Genesis 10/15

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

OMNICARE, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 19800
	:	
NCS HEALTHCARE, INC., JON H. OUTCALT, KEVIN B. SHAW, BOAKE A. SELLS, RICHARD L. OSBORNE, GENESIS HEALTH VENTURES, INC., and GENEVA SUB, INC.,	:	
	:	
Defendants.	:	

THE NCS DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF OMNICARE'S MOTION TO COMPEL

Defendants NCS Healthcare, Inc. ("NCS"), and Boake A. Sells and Richard L. Osborne (the "Independent Individual Defendants") (collectively, the "NCS Defendants") respectfully submit this memorandum in opposition to Omnicare, Inc.'s ("Omnicare") Motion to Compel Production of Notes and Drafts of Minutes of Meetings of the NCS Board of Directors and Special Committee ("Omnicare's Motion"). With this motion, Omnicare is belatedly seeking materials that are clearly privileged under well-settled Delaware law.

BACKGROUND

A. Factual Background

1. This litigation arises out of Omnicare's continuing attempts to thwart a merger between NCS and defendant Genesis Health Ventures, Inc. (the "Genesis Merger"). The Genesis Merger was the end-result of a more than two-year process conducted by NCS (and its advisors) examining various restructuring alternatives. Throughout that time, the NCS Board was faced with managing a company in default on its debt – consisting of senior, subordinated and trade debt of approximately $350 million – with fiduciary duties to both shareholders and creditors. Under the terms of the Genesis Merger, all of NCS's obligations are completely satisfied, and substantial provisions are made for equity.

2. Part of the two-year process also involved failed discussions with Omnicare about three proposals Omnicare made to purchase NCS's assets under Section 363 of the United States Bankruptcy Code at scavenger prices. Not once in those discussions did Omnicare make a proposal that would have resulted in recovery for NCS shareholders. Late in the business day on July 26, 2002 – after not communicating directly with NCS for almost five months – Omnicare sent NCS a highly conditional indication of interest in acquiring NCS at $3.00 per share in cash. Among other things, Omnicare's expression of interest was conditioned upon expedited due diligence of NCS,

despite having the opportunity for substantial due diligence review during their earlier failed negotiations with NCS.

3. Thus, on July 28, 2002, the NCS Board was faced with a choice: execute the firm Genesis offer providing recovery for all NCS stakeholders (and which, according to Genesis, would have been taken off the table if not accepted by midnight July 28), or roll the dice on Omnicare's belated "offer to negotiate" and risk losing any recovery for NCS stakeholders. The NCS Board made the right decision for all of its constituencies, and chose the option providing guaranteed recovery for all NCS stakeholders by approving the Genesis Merger.

B. Procedural Background

4. Pursuant to the Court's August 19 Scheduling Order, the NCS Defendants produced more than 7,200 pages by the Saturday, August 31 deadline. In contrast, Omnicare, from the outset, has improperly and selectively withheld or redacted several categories of responsive documents, forcing the NCS Defendants to file three separate motions to compel.[1]

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[1] Omnicare has steadfastly refused to produce responsive documents and has placed the NCS Defendants in the position of repeatedly having to ask (or file motions to compel for):

- Documents reflecting communications Omnicare had with the Ad Hoc Committee (Ex. A, September 3, 2002 letter from Edward B. Micheletti to John M. Seaman);
- Documents supporting Omnicare's contention that its offer is fully financed (Ex. B, September 4, 2002 letter from Edward B. Micheletti to John M. Seaman);

(continued...)

5. For example, Omnicare refused to produce by the August 31 deadline any information about its attempt to communicate with the NCS Board subsequent to commencing its Tender Offer on "relevancy" and "improper motive" grounds. After counsel for Omnicare refused to meaningfully discuss their objections, the NCS Defendants were forced to file their first motion to compel.

6. Upon further review of Omnicare's production, the NCS Defendants also determined that Omnicare failed to produce responsive documents pertaining to a number of key allegations in their Amended Complaint. Accordingly, the NCS Defendants wrote Omnicare and requested those documents so they would not be forced to file a second motion to compel.

7. Ultimately, Omnicare capitulated, and produced on Saturday, September 7, more than 4,100 additional responsive documents it had failed to produce by the August 31 deadline. Omnicare also produced approximately 3,000 additional responsive documents on September 11. Omnicare produced substantially more respon-

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[1] (...continued)

- Almost 200 documents that Omnicare withheld and redacted on business strategy grounds (despite the majority of those documents being dated prior to 2002) (Ex. C, September 6, 2002 letter from Edward B. Micheletti to John M. Seaman); and
- Documents previously withheld by Omnicare on business strategy grounds even after Special Master Regan ordered the production of these documents and the parties agreed not to contest his decision (Ex. D, October 11, 2002 letter from Edward P. Welch).

sive documents after the August 31 deadline (about 7,100 documents) than before the deadline (about 5,400 documents).

8. Nevertheless, the NCS Defendants were also forced to file two additional motions to compel, claiming that Omnicare (1) withheld or redacted almost 200 documents under the "business strategy" privilege (despite the fact that the majority of those documents were generated before July 2002); and (2) waived its attorney-client privilege in connection with communications regarding its proposed NCS transactions.

9. In response, Omnicare (who, as explained above, had been less than forthcoming in the discovery process) cobbled together its own motion to compel claiming that NCS had waived its attorney-client privilege in connection with the minutes of all NCS Board and Independent Committee meetings. Notably, however, this motion did not target the draft minutes from any of those meetings.

10. On September 20, the Court appointed a Special Master to resolve the three outstanding discovery motions. On September 27, the Special Master heard argument on these motions, and Omnicare did not raise any issue about draft minutes at that hearing. On October 11, the Special Master issued a final report denying Omnicare's motion to compel, and granting NCS's business strategy motion in part, directing Omnicare to produce all documents created before July 2002 that it had wrongfully withheld or redacted on business strategy grounds.

11. Meanwhile, counsel for the NCS Defendants were searching for the draft minutes requested by Omnicare, and discovered that certain materials in the possession of Megan Mehalko[2] were inadvertently omitted from the original production. Also during this time, the NCS Defendants discovered that Ms. Mehalko had electronically mailed certain draft minutes to Edward P. Welch. The NCS Defendants promptly reviewed and produced some of these materials, listed the remaining privileged materials on amended privilege and redaction logs and explained to Omnicare that the draft minutes (and Ms. Mehalko's notes which comprised the first draft of those minutes) were privileged. (See Ex. E, September 13, 2002 letter from Edward B. Micheletti to John M. Seaman; Ex. F, September 17, 2002 letter from Edward B. Micheletti to John M. Seaman; Ex. G, September 26, 2002 letter from Edward B. Micheletti to James P. Smith III).

12. In response to the Special Master's ruling denying their original motion to compel, Omnicare filed this motion.[3]

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[2] Ms. Mehalko is an attorney at Benesch, Friedlander, Coplan & Aronoff LLP, outside counsel to NCS's Board of Directors and Independent Committee, and attorney for the NCS Defendants.

[3] Rather than raise this issue with the Special Master in a timely fashion, Omnicare, which was fully aware of the issue before the Special Master's hearing, waited until the eve of depositions before springing this motion. Omnicare is also fully aware that the Court is disinclined to permit more than one deposition of the same witness, and Omnicare's tardy motion should not result in multiple depositions of the NCS directors.

ARGUMENT

13. Drafts of documents, the final versions of which are produced or made public, may be withheld as privileged because their disclosure would allow the recipient to inferentially determine the advice and opinions of the attorneys drafting the documents. See, e.g., Jedwab v. MGM Grand Hotels, Inc., C.A. No. 8077, 1986 WL 3426, at *3 (Del. Ch. Mar. 20, 1986) (Ex. J hereto); Lee v. Engle, C.A. Nos. 13323, 13284, 1995 WL 761222, at *6 (Del. Ch. Dec. 15, 1995) (Ex. K hereto).[4]

14. Omnicare relies on a highly misleading description of Frank v. Engle to support its position that "evidence that the minutes were being tailored to promote the defendants' litigation strategy" mandates production of draft minutes. (Omnicare Motion at 9) Specifically, the Court explained that:

> Plaintiffs request "draft" minutes for meetings of the Sunstates board and its committees. In an earlier opinion deciding plaintiffs' first motion to compel, I denied plaintiffs' request for draft copies of board minutes. I reasoned that the finalized versions of these documents would adequately inform plaintiffs of what occurred at the meetings without compromising the board's right to edit and certify the content of its minutes privately, a process that normally relies on legal counsel.

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[4] Although Omnicare notes that the Court in Pfizer, Inc. v. Warner-Lambert Co. ordered production of notes, that opinion offers no grounds for such production, and does not address either Jedwab or Lee v. Engle. C.A. No. 17524, 1999 WL 33236240 (Del. Ch. Dec. 8, 1999) (Ex. L hereto). Also, the law of other jurisdictions cited by Omnicare, in particular the Northern District of California's decision in In re MicroPro Sec. Litig., has already been considered and rejected by this Court. See Lee v. Engle, 1995 WL 761222, at *5 (rejecting MicroPro as inconsistent with Jedwab).

> Plaintiffs now argue that defendants have abused my order by not turning over "final" drafts. Instead, they contend, defendants have implemented a procedure for approving final drafts that purposefully delays discovery and affords Engle, the alleged mastermind of defendants' wrongdoing, the opportunity to tailor the minutes in light of this litigation. Plaintiff finds testimony by Sunstates' secretary, Richard Leonard, an attorney, significant in that he admits that he gave no legal opinions as to the content of the minutes, but merely waited for Engle to make his comments before finalizing the minutes and turning them over to plaintiffs. Engle's comments came years after the meetings, and apparently, were made just before the deadline for releasing the documents. According to plaintiffs, Leonard's role, which was to wait for Engle's comments, shows that the draft minutes should not be protected from discovery under a work product or attorney-client privilege theory, and that, furthermore, the finalization procedure is merely a charade. . . .
>
> I originally denied plaintiffs access to the draft minutes because I thought that finalized minutes were adequate. Defendants' failure to turn over final minutes in a timely manner undermine[s] my confidence in that ruling. Moreover, plaintiff show[s] good cause to reconsider this issue, *i.e.*, Leonard's unrebutted testimony that the "finalization" process constituted nothing more than for Leonard to wait for Engle's (possibly self-serving) comments.

Frank v. Engle, C.A. No. 13323, 13284, 1998 WL 155553, at *2-*3 (Del. Ch. Mar. 30, 1998) (emphasis added) (Ex. M. hereto).

15. Thus, the Court reversed its prior ruling protecting draft minutes from discovery only because defendants had withheld the final versions of the minutes for almost three years. See Frank v. Engle, 1998 WL 155553, at *2. Here, of course, there was no material delay in producing final versions of the NCS Board minutes. Indeed, Omnicare has been in possession of those minutes for over a month.

16. Further, Omnicare's contention that the NCS Defendants acted improperly by producing the draft minutes of the August 8, 2000, meeting is belied by

Frank v. Engle. The draft minutes of the August 8 meeting was the only version retained in NCS's files. Rather than delay production, the NCS Defendants produced this draft to allow Omnicare to obtain the relevant factual information about this meeting. See Frank v. Engle, 1998 WL 155553, at *2-*3.

17. And without any substantiating evidence, Omnicare speciously claims that because Skadden's draft lines appear on the August 19, 2002 Minutes, counsel for NCS has improperly manipulated the content of that document. Omnicare's claim is based on the faulty premise that Skadden Arps is acting solely as "Defendants' trial counsel." Rather, Skadden is providing both corporate and litigation counsel to the NCS Defendants (in addition to Benesch Friedlander, as indicated on the cover page of NCS's 14D-9), and Skadden's involvement in drafting the minutes and resolutions to be adopted by the NCS Board at the August 19 meeting is unremarkable. Certainly, the attorneys who were drafting the 14D-9 were also in the best position to draft the minutes and resolutions about the 14D-9 that would ultimately be considered and adopted by the NCS Board.

18. Likewise, Omnicare's unsubstantiated conclusion that Skadden attorneys must have "revised" the minutes after the August 19 meeting is baseless. (Omnicare Motion at 9) Omnicare would have this court "presume" that, merely because NCS's trial counsel were provided draft versions of minutes, that they abused "the drafting and editing process" to conform the minutes "to fit the NCS Defendants' litigation strategy." (Omnicare Motion at 10) This outlandish claim is not supported by a

shred of evidence (as opposed to the abuse of process claims in Frank v. Engle, which were substantiated by deposition testimony, see 1998 WL 155553, at *2), and must be rejected.

19. Surprisingly, Omnicare claims that "NCS's trial counsel is painstakingly crafting these minutes – even as the litigation continues – to ensure that what is presented in these final minutes will dovetail with NCS's litigation strategy."[5] (Omnicare Motion at 10) (emphasis added to indicate allegations of current, rather than past, actions). Such activity would require a time machine – NCS's trial counsel cannot be "painstakingly crafting these minutes – even as the litigation continues", at least not effectively, as signed versions of such minutes were produced over one month ago.

20. When compared with the delay faced in Engle, Omnicare's complaints seem petty. The NCS Defendants have a continuing duty to produce responsive documents as they become available, and have done so here. Omnicare received final versions of the August 19 minutes on September 3, 2002 – just fifteen days after the meeting.[6] The plaintiffs in Frank v. Engle waited over two years for finalized minutes.

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5 To the extent Omnicare claims that a sinister presumption is appropriate because the drafts were labeled as withheld pursuant to both the work product and attorney-client privileges, the NCS Defendants note that in Lee v. Engle, similar documents were protected under both doctrines. See Lee v. Engle, 1995 WL 761222, at *6.

6 In fact, the only reason Omnicare did not receive these minutes on August 31 was due to a courier delay during the Labor Day weekend, which Omnicare's local counsel also experienced. (See Ex. H, September 5, 2002 letter from Edward B. Micheletti to David F. Owens)

See Frank v. Engle, 1998 WL 155553, at *2. Omnicare acknowledges that a certain amount of delay is inevitable, "for the purpose of documenting compliance with corporate formalities." (Omnicare Motion at 10) A certain amount of time is also necessary for directors to review, comment upon, and sign the minutes. One should not infer "abuse of the drafting and editing process" from this fifteen day period, while the board was attempting "to edit and certify the content of its minutes privately, a process that normally relies on legal counsel." Frank v. Engle, 1998 WL 155553, at *2.

21. Similarly, Ms. Mehalko's notes drafted at the board meetings and Independent Committee meetings, which in effect are the first draft of the minutes of those meetings, were properly withheld as privileged. See, e.g., Jedwab, 1986 WL 3426, at *3; Lee v. Engle, 1995 WL 761222, at *6. Production of those notes would enable Omnicare to inferentially discover, by comparison between the initial notes and the final version already produced, the "opinion" work product of Ms. Mehalko in finalizing the minutes. Id. This risk alone justifies withholding the notes on attorney-client privilege grounds. See Lee v. Engle, 1995 WL 761222, at *5-*6 (Del. Ch. Dec. 15, 1995).

22. Further, Ms. Mehalko's notes have properly been withheld on work product grounds. Ms. Mehalko is an attorney, representing NCS's Independent Committee and the Board of Directors. (See Ex. I, NCS007367 (Minutes of NCS's Board of Directors)). At certain meetings, she also acted as secretary, and her notes reflect her dual role. Her notes were also taken at meetings either after this litigation was initiated, or

when litigation was foreseeable. They are thus appropriately withheld under the work product privilege. See Lee v. Engle, 1995 WL 761222, at *4 (summarizing cases).

23. As a result, Omnicare's reliance on Texaco, Inc. v. Phoenix Steel Corp., 264 A.2d 523, 525 (Del. Ch. 1970) is misplaced. There, the Court found as a matter of fact that the drafter of a memorandum "was not in any respect acting as counsel," and concluded that, as a matter of law, the memorandum was not privileged. See id. Here, the minutes of the meeting reflect that Ms. Mehalko was acting in a dual capacity – as both counsel and secretary, and Omnicare has not established otherwise. Thus, the Court's decision in Texaco is inapplicable here.

24. In order to obtain factual information contained in documents properly withheld under the work product privilege, Omnicare must show a substantial need for such information. See Grimes v. DSC Communications Corp., 724 A.2d 561, 570 (Del. Ch. 1998).[7] Omnicare already has the factual information contained in these notes by virtue of the production of the final, signed minutes. Thus, Omnicare cannot demonstrate any substantial need for the notes.

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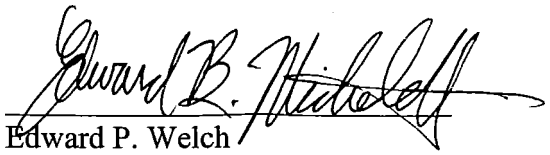
[7] "Opinion" work product, consisting of "attorneys' mental impressions, conclusions, opinions, and legal theories" remains protected from discovery, even if the opposing party demonstrates substantial need for the factual information contained in the document. Lee v. Engle, 1995 WL 761222, at *4 (citing E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., C.A. No. 89C-AU-99, 1992 WL 423944 (Del. Super. Dec. 23, 1992)).

CONCLUSION

WHEREFORE, for all of the foregoing reasons and the authorities cited, the NCS Defendants respectfully request that the Court deny Omnicare's Motion to Compel.



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