THE COURT OF CHANCERY OF THE STATE OF
DELAWARE COUNTY OF NEW CASTLE

ROBERT M. MILES and GUILLERMO MARTI, Plaintiffs, v. NCS HEALTHCARE, INC., JON H. OUTCALT, KEVIN B. SHAW, RICHARD L. OSBORNE, BOAKE A. SELLS, GENESIS HEALTH VENTURES, INC., and GENESIS SUB, INC., Defendants.	C.A. No. 19786-NC
ANTHONY NOBLE, Plaintiff, v. NCS HEALTHCARE, INC., RICHARD L. OSBORNE, JON H. OUTCALT, BOAKE A. SELLS, and KEVIN B. SHAW, Defendants.	C.A. No. 19807 NC
JEFFERY TREADWAY, Plaintiff, v. JON H. OUTCALT, KEVIN E. SHAW, BOAKE A. SELLS, RICHARD L. OSBORNE, and NCS HEALTHCARE, INC., Defendants.	C.A. No. 19810 NC

TILLIE SALTZMAN, Plaintiff, v. JON H. OUTCALT, KEVIN E. SHAW, BOAKE A. SELLS, RICHARD L. OSBORNE, and NCS HEALTHCARE, INC., Defendants.	:	C.A. No. 19812 NC
DOLPHIN LIMITED PARTNERSHIP I, L.P., Plaintiff, v. JON H. OUTCALT, KEVIN E. SHAW, BOAKE A. SELLS, RICHARD L. OSBORNE, GENESIS HEALTH VENTURES, INC., GENESIS SUB, INC., and NCS HEALTHCARE, INC., Defendants.	:	C.A. No. 19822

MEMORANDUM OF LAW IN OPPOSITION TO LOWEY DANNENBERG'S LEAD COUNSEL APPLICATION AND IN SUPPORT OF BEATIE AND OSBORN'S LEAD COUNSEL APPLICATION

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PRELIMINARY STATEMENT

Beatie and Osborn LLP submits this memorandum of law in opposition to the application of Lowey Dannenberg Bemporad & Selinger, P.C. ("Lowey Dannenberg") for appointment as lead counsel for the public shareholders of NCS Healthcare, Inc. ("NCS"). Applying the criteria set forth in TWC Technology[1] and U.S. Timberlands,[2] the Court should appoint Beatie and Osborn as lead counsel for the class.

Beatie and Osborn is mindful of the Court's desire that lawyers resolve these types of disputes without involving the Court. Unfortunately, as detailed in the affidavit of Daniel A. Osborn, the lawyers have not been able to do that in this case. Beatie and Osborn remains willing to talk to Lowey Dannenberg about a co-lead counsel arrangement, but Lowey Dannenberg does not appear to be interested, necessitating the filing of this memorandum.

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[1] TCW Technology Limited Partnership v. Intermedia Communications, Inc., 2000 WL 1654504, *4 (Del. Ch.).

[2] Hirt v. U.S. Timberlands Service Co. LLC, 2002 WL 1558342, *2 (Del. Ch.).

PROCEDURAL BACKGROUND

This is a breach of fiduciary duty lawsuit brought against NCS' directors on behalf of all persons who held NCS Class A common stock as of July 29, 2002 (the "Class"). The lawsuit was filed in response to NCS' proposed merger with Genesis Health Ventures, Inc. ("Genesis"). Genesis is charged with aiding and abetting the directors' alleged wrongdoing.

This action was commenced on July 30, 2002. The Complaint alleges that the individual defendants breached their fiduciary duty to the Class by failing to hold a valid and proper auction for the Company and by failing to get the best price for NCS' public shareholders.

On August 1, 2002, Omnicare, a third-party bidder for NCS, filed suit against NCS claiming that the Company had improperly and unfairly rebuffed Omnicare's bids to acquire NCS. Over the next several days, four other law firms filed three separate Complaints similar to the Beatie and Osborn Complaint. On August 7, 2002, Lowey Dannenberg filed its Complaint. While Lowey Dannenberg attributes its later filing to undertaking a "careful analysis" of the facts, its Complaint does not differ materially from any of the others that were filed. This is not surprising, as all of the firms had essentially the same information available to them, including press releases, SEC filings and whatever other news stories were accessible from the Internet.

Prior to filing its Complaint, Lowey Dannenberg approached Beatie and Osborn about a co-lead counsel arrangement for representation of the minority shareholders. Beatie and Osborn initially refused to agree to such an arrangement because Lowey Dannenberg had not yet filed a Complaint and because other firms who had filed Complaints had already proposed co-lead counsel structures. After Lowey Dannenberg filed its Complaint and moved for lead counsel, Beatie and Osborn offered to work as co-lead counsel. Lowey Dannenberg has never responded.

BACKGROUND OF THE UNDERLYING TRANSACTION

NCS is a corporation organized under the laws of the State of Delaware with its principal place of business in Beachwood, Ohio. (Amend. Comp. ¶ 2).[3] The Company provides pharmacy services to long-term care institutions, including skilled nursing facilities, assisted living facilities, and other institutional healthcare settings. (Id.). The individual defendants, Jon H. Outcalt, Kevin B. Shaw, Richard L. Osborne and Boake A. Sells, are the directors of NCS.

NCS has two classes of common stock: Class A stock and Class B stock. (Amend. Comp. ¶ 4). The Class B stock is reserved for Company insiders; Class A and Class B stock are voting stock, but the Class B stock has ten times the voting power of Class A stock. (Amend. Comp. ¶ 5). Jon H. Outcalt is the Chairman of the Board of Directors of NCS and has approximately 49% voting power over NCS through his approximately 3.4 million shares of Class B stock. (Amend. Comp. ¶ 6). Defendant Kevin B. Shaw is President, Chief Executive Officer, secretary and a director of NCS. (Amend. Comp. ¶ 7). Mr. Shaw has approximately 16% voting power of NCS through his approximately 1.1 million shares of Class B stock. (Id.) In short, Outcalt and Shaw control a majority of NCS's voting power.

By February 2002, NCS had defaulted on two separate indebtednesses worth approximately $302 million. (Amend. Comp. ¶ 19, 22). The Company hired UBS Warburg as a financial advisor to assist the Company in exploring strategic alternatives. (Amend. Comp. ¶ 20). After several months without finding any strategic alternative, NCS engaged Brown, Gibbons, Lang and Company

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[3] "Amend. Comp. ¶ _" refers to the numbered paragraphs in the plaintiffs' First Amended Class Action Complaint, filed contemporaneously with this memorandum

L.P. ("Brown Gibbons") to restructure its outstanding debt. (Amend. Comp. ¶ 23). The Company never announced a debt restructuring. (Id.).

In July 2001, Omnicare approached NCS' directors and expressed interest in acquiring the Company. (Amend. Comp. ¶ 24). With bankruptcy looming on the horizon, NCS' Chief Executive Officer contacted Omnicare and indicated that the Company's Board of Directors would review Omnicare's proposal for the Company. (Amend. Comp. ¶ 25). NCS requested Brown Gibbons to seek third parties with which it could negotiate for a sale of the Company or its assets. (Amend. Comp. ¶ 27).

While the individual defendants realized that a sale or break up of the Company was inevitable and that they had a duty to get the highest price possible for the Company, they negotiated exclusively with Genesis rather than other interested parties, namely Omnicare. (Amend. Comp. ¶ 29). Instead of negotiating in good faith with Omnicare, the individual defendants breached their fiduciary duties to NCS' public shareholders and approved a merger agreement with Genesis in a stock-for-stock deal valued at $1.60 per NCS share. (Amend. Comp. ¶ 44). At the time the directors accepted Genesis' offer, Omnicare had made a cash offer of $3 per share. (Amend. Comp. ¶ 36). In addition, the merger agreement included numerous provisions that were designed to lockup and end the bidding for NCS. (Amend. Comp. ¶ 47-53). These provisions prevent the individual directors from performing their fiduciary duties and obtaining the best possible price for the Company. (Amend. Comp. ¶ 28-29). Upon information and belief, the individual defendants spurned Omnicare's offers for Genesis' offer because Genesis provided the controlling shareholders with positions within the surviving entity. (Amend. Comp. ¶ 42).

ARGUMENT

BEATIE AND OSBORN SHOULD BE APPOINTED PLAINTIFFS' LEAD COUNSEL

This Court has delineated six factors to be considered in evaluating competing applications for lead counsel. The factors are:

1. the quality of the pleadings and the pleading best able to represent the interest of the shareholder class;
2. the economic stakes of the competing litigants in the outcome of the lawsuit;
3. the willingness and ability of all the contestants to litigate vigorously on behalf of the class;
4. the vigorousness and enthusiasm with which the contestants have prosecuted the action;
5. whether their exists a conflict between the large oftentimes institutional shareholders and the smaller individual shareholders; and
6. the competence of counsel and their access to resources necessary to prosecute the claims at issue.[4]

In all candor, there is really very little difference between the applications of Beatie and Osborn and Lowey Dannenberg. Both firms have the competence, experience and resources to litigate a case of this nature. Similarly, given that the cases are less than three weeks old, neither firm can point to significant steps toward prosecution of the lawsuit. Each firm has filed a

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[4] These factors are drawn from two Court of Chancery decisions, TCW Technology Limited Partnership v. Intermedia Communications, Inc., 2000 WL 1654504, *4 (Del. Ch.) and Hirt v. U.S. Timberlands Service Co. LLC, 2002 WL 1558342, *2 (Del. Ch.).

Complaint; Beatie and Osborn has participated in countless telephone conferences with counsel for Omnicare and we suspect Lowey Dannenberg has done the same; Beatie and Osborn is in the process of preparing a motion for a preliminary injunction while Lowey Dannenberg has told the Court it is doing likewise; and finally, Beatie and Osborn is filing, contemporaneously with this memorandum, an Amended Complaint, while Lowey Dannenberg is probably preparing one as well. There seems little doubt that both firms are ready, willing and able to prosecute the case.

The only real difference between the applications of the two firms is the economic stakes of their respective clients. Beatie and Osborn originally filed on behalf of two clients who owned more than 100,000 shares. Since that time, a number of shareholders have contacted Beatie and Osborn about representing them in the litigation. Among those shareholders is Mr. Guillermo Marti, who, at all relevant times, has owned 655,010 shares of NCS.

Lowey Dannenberg, on the other hand, represents a client, Dolphin Limited Partnership, Inc., that owns 500,000 shares. However, Beatie and Osborn has been told by Lowey Dannenberg that while Dolphin owned some NCS stock before the July 29, 2002 announcement, the investment firm purchased additional shares of NCS stock after the announcement. Lowey Dannenberg has not told Beatie and Osborn the number of shares owned pre-announcement and post-announcement, probably for a couple of reasons. First, persons or entities who purchased NCS stock after the July 29 announcement have no standing to assert the claims set forth in the various Complaints that have been filed. Second, this may give rise to unique defenses that defendants could raise relating to class certification. This information should be disclosed to the Court so that proper evaluation of the competing motions can be achieved.

CONCLUSION

In light of the foregoing, the undersigned respectfully requests that the Court enter the Order attached hereto consolidating the actions and appointing Beatie and Osborn LLP as lead counsel for the Class.

Dated: August 20, 2002.

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