesis that provided substantial value to both the debtholders and equityholders or, instead, sacrifice the Genesis offer to recommence due diligence and negotiations with Omnicare. The NCS directors did not abdicate that decision or delegate it to someone else; they *made* the decision. The Court below so held when it found that the NCS directors made this decision and complied with their fiduciary duties. Op. 34-41.

Plaintiffs also make a dangerous legal argument: that the Genesis Merger Agreement and the Voting Agreements are illegal under § 141(a) because they "plainly prevent the NCS Directors from performing their statutory duties to manage the affairs of NCS." OB 29. Importantly, this legal argument, if sustained, would mean that any merger agreement with a § 251(c) provision is illegal under § 141(a). If submitting a merger agreement to a shareholder vote after the withdrawal of the initial board recommendation constitutes an "abdication of management duties," as Plaintiffs argue, then every merger agreement with a § 251(c) provision is illegal under § 141(a) because every such provision allows precisely that occurrence While Plaintiffs fault the Court of Chancery. The Court below indicated that it did not explicitly address this argument because it regarded it as insubstantial. In its order refusing an interlocutory appeal, the Court explained that "[i]t is simply non-sensical to say that a board of directors abdicates its duty to manage the 'business and affairs' of a corporation under § 141(a) of the DGCL by agreeing to the inclusion in a merger agreement of a term expressly authorized by § 251(c) of the same statute." Order 6 (BG 6).

The Court below is correct. First, this term of the Merger Agreement is expressly sanctioned by 8 *Del. C.* § 251(c). This statutory subsection obviously envisions a situation in which the board of directors, after executing a merger agreement, determines that there is a better alternative to the merger previously recommended; and it specifically sanctions a provision in the merger agreement that obligates the board, despite that development, *not* to terminate the merger agreement but to submit it to the stockholders for a vote. It is absurd to suggest, as Plaintiffs do here, that a provision specifically envisioned and permitted by § 251(c) nonetheless results in an impermissible abdication of directorial responsibilities under § 141(a). Moreover, in this case, § 141(a) specifically provides that the directors shall manage the corporation "except as may be otherwise provided *in this chapter* or in [the corporation's] certificate of incorporation" (emphasis added).

Second, entering into a contract which obligates the corporation to a particular business transaction is not an "abdication" of management responsibilities. Every contract entered into by a corporation limits the business alternatives available to the corporation after the contract is executed. But as this Court has held:

> [B]usiness decisions are not an abdication of directorial authority merely because they limit a board's freedom of future action. . . . In a world of scarcity, a decision to do one thing will commit a board to a certain course of action and make it costly and difficult (indeed, sometimes impossible) to change course and do another. This is an inevitable fact of life and is not an abdication of directorial duty.

Grimes v. Donald, 673 A.2d 1207, 1214-15 (Del. 1996). Indeed, the determination of whether to enter into such contracts, and the negotiation of the terms of such contracts, are an important part of the management oversight of a board.

There is nothing in Delaware corporate law that would require directors to insist that every material contract executed by the corporation contain a provision permitting its termination in the event the directors determine it is no longer in the interest of the corporation to comply with the contract. *Halifax Fund, L.P. v. Response USA, Inc.*, 1997 Del. Ch. LEXIS 76, at *5 (May 13, 1997) ("the defendant's argument that they acted under a good-faith belief that they were acting in the best interests of the corporation is not relevant, because it does not constitute a valid legal defense to the present claim for breach of contract"). While the DGCL obviously requires that most merger agreements be conditioned on stockholder approval, merger agreements are not subject to some *per se* requirement, whether under § 141(a) or otherwise, that the agreement be terminable by the corporation being "acquired" if its directors determine it is no longer in the best interests of the corporation to consummate the merger.[14] Delaware law does not require that merger agreements be options. No such requirement applies to other agreements the corporation may execute, and there are other agreements that the corporation may execute that are as or more important to stockholder value than merger agreements. This is particularly true where, as here, approval of a majority of the stockholder voting interest has been received.

Nor are the Voting Agreements an abdication of directorial responsibility or otherwise prohibited under § 141. Voting agreements are specifically permitted under § 218 of the DGCL, and the Voting Agreements in this case relate to conduct that has nothing to do with the powers or duties of directors. These agreements relate to the right and contractual obligations of stockholders to vote their shares. Stockholders have the right to vote their shares, or to agree to vote their shares, in whatever manner they see fit. *See, e.g., Malpiede v. Townson*, 780 A.2d 1075, 1100 n.91 (Del. 2001). Such an agreement does not involve any abdication of directorial duties, nor do the directors abdicate any of their management responsibilities by allowing stockholders to enter into such agreements.

As more fully explained in Genesis' brief below, *Quickturn,* which involved a "deferred redemption provision" in a Rights Plan, is consistent with the foregoing analysis and is readily distinguishable from this case in two respects: the nature of the constraint imposed on director action there[15] and the manner in which the constraint was imposed. Genesis refers this Court to the discussion of *Quickturn* in its brief below.

Plaintiffs contends that "[i]t is no answer that Section 251(c) sanctions a 'force the vote' provision" because "inequitable conduct does not become permissible simply because it is legally possible." OB 30. However, Plaintiffs' contention is not that such a merger term is "inequitable"; if it were the Court below already addressed the "equities" of this Merger Agreement when resolving the fiduciary duty issues. Op. 44-45. Rather, Plaintiffs claim the § 251(c) provision is illegal under § 141(a), regardless of the "equities." OB 28-30. What is expressly permitted by one section of the DGCL cannot be prohibited by another. *Rothschild Int'l Corp. v. Liggett Group, Inc.*, 474 A.2d 133, 136 (Del. 1984).

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[14] If such a requirement existed, every merger agreement should be required to contain a provision that *both* parties are permitted to terminate it whenever the directors of either party determine it to be in their respective best interest to do so. But that proposition is contrary to common sense and settled law. *Cf. In re IBP, Inc. S'holder Litig.*, 789 A.2d 14, 83 (Del. Ch. 2001).

3. Genesis did not aid or abet any breach of fiduciary duty.

Genesis relies upon its brief below on this issue.

II. EVEN IF THE PLAINTIFFS ESTABLISH A PROBABILITY OF SUCCESS, PLAINTIFFS HAVE NOT ESTABLISHED IMMINENT IRREPARABLE HARM OR THAT THE BALANCE OF THE EQUITIES FAVOR PLAINTIFFS.

Genesis relies upon its brief below on this issue. If this Court reverses the decision of the Court below on the probability of success, this case should be remanded to the Court below to rule upon the other criteria necessary for injunctive relief.[16]

[16] *See Black & Decker, Inc. v. Hoover Service Center*, 886 F.2d 1285, 1296 (Fed. Cir. 1989) ("[W]e do not order a grant of [appellant's] motion for preliminary injunction. . . . but vacate the [lower court's] order denying the motion and remand in light of the determinations . . . yet to be made and properly only to be made in the first instance, by the [lower court]." *See also This That and the Other Gift and Tobacco, Inc v. Cobb County*, 285 F.3d 1319, 1324 (11th Cir. 2002) (finding that lower court erred in concluding that plaintiffs did not show substantial likelihood of success and remanding case to lower court for consideration of other preliminary injunction requirements); *Idaho Watersheds Project v. Hahn*, 187 F.3d 1035, 1037 (9th Cir. 1999) (same).

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling of the Court of Chancery denying Plaintiffs' preliminary injunction application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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