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 DEFENDANT SHAREHOLDERS BOAKE A. SELLS AND RICHARD L. OSBORNE IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P. O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000
Attorneys for Defendant Shareholders
Boake A. Sells and Richard L. Osborne

OF COUNSEL:

BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP
2300 BP Tower, 200 Public Square
Cleveland, Ohio 44114-2378
(216) 363-4500

March 25, 2003

TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES

CASES **PAGE(S)**

PRELIMINARY STATEMENT

There is no dispute that Plaintiffs' counsel deserves to receive *some* compensation for their efforts in this litigation. However, their extraordinary request for $13.5 million – which represents more than 13.5% of the common benefit fund of $99,000,000 (the "Fund") – far exceeds the outer bounds of what is fair and reasonable under Delaware law, and does not fairly account for the fact that Plaintiffs' counsel's efforts were not the sole reason for the creation of the Fund. For these reasons, defendant shareholders Boake A. Sells and Richard L. Osborne (the "Defendants") oppose as excessive the requested fee amount. In contrast, Defendants contend that under the circumstances a fee award of approximately 5% would be consistent with existing Delaware precedent and consistent with Plaintiffs' counsel's limited role in creating the Fund.

By any standard, the requested fee amount here – which amounts to a whopping $4,100 per hour – is wildly unreasonable. Indeed, if approved, it would be one of the highest fees ever awarded by this Court (in both absolute amount and percentage of a common fund approximating $100 million), and well beyond the range of reasonable fee awards (3%-7%) that are typically awarded under similar circumstances. In fact, the Court in Dow Jones & Co. v. Shields, C.A. No. 184, 1991, 1992 WL 44907 (Del. Ch. Jan. 10, 1992) (cited by Plaintiffs) – far and away the most analogous reported fee award decision – approved fees totaling approximately 5.3% of a $95 million fund in an expedited action where plaintiffs' counsel logged about 3,300 hours. Here, Plaintiffs'

counsel purportedly logged about 3,260 hours, and obtained a total common benefit of about $99 million. The Court should consider the 5.3% fee award in Dow Jones as the appropriate precedent for awarding fees in this matter.

In addition, Plaintiffs' counsel do not fairly account for the numerous other factors that led to the creation of the Fund. Plaintiffs' counsel had little, if anything, to do with the negotiations leading to Omnicare's "irrevocable" offer for $3.50 per share of NCS stock made on October 6, 2002. Similarly, Plaintiffs' counsel played no role whatsoever in the post-preliminary injunction negotiations between NCS, Omnicare and Genesis Health Ventures, Inc. ("Genesis"), which led to the ultimate $5.50 per share merger price. Omnicare, however, played a significant and material role in the entire litigation effort even after being dismissed from the proceedings on standing grounds. Although Plaintiffs' counsel's efforts played a role in the outcome of the litigation, those efforts were not substantial enough to justify the $13.5 million fee award they now seek.

For these reasons, and as explained in greater detail below, the Court should reject the requested fee amount, and instead award a reasonable amount, consistent with applicable precedent, of approximately 5 percent.

STATEMENT OF FACTS

A. The Complaints And Motions For Expedited Proceedings.

On July 26, 2002, Omnicare sent NCS's Board of Directors (the "NCS Board") an offer to negotiate a merger agreement, suggesting a price of $3.00 in cash per share of NCS stock and conditioning the offer on, among other things, completion of due diligence and third-party consents. (Ex. 1) On July 28, 2002, after extensive consideration of the risks to shareholders presented by Omnicare's offer to negotiate, the NCS Board rejected this offer, and entered into a merger agreement with Genesis, valued at approximately $1.60 per share of NCS stock. On August 1, Omnicare amended its offer to negotiate, suggesting a price of $3.50 per share, again conditioned on due diligence, and announced that it would be launching a tender offer for NCS stock at that price (which it did on August 8). (Ex. 2)

Also, on August 1, 2002, Omnicare commenced a lawsuit to enjoin the NCS/Genesis Merger, which was announced on July 29, 2002. (Ex. 3)[1] Thereafter, on August 12, 2002, Omnicare moved to expedite proceedings, and the Court granted that motion on August 19, 2002.

At the end of July, several NCS stockholders (hereinafter "Stockholder Plaintiffs") filed class action lawsuits seeking to enjoin the NCS/Genesis Merger. Rather than immediately pursue expedited proceedings, Plaintiffs' counsel squabbled over lead

---

[1] Omnicare amended its original complaint on August 12, 2002 and October 10, 2002.

counsel status for almost a month. Ultimately, the Stockholder Plaintiff complaints were consolidated on August 30, 2002. (Ex. 4) On September 12, 2002, almost a month after granting Omnicare's motion to expedite proceedings, the Court granted Stockholder Plaintiffs' tag-along motion to expedite proceedings and required Stockholder Plaintiffs to coordinate with Omnicare on taking depositions.

As explained further in Section II.B.2.(a), infra, throughout this time NCS and Omnicare were wrestling over the due diligence condition to Omnicare's offer to negotiate. Ultimately, NCS was able to secure a waiver to the "no talk" provision in the NCS/Genesis merger agreement, permitting them to enter discussions with Omnicare. These discussions led to the Omnicare "Irrevocable Offer," which was conditioned only upon the termination of the NCS/Genesis Merger and not on due diligence. Stockholder Plaintiffs played no role whatsoever in these talks.

B. Omnicare Files A Motion For Summary Judgment, And Stockholder Plaintiffs Follow Suit.

Thereafter, on September 30, 2002, Omnicare moved for summary judgment on Count I of its Complaint, seeking a declaration that the Voting Agreements (entered into between Genesis and certain large NCS stockholders) violated the transfer restrictions in NCS's certificate of incorporation. (Ex. 5) On October 2, 2002, Stockholder Plaintiffs joined in this motion, and filed a three-page memorandum adopting in

toto Omnicare's arguments.[2] (Ex. 6) On October 29, 2002, after oral argument, the Court denied both of these motions, and granted summary judgment in favor of Defendants with respect to this claim. Omnicare v. NCS, C.A. Nos. 19800 & 19786, 2002 WL 31445163 (Del. Ch. Oct. 29, 2002). (Ex. 8)

C. The Court Grants NCS's Motion To Dismiss Omnicare On Standing Grounds, And Stockholder Plaintiffs Are Forced To Hastily File Their Own Motion For A Preliminary Injunction.

Earlier, on October 3, 2002, NCS moved to dismiss Omnicare's Second Amended Complaint, alleging Omnicare lacked standing because it did not own a single share of NCS stock until July 30, 2002. (Ex. 9) The Court granted NCS's motion on October 25, 2002. Omnicare v. NCS, 809 A.2d 1163 (Del. Ch. 2002).

With Omnicare out of the picture, Stockholder Plaintiffs were forced, for the first time, to take something other than a passive role in the litigation. On November 3, 2002 – more than three months after filing their complaints – Stockholder Plaintiffs filed a motion for preliminary injunction seeking to enjoin implementation of the NCS/Genesis Merger and the Voting Agreements. (Ex. 10) On November 14, 2002, the Court heard Stockholder Plaintiffs' motion, which was denied on November 22, 2002. In re NCS HealthCare, Inc., C.A. No. 19786, 2002 WL 31720732 (Del. Ch. Nov. 25, 2002). (Ex. 11)

---

[2] On October 10, 2002, the Court held a scheduling conference, and chastised Stockholder Plaintiffs for failing to promptly file their summary judgment motion and move for a preliminary injunction. (Ex. 7 at 25)

D. The Supreme Court Consolidates Appeals, And Reverses The Denial Of A Preliminary Injunction.

On October 30, 2002, Omnicare appealed the Court of Chancery's decision to grant summary judgment in favor of NCS, as well as their dismissal on standing grounds. On November 25, 2002, Stockholder Plaintiffs filed applications in both the Court of Chancery and the Delaware Supreme Court seeking certification of an interlocutory appeal of the denial of their motion for a preliminary injunction.

On November 26, 2002, the Court of Chancery refused to certify Stockholder Plaintiffs' interlocutory appeal, and the Delaware Supreme Court denied certification as well. However, on December 4, 2002, the Supreme Court reversed course, vacated its earlier order denying certification, and granted certification and an expedited appeal of the denial of the motion for a preliminary injunction (and consolidated Stockholder Plaintiffs' appeal with Omnicare's appeal).

After oral argument on December 10, 2002, the Supreme Court entered an order reversing the Court of Chancery's denial of a motion for a preliminary injunction and remanded the proceedings to the Court of Chancery for the entry of a preliminary injunction precluding implementation of the NCS/Genesis Merger. Omnicare v. NCS, Nos. 605, 2002 & 649, 2002, 2002 WL 31767892 (Del. Dec. 10, 2002). (Ex. 12) On December 11, 2002, this Court issued a preliminary injunction enjoining NCS from

Options"). (Id.) The table below illustrates the total benefit for each of these classes of the various offers.

Agreement	Genesis Merger Agreement (July 28, 2002)	Omnicare Irrevocable Offer (October 7, 2002)	Omnicare Merger Agreement (December 18, 2002)
Per Share Value	$1.60	$3.50	$5.50
Value of 23,750,808 shares outstanding	$38,001,292.80	$83,127,828.00	$130,629,444.00
Value of 1,519,417 "Below $1.60 Options"	$1,891,009.66	$4,777,901.96	$7,816,735.96
Value of 358,167 "$4.25 Options"	$0	$0	$447,708.75
Value of 634,758 "Above $5.50 Options"	$0	$0	$0
Total Value	$39,892,302.46	$87,905,729.96	$138,893,888.71

(Id. at ¶¶ 3-6)

Thus, the difference in the value between the Omnicare Merger Agreement and the Genesis Merger Agreement ($138,893,888.71 and $39,892,302.46, respectively) – the Fund – is about $99 million.

F. Plaintiffs' Counsel Seek An Unprecedented Fee Award For Their Limited Role In Creating The Fund.

On December 27, 2002, Plaintiffs' counsel filed a new cause of action against Omnicare (and its wholly owned subsidiary, NCS Acquisition Corp.), seeking a temporary restraining order to escrow $13.5 million of the consideration to be paid to stockholders for the payment of attorneys' fees. Defendants Sells and Osborne intervened in that cause of action. On January 2, 2003, the Court issued an order restraining

Omnicare from paying $13.5 million of the merger consideration to NCS shareholders. Subsequently, Omnicare agreed to contribute $4.5 million of its own funds toward payment of Plaintiffs' attorneys' fees,[5] and the parties requested that the Court issue a modified TRO requiring only $9 million of the merger consideration otherwise payable to NCS stockholders to be set aside. The Court issued a modified TRO on January 6, 2003.

---

[5] Incredibly, Plaintiffs' counsel want to include Omnicare's $4.5 million contribution as part of the compensable benefit in this case. (OB at 10 n.5) Plaintiffs' counsel provide no explanation for this novel, troubling proposition, which should be rejected for several reasons. First, it erroneously assumes that the full $13.5 million fee request should be awarded here. Second, Plaintiffs played no role in obtaining the $4.5 million contribution from Omnicare. Third, Plaintiffs' counsel's citation to an unreported transcript discussion in Quickturn, is unhelpful. Although a similar issue about a compensable benefit was apparently raised in that proceeding, it was never directly decided by the Court, which ultimately decided that counsel's withdrawal of a $2 million fee request for mooted Revlon claims, in return for a $750,000 payment by the successful bidder, was adequate consideration for the release provided by plaintiffs to the successful bidder. See, e.g., Shapiro v. Quickturn Design Sys., Inc., C.A. No. 16850, (July 25, 2000) (transcript). (Pl. Comp. Ex. S)

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

Fee determinations are left to the sound discretion of the Court. See, e.g., Seinfeld v. Coker, C.A. No. 16964, 2000 WL 1800214, at *5 (Del. Ch. Dec. 4, 2000). In order to protect the class for whom the benefit was created, the Court applies heightened judicial scrutiny to fee applications. See, e.g., Painewebber R & D Partners II, L.P. v. Centocor, Inc., C.A. No. 14405, 2000 WL 130632, at *1 (Del. Ch. Jan. 31, 2000).

In assessing the reasonableness of a fee award, this Court examines factors such as the: (1) time and effort expended by counsel; (2) difficulty and complexity of the litigation; (3) counsel's standing and ability; (4) contingent nature of the fee; (5) stage at which the litigation ended; (6) amount of the benefit that can fairly be attributed to the efforts of the requester of the fees; and (7) size of the benefit conferred. See, e.g., Sugarland Indus. Inc. v. Thomas, 420 A.2d 142 (Del. 1980); State of Wisconsin Inv. Bd. v. Bartlett, C.A. No. 17727, 2002 WL 568417, at *5 (Del. Ch. Apr. 9, 2002) (citing Goodrich v. E.F. Hutton Group, Inc., 681 A.2d 1039 (Del. 1996)).

Of these factors, Plaintiffs' counsel correctly note that the size of the benefit conferred is the starting point for the fee analysis. See, e.g., Seinfeld, 2000 WL 1800214, at *5. Lost in Plaintiffs' analysis, however, is the end to which the Sugarland factors are employed – creating the proper incentive to litigate relevant lawsuits efficiently and effectively. See id. at *3. As explained in Seinfeld, the appropriate fee award is the minimum necessary to provide such an incentive; "anything above that point is a

windfall.... serving no other purpose than to siphon money away from stockholders and into the hands of their agents." Id.

Here, the size of the benefit conferred, the time and effort expended by Plaintiffs' counsel, the amount of the benefit that can be fairly attributed to Plaintiffs' counsel (as opposed to Omnicare, or some other factor), and the state at which the litigation ended all warrant a decidedly lower fee award than the one requested.[6] Indeed, the fee requested by Plaintiffs is far greater than the amount necessary to incentivize plaintiffs to litigate similar lawsuits efficiently and effectively. Accordingly, Plaintiffs' counsel's fee request must be rejected, and the Court should instead award a reasonable fee amount of approximately 5 percent.

---

[6] Defendants have no reason to doubt counsel's standing and ability to litigate this action, and take no position on the contingent nature of the fee.

II. PLAINTIFFS' FEE DEMAND IS UNREASONABLE.

A. Time And Effort Expended By Counsel.

1. The percentage sought by Plaintiffs' counsel is well beyond the typical range awarded by this Court, and much too high compared to the benefit achieved.

The requested fee award here represents over 13.5% of the Fund. As this Court has previously recognized, this percentage is well outside the typical range of fee amounts awarded by this Court under similar circumstances. See, e.g., In re Digex, Inc. S'holders Litig., Consol. C.A. No. 18336-NC, (Apr. 6, 2001) (transcript) (finding that award of 7.5 percent of settlement fund (worth approximately $165 million) was fair and reasonable, despite being "extraordinary when viewed within the context of earlier fee awards before this Court") (Pl. Comp. Ex. F), citing In re Cendant Corp. Prides Litig., 243 F.3d 722 (3d Cir.) (recognizing that in mega-fund recoveries (involving funds over $100 million), the typical common fund percentage fee awarded is in the range of 3%-7%), cert. denied, Kirby McInerney & Squire, LLP v. Joanne A. Aboff Family Trust, 534 U.S. 889 (2001).

Chancellor Chandler's analysis in Digex is consistent with other Delaware cases involving settlement funds approximating $100 million and higher. See, e.g., Dow Jones, 1992 WL 44907, at *2 (awarding fee amount representing 5.3% of $95 million common fund); In re Anderson Clayton S'holders Litig., C.A. No. 8387, 1988 WL 97480 (Del. Ch. Sept. 19, 1988) (awarding fee amount representing between 0.41% and 0.83% of common fund worth approximately $108-$218 million); Joseph v. Shell Oil Co., C.A.

No. 7450, 7699, 1985 WL 150466 (Del. Ch. Apr. 22, 1985) (order) (awarding fee amount representing 7.9% of common fund worth approximately $190 million), aff'd sub. nom. Selfe v. Joseph, 501 A.2d 409 (Del. 1985); In re Crocker S'holders Litig., C.A. No. 7405, 1985 WL 11550 (Del. Ch. May 21, 1985) (awarding fee amount representing 2.5% - 5% of common fund worth approximately $35-$70 million).

These decisions are consistent with the well-settled principle that as "the dollar amount of the benefit increases, the fee award as compared to the benefit achieved has tended to significantly decrease." Fox v. Chase Manhattan Corp., C.A. No. 8192-85, 1986 WL 673, at *4 (Del. Ch. Jan. 9, 1986) (citations omitted). This reduction makes sense given that "beyond a certain point, the effort and risk required to produce a higher or incremental monetary benefit do[es] not normally increase in proportion to the increase in the monetary benefit itself." Id. In light of the size of the benefit received by NCS shareholders, Plaintiffs are not entitled to such a large percentage of the fund.[7]

---

[7] For this reason, the cases cited by Plaintiffs' counsel involving higher percentages are inapposite. See e.g., McMullin v. Beran, C.A. No. 16493-NC (Del. Ch. Nov. 26, 2002) (order) ($17.6 million fund) (Pl. Comp. Ex. L); In re Intek Global Corp. S'holders Litig., Cons. C.A. No. 17207 (Del. Ch. Apr. 24, 2000) ($4.3 million fund) (transcript) (Pl. Comp. Ex. J); In re Home Shopping Inc. S'holders Litig., C.A. No. 12868 (Del. Ch. Jan 24, 1995) (transcript) (unspecified fund and fee amounts) (Pl. Comp. Ex. I). Other cases cited by plaintiffs involve smaller fee amounts, and inferentially much smaller funds. See In re Corporate Software Inc. S'holders Litig., C.A. No. 13209 (Del. Ch. Nov. 15, 1994) (order) ($300,000 in fees) (Pl. Comp. Ex. C); In re USA Cafes, L.P. Litig., C.A. No. 11146 (Del. Ch. June 22, 1994) (order) ($600,000 in fees) (Pl. Comp. Ex. T); Deutsch v. Cogan, C.A. No. 8808 (Del. Ch. Nov. 4, 1993) (order) ($800,000 in fees) (Pl. Comp. Ex. E); Braunschweiger v. American Home Shield Corp., C.A. No. 10755 (Del. Ch. July 27, 1992) (order)

(continued...)

Under the circumstances, a fee award of approximately 5% would be fair and reasonable. Perhaps the most analogous reported case – cited by Plaintiffs' counsel in their opening brief (OB at 15) – is Dow Jones & Co. v. Shields, where this Court granted a fee award of $5 million, representing 5.3% of a $95 million common benefit fund. Dow Jones, 1992 WL 44907, at *2. Approximately 3,300 billable hours were recorded by plaintiffs' counsel in that expedited action, as compared to the approximately 3,260 billable hours reported by Plaintiffs' counsel here. Id. at *2; see also Bemporad Aff. Ex. 4. Moreover, as here, the benefit was not solely attributable to Plaintiffs' counsel's effort. See Part B, infra. The Court in Dow Jones recognized that an independent committee had played a substantial role in securing the benefit achieved and that the fee amount shall be lowered accordingly. Id. By all accounts, a fee award approximating 5 percent, like the one approved in Dow Jones, would be appropriate under the circumstances, and consistent with existing precedent.

2. The time and effort expended by Plaintiffs' counsel (when considered on an hourly basis) does not justify the fee sought.

Here, Plaintiffs' counsel's fee demand is too high compared to the amount of time they claim to have spent on this litigation. Plaintiffs' counsel had earlier represented that they spent approximately 3,000 hours on this matter (in Plaintiffs' counsel's fee petition, the number of hours has increased to more than 3,200). See Bemporad Aff.

---

[7] (...continued)
($800,684 in fees and disbursements) (Pl. Comp. Ex. B); Weigand v. Berry Petroleum Co., C.A. No. 9316 (Del. Ch. Nov. 25, 1991) (order) ($1.5 million in fees) (Pl. Comp. Ex. U).

Ex. 4. Their $13,500,000 fee demand amounts to approximately $4,100 per hour, or a premium over their normal billing rates (assuming a generous rate of $500 per hour) of approximately 725 percent.

By any standard, that is simply too high. See, e.g., Digex, at 142 (noting that premiums for attorney billing rates in expedited matters typically range between 50 to 400 percent); see also In re North American Philips Stockholders' Litig., C.A. No. 9178, 1987 WL 28434, at *1 (Del. Ch. Dec. 16, 1987) (requiring consideration of time and labor expended); see also In re McCaw Cellular Communications, Inc. S'holder Litig., Civ. A. No. 12793, 1994 WL 594017, at *3-4 (Del. Ch. Oct. 18, 1994) (refusing to rule on fee application where plaintiffs' counsel "played no role in negotiating the merger transaction that is the foundation for the claimed benefit" and provided no other basis for determining reasonable fee); In re MCA, Inc. S'holders Litig., C.A. No. 11740, 1993 WL 43024, at *5 (Del. Ch. Feb. 16, 1993) (fee "will be reduced" where benefit was partly caused by shareholder litigation and partly caused by actions of others), aff'd, 633 A.2d 370 (Del. 1993).[8]

---

[8] To the extent the Court considers the hours spent by counsel in determining the size of the fee award, it should deduct the time Plaintiffs' counsel expended arguing over lead counsel status, as well as any time spent drafting a useless appraisal petition, both of which indisputably produced no benefit to the class. See In re First Interstate Bancorp Consol. S'holder Litig., 756 A.2d 353, 364 (Del. Ch. 1999) (adjusting hours to remove time spent on tasks producing no benefits to the class), aff'd sub nom. 755 A.2d 388 (Del. 2000); In re Diamond Shamrock Corp., C.A. No. 8798, 1989 WL 17424, at *2 (Del. Ch. Feb. 23, 1989) (time not benefitting the class is noncompensable).

Additionally, Plaintiffs' counsel have not submitted any evidence showing the work they performed, hours expended or hourly rates, other than Mr. Bemporad's conclusory affidavit. The absence of supporting evidence weakens Plaintiffs' counsel's application for such a sizable fee. See, e.g., Fox, 1986 WL 673, at *1.[9]

B. The Shareholder Litigation Was Not The Sole Cause Of The Fund.

In determining the proper fee award, the Court must consider the amount of the benefit that can fairly be attributed to the efforts of the party requesting fees. Here, while the shareholder litigation was a direct cause of the benefit, it was not the sole cause. It is therefore appropriate to lower the percentage of the benefit awarded. See, e.g., Digex, at 140, 143 (recognizing that lower fee was warranted because counsel for stockholder plaintiffs' efforts were not the only reason benefit was created); McCaw, 1994 WL 594017, at *3-4 (refusing to rule on fee application where plaintiffs' counsel "played no role in negotiating the merger transaction that is the foundation for the claimed benefit" and provided no other basis for determining reasonable fee); MCA, 1993 WL 43024, at *6 (fee "will be reduced" where benefit was partly caused by shareholder litigation and partly caused by actions of others). Under the circumstances, a fee award representing 5% of the Fund would best represent Plaintiffs' counsel's efforts. See, e.g.,

---

[9] Plaintiffs' fee request is especially dubious in light of Omnicare's agreement to pay $4.5 million of its own money toward Plaintiffs' attorney fees. As this Court has recognized where "the fee is to be allocated by the Court out of funds which would otherwise belong to others, such generosity must not be unreasonably practiced at the enforced expense of others." Lewis v. Great W. United Corp., C.A. No. 5397, 1978 WL 2490, at *7 (Del. Ch. Mar. 28, 1978).

Dow Jones, 1992 WL 44907, at *2 (awarding fee amount representing 5.3% of $95 million common fund, in part, because plaintiffs' counsel was not sole cause of the Fund).

1. Omnicare's litigation efforts contributed significantly to the benefit.

First, given Omnicare's lead role in the litigation until its dismissal for lack of standing in late October 2002, Plaintiffs' counsel are, at most, only partially responsible for the benefit achieved. Typically, this Court refuses to award shareholders' attorneys a fee based on a percentage of the common benefit fund where counsel for bidders "occupied the dominant, lead litigation role[]." Robert M. Bass Group. Inc. v. Evans, C.A. Nos. 9953, 9909; 1989 WL 137936, at *3 (Del. Ch. Nov. 16, 1989) (concluding that attorneys for shareholders served monitoring role that was "secondary and minimal" to efforts of counsel for bidders); see also In re Dunkin' Donuts S'holders Litig., C.A. No. 10825, 1990 WL 189120, at *7 (Del. Ch. Nov. 27, 1990) (refusing to award percentage of common benefit fund to shareholders' attorneys who "occupied only a monitoring, []active, role" compared to lead role played by counsel for hostile bidder); see also Digex, at 140, 143 (recognizing that counsel for special committee played significant role in outcome of litigation and, thus, reducing amount of fee awarded to counsel for stockholder plaintiffs).[10]

---

[10] Rather than awarding shareholders' attorneys who played a secondary role a percentage of the common benefit fund, this Court will determine the appropriate fee on a quantum meruit basis. See In re Dunkin' Donuts, 1990 WL 189120, at *7; Bass Group, 1989 WL 137936, at *3.

Until its dismissal, Omnicare clearly "occupied the dominant lead litigation role[]" while Plaintiffs' counsel occupied a secondary, monitoring role. Bass Group, 1989 WL 137936, at *3. Throughout discovery, Omnicare handled the bulk of the work. Omnicare produced 14,710 pages of documents as compared to 1,534 pages produced by Plaintiffs. Omnicare responded to twelve interrogatories and Plaintiffs responded to none. At depositions, Omnicare led the charge by thoroughly examining the witnesses and Plaintiffs' counsel followed up with a few, cursory questions (if any at all). Compare Sells Tr. 5-184, 213-24 (questioning by Omnicare) with Sells Tr. 185-202 (questioning by Plaintiffs). Additionally, Plaintiffs' counsel only had to prepare and defend two (relatively brief) depositions of their clients while Omnicare's counsel prepared and defended [four] lengthy depositions of Omnicare's witnesses.

Even more significant is that even after Omnicare's complaint was dismissed, counsel for Omnicare continued to provide Plaintiffs' counsel with material assistance in their litigation efforts. Omnicare's counsel continued to attend depositions, coached Plaintiffs' counsel in their questioning and actively participated in those depositions. See Osborne Tr. 60-61, 114, 133 (asking for documents, providing documents and seeking clarification of deponent's answers); Outcalt Tr. 43, 46 (criticizing form of objections by counsel for Outcalt and counsel for NCS). At the deposition of Kevin Shaw, for example, Mr. Farber, counsel for Omnicare, was clearly an active participant. See Shaw Tr. 60 ("I want to make a record that Mr. Farber [counsel for Omnicare] is here

today and he's just assisted Mr. Osborn [counsel for Plaintiffs] in his questioning, and he has been assisting throughout the deposition and feeding him documents.").

Even Plaintiffs' counsel freely admit that Omnicare, even after it was dismissed on standing grounds, drafted the key litigation documents in the preliminary injunction action. For example, Plaintiffs' counsel relied on attorneys from Potter Anderson and Dewey Ballantine to draft the opening brief in support of their motion for preliminary injunction. (Bemporad Aff. ¶ 12) The reply brief was co-authored by Omnicare's attorneys. (Bemporad Aff. ¶ 13) Supplemental briefing "was analyzed principally by Omnicare's counsel," with Plaintiffs' counsel providing input. (Bemporad Aff. ¶ 14) Omnicare's counsel also "prepared working drafts of the opening brief ... and the reply brief" submitted to the Supreme Court, with Plaintiffs' counsel "provid[ing] input." (Bemporad Aff. ¶ 20) Omnicare's major role in the preliminary injunction proceedings suggests a reduced award (of approximately 5% of the Fund) is appropriate. Dow Jones, 1992 WL 44907, at *2.

2. Additional factors contributing to the common benefit.

As in Sugarland, the benefit of the litigation here can be divided into two stages, Phase 1 and Phase 2. Before the preliminary injunction ("Phase 1"), there was a potential benefit of $1.90 per share available, based on the Omnicare and Genesis offers at the time. After the preliminary injunction ("Phase 2"), Omnicare and Genesis increased their offers by $2.00 per share. The total benefit represented by Phase 1 was approximately $48 million; the total benefit represented by Phase 2 was approximately

$51 million. The link between the shareholder litigation and the benefit in Phase 1 is stronger than in Phase 2, but in neither case was the shareholder litigation the sole cause of the benefit. Again, this should result in a reduced fee award approximating about 5% of the common fund. See, e.g., Dow Jones, 1992 WL 44907, at *2.

(a) Plaintiffs' counsel's limited role in Phase 1.

By early August 2002, NCS had signed the NCS/Genesis Merger Agreement, worth approximately $1.60 per share, and had a conditional "offer to negotiate" from Omnicare, which promised $3.50 per share but required satisfactory completion of due diligence among other conditions. (Exs. 14, 15) On August 20, NCS responded to Omnicare's open tender offer by filing its Rule 14D-9 response with the SEC (the "NCS 14D-9"), highlighting the conditional nature of the Omnicare offer, and explaining these conditions and that those conditions made any recovery to shareholders uncertain. (Ex. 16) NCS also filed suit in the United States District Court for the District of Northern Ohio (the "Ohio Action"), alleging that Omnicare's Tender Offer filings were materially misleading, in part because they failed to disclose Omnicare's continued insistence on due diligence as a condition for any negotiated merger agreement. (Ex. 17) NCS moved for an order to enjoin the tender offer pending corrective disclosures. (Id.)

In response to the Ohio Action and the NCS 14D-9, Omnicare affirmatively rescinded its request for due diligence in an August 27 press release. (Ex. 18) Thereafter, NCS requested a waiver from Genesis to allow NCS to enter merger negotiations with Omnicare, and received such a waiver on September 10. (Ex. 19) On October

6, after negotiations, Omnicare irrevocably committed to a merger agreement for $3.50 per share, contingent only on the termination of the NCS/Genesis Merger Agreement. (Ex. 20)

Stockholder Plaintiffs' litigation had little, if any, effect in causing these significant material events during Phase 1. Indeed, as late as August 27, Plaintiffs' counsel were squabbling amongst themselves over who should be appointed lead counsel, and had taken no action related to the merits of the litigation. (Ex. 21) Stockholder Plaintiffs' motion to expedite proceedings was not granted until September 12, 2002, almost a month after filing the complaint. By October 6, Plaintiffs' counsel had taken no depositions and had filed no discovery motions. Their only substantive involvement in the case to that point was to defend two depositions noticed by the NCS Defendants, and to join in Omnicare's motion for summary judgment. (See Ex. 6) Plaintiffs' counsel did not even file a motion for a preliminary injunction until November 3, 2002.

While it is true that NCS could not have accepted Omnicare's offer without the success of the shareholder litigation, the nature of that offer changed significantly, through the bargaining and negotiation of both NCS and Omnicare. NCS turned a conditional offer to negotiate – one that Stockholder Plaintiffs have acknowledged Omnicare could freely revoke (Marti 90, 95-96; Miles 54-55, 59) – into an irrevocable offer for $3.50 per share. Stockholder Plaintiffs had no involvement in creating the irrevocable offer. The net benefit of being able to "accept" Omnicare's conditional offer to negotiate is speculative at best, and warrants a reduction in Plaintiffs' counsel's

requested fee amount (to about 5% of the Fund). See, e.g., Dow Jones, 1992 WL 44907, at *2.

(b) Plaintiffs' counsel's limited role in Phase 2.

Similarly, the shareholder litigation was clearly not the sole cause of Omnicare's increased offer to $5.50 during Phase 2 of the litigation. On December 11, when the NCS/Genesis Merger Agreement was preliminarily enjoined, NCS could still not accept any offer from Omnicare, because it could not unilaterally terminate the NCS/Genesis Merger Agreement. NCS, Omnicare and Genesis negotiated with each other, with NCS insisting on bidding procedures that would free it from the constraints imposed by the NCS/Genesis Merger. Plaintiffs' counsel did not play any role in these negotiations. Eventually, Genesis agreed to terminate the NCS/Genesis Merger Agreement in exchange for a $22 million payment from Omnicare.

The circumstances leading up to Omnicare's increased offer in Phase 2 are remarkably similar to the circumstances the Supreme Court addressed in Sugarland. There, the Court of Chancery enjoined a sale of a parcel of land to one group when another group had offered $3.2 million more for the parcel. Sugarland, 420 A.2d at 145. The Court of Chancery ordered competitive bidding, which resulted in sale of land conferring a benefit approximately $11.5 million more than the higher bid at the time of the injunction. Id. at 151. The Supreme Court held that the benefit resulting from the competitive bidding was due only in part to the efforts of counsel, and awarded a lower percentage of that benefit than the difference between the pre-injunction offers. Id.

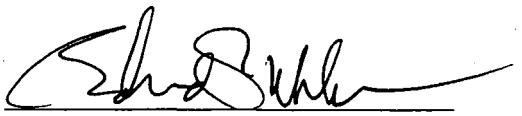
A similar approach is warranted here. Although (as in Sugarland) competitive bidding was not feasible prior to the preliminary injunction order, Plaintiffs' counsel had no involvement in the competitive bidding. The increased benefit was primarily due to the efforts of NCS, Genesis, Omnicare and their respective counsel. Thus, a lower percentage fee award for this portion of the benefit is appropriate. See, e.g., Digex, at 140, 143; McCaw, 1994 WL 594017, at *3-4; MCA, 1993 WL 43024, at *5; see also Dow Jones, 1992 WL 44907, at *2.

C. The Shareholder Litigation Ended Without Trial.

The shareholder litigation ended at a preliminary stage; the case never reached a trial on the merits. As a result, Plaintiffs' counsel did not invest years of effort on this matter, or come close to logging the amount of hours that might support their bloated fee requests. Thus, a reduced fee award percentage is appropriate here. See, e.g., Fox, 1986 WL 673, at *4 (distinguishing case from Smith v. Van Gorkom where plaintiffs' attorneys received $5.5 million fee after investing five years, 16,000 hours and $250,000 in out-of-pocket expenses).

CONCLUSION

WHEREFORE, for all of the foregoing reasons and the authorities cited, Defendants respectfully request that the Court reduce the attorneys' fees sought by Plaintiffs to an amount approximating 5% of the Fund.



Edward P. Welch
Edward B. Micheletti
Katherine J. Neikirk
James A. Whitney
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P. O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000
Attorneys for Defendant Shareholders
Boake A. Sells and Richard L. Osborne

OF COUNSEL:

Mark A. Phillips
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP
2300 BP Tower, 200 Public Square
Cleveland, Ohio 44114-2378
(216) 363-4500

DATED: March 25, 2003

CERTIFICATE OF SERVICE

I, James A. Whitney, hereby certify that I caused to be served two copies of the Memorandum of Defendants Shareholders Boake A. Sells and Richard L. Osborne in Opposition to Plaintiffs' Application for Attorneys' Fees and Expenses, the Appendix thereto and Compendium of Unreported Opinions cited therein on March 25, 2003, upon the following counsel of record in the manner indicated:

BY HAND DELIVERY

Joseph A. Rosenthal, Esquire
Rosenthal, Monhait, Gross & Goddess, P.A.
Mellon Bank Center, Suite 1401
Wilmington, DE 19899

Robert J. Kriner, Esquire
Chimicles & Tikellis LLP
One Rodney Square, 5th Floor
Wilmington, DE 19899

Donald J. Wolfe, Jr., Esquire
Potter, Anderson & Corroon LLP
Hercules Plaza
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899

James A. Whitney