10.17.02
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PUBLIC VERSION - REDACTED

~~CONFIDENTIAL — FILED UNDER SEAL~~

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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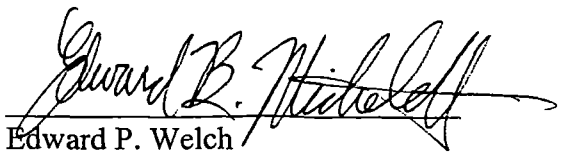
[7] "Opinion" work product, consisting of "attorneys' mental impressions, conclusions, opinions, and legal theories" remains protected from discovery, even if the opposing party demonstrates substantial need for the factual information contained in the document. Lee v. Engle, 1995 WL 761222, at *4 (citing 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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DATED: October 15, 2002

Exhibit A

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September 3, 2002

BY FACSIMILE

John M. Seaman, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
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Re: Omnicare, Inc. v. NCS Healthcare, Inc., et al
Delaware Chancery Court, C.A. No. 19800

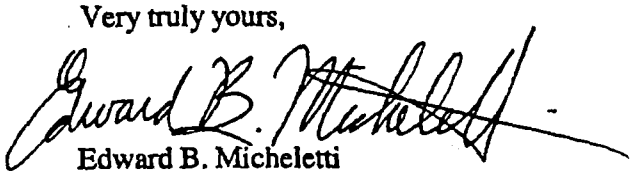
Dear John:

I write to address a few outstanding discovery issues. First, we need to set up a briefing schedule for our motion to compel, which was filed with the Court earlier this morning. We believe it is important to have our motion resolved before depositions begin. Accordingly, we intend to call the Court and request a hearing for this Friday or (at the latest) early next week. To facilitate this schedule, we propose that Omnicare respond to our motion on Thursday, September 5, with NCS submitting a reply (if at all) on Friday, September 6. Please contact me as soon as possible and let me know whether this schedule is acceptable. We would like to call the Court for a hearing date no later than tomorrow morning.

Second, as we discussed earlier this morning, we have not found any documents in Omnicare's production that are responsive to request number 16 of the NCS Defendants' document request – namely all documents which "relate to any meeting or communications between Omnicare and the Ad Hoc Committee." Given that Omnicare agreed to produce such documents in its responses/objections filed August 28, we ask that Omnicare promptly produce those documents to our offices as soon as possible.

Finally, I would propose exchanging privilege logs on Wednesday, so that the parties will have ample opportunity to review them before depositions begin.

Very truly yours,



Edward B. Micheletti

EBM/ll
cc: Edward P. Welch, Esquire
David C. McBride, Esquire

EXHIBIT B

REDACTED

Exhibit C

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September 6, 2002

BY FACSIMILE

John M. Seaman, Esquire
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Re: Omnicare, Inc. v. NCS Healthcare, Inc., et al
Delaware Chancery Court, C.A. No. 19800

Dear John:

We received Omnicare's privilege and redaction logs late last night. We are concerned about your unprecedented use of the "business strategy" privilege to withhold or redact more than 200 responsive documents, especially since the business strategy privilege is normally reserved for the *target* corporation in a hostile litigation. See Pfizer Inc. v. Warner-Lambert Co., 1999 WL 33236240, *2 Chandler, C. (Del. Ch., Dec. 8, 1999). In contrast, NCS (the target) has withheld only two documents on business strategy grounds.

Perhaps what is most egregious is that the overwhelming number of documents withheld or redacted on business strategy grounds are documents generated before 2002. This is especially surprising given that business "plans and strategies that have already been made and are already the subject of disclosure" are not covered by the privilege. See, e.g., Atlantic Research Corp. v. Clabir Corp., 1987 WL 758584, Jacobs, V.C. (Del. Ch. Feb. 10, 1987). Even assuming, arguendo, that the business strategy is available to a bidder such as Omnicare, it is difficult to believe that documents generated before 2002 (or even before Omnicare launched its tender offer) have been properly withheld or redacted on business strategy grounds.

In fact, many categories of documents listed on Omnicare's privilege log seem to have been unreasonably withheld or redacted on business strategy grounds, including (but not limited to):

- Notes and Materials From 2000 and 2001. For example: OMN 00434-00441 (described as a "NCS Healthcare 10-Q, filed 0/5/15/01, with handwritten notes"). Other examples include document numbers 9-25, 29-37, 41, 101-135, 142-163 on Omnicare's privilege log.

- Omnicare Request for Capital Appropriation (from 2001). These include document numbers 207-224 on Omnicare's privilege log.

- Merrill Lynch Financial Presentations. For example: OMN 00134, 00139, 00145-183 (described as a Merrill Lynch "Presentation re: NCS Healthcare" dated 6/29/01). In fact, all of Merrill Lynch's Presentation Materials produced by Omnicare have been severally redacted.

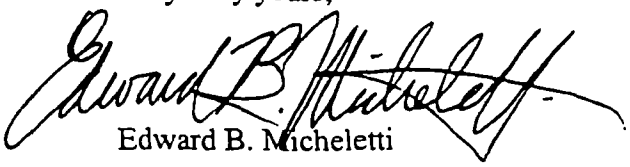
- Omnicare Board Minutes and Resolutions. For example: OMN 02621-02622, 02624-02625 (described as "Minutes of meeting of Omnicare Board of Directors" dated July 26, 2002).

- Omnicare's Various NCS Proposals. Examples include documents numbered 38-39, 42-44, 50, 52, 76-78, 84-88, 93-97, 176-187, 190-200, 226-244 on Omnicare's privilege log. All of these documents apparently pertain to Omnicare's decision to launch either its July 26 or July 29 expressions of interests, its Tender Offer, or its various publicly disclosed merger proposals.

We ask that you consider amending your privilege and redaction logs, and produce all responsive documents falling in the above categories by Monday, September 9. Obviously, if certain of these documents contain sensitive business information, you can always mark them "highly confidential" pursuant to our Confidentiality Stipulation. If you are unwilling to produce these documents by next Monday, we intend to request that the Court conduct an in camera review of all documents you have withdrawn or redacted on business strategy grounds.

As always, I remain available to discuss this issue further.

Very truly yours,



Edward B. Micheletti

EBM/ll

cc: David C. McBride, Esquire

Exhibit D

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October 11, 2002

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Re: Omnicare, Inc. v. NCS Healthcare, Inc.
Delaware Chancery Court, C.A. No. 19800

Ladies and Gentlemen:

Below is a summary of the items discussed at today's conference call.

Preliminary Injunction

The parties have agreed to contact the Court on Tuesday, October 15, 2002 (as the Court will be closed for Columbus Day on Monday) in order to discuss a proposed schedule for the preliminary injunction hearing. The parties tentatively agreed to the following briefing schedule based upon a possible stockholder meeting date of November 27, 2002 (which could obviously change):

- Opening brief(s) will be filed on or before November 4, 2002
- Answering brief(s) will be filed on or before November 11, 2002
- Reply brief(s) will be filed on or before November 15, 2002

Deposition Schedule

Below is the current deposition schedule agreed to by the parties:

Deponent	Date	Place
David Froesel	October 16, 2002	Dewey Ballantine, New York
Boake Sells	October 17, 2002	Benesch Friedlander, Cleveland
Cheryl Hodges	October 18, 2002	Dewey Ballantine, New York
Richard Osborne	October 19, 2002	Benesch Friedlander, Cleveland
Brown, Gibbons, Lang & Co.	October 21, 2002	Jim Smith will promptly determine location.

Deponent	Date	Place
George Hager	October 22, 2002	Wachtell Lipton, New York
Catherine Greany	October 22, 2002	Porter Wright, Cincinnati
Glenn Pollack	October 23, 2002	Skadden Arps, Wilmington
Joel Gemunder	October 23, 2002	Dewey Ballantine, New York
Joseph LaNasa	October 25, 2002	Wachtell Lipton, New York
Judy Mencher	October 25, 2002	Jim Smith will promptly determine location within Boston
Kevin Shaw	October 28, 2002	Squire Sanders, Cleveland
John Outcalt	October 29, 2002	Squire Sanders, Cleveland
Andrea Lindell	Jim Smith will promptly confirm	Jim Smith will promptly confirm
Sheldon Margen	" "	" "
Merrill Lynch	" "	" "
Bank One	" "	" "
Lehman	" "	" "
Deutsche Bank	" "	" "

With regard to the these depositions, the parties have agreed that:

- All depositions will begin at 10:00 a.m. and presumptively end by 5:00 p.m. with a 45 minute lunch break.
- Although some depositions were originally noticed to be videotaped, all depositions will only be recorded stenographically, with no videotape.
- The party noticing the deposition will provide a court reporter.
- The party hosting the deposition will provide lunch.
- Aligned parties will allocate their time to avoid repetitive questions, and to facilitate conclusion of the deposition by 5:00 p.m.

Other Items

We are offering Mr. Sells for deposition on October 17th and Mr. Osborne for deposition on October 19th with the understanding that they will not be called back for further questioning, regardless of the outcome of Omnicare's outstanding motion to compel. Jim Smith has agreed to take this under advisement, and noone otherwise objected. We also requested that Omnicare send the business strategy documents by overnight delivery to us for Saturday delivery in order to prepare for the Froesel deposition scheduled for October 16th. Ed Welch noted that the Genesis exception would only result in production of additional documents if accepted by the Court and that there was no basis for withholding the other documents addressed in the Special Master's opinion. Jim Smith also said that he will get back to us about this request.

Very truly yours,

Edward P. Welch

Exhibit E

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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September 13, 2002

BY HAND

John M. Seaman, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951

Re: Omnicare, Inc. v. NCS Healthcare, Inc.
Delaware Chancery Court, C.A. No. 19800

Dear John:

Enclosed please find documents bearing bates numbers NCS 007656 to NCS 008252.

As I mentioned in my September 9 letter, we have reviewed at your request document 17 on NCS's privilege log and have confirmed that it was properly withheld. We have also reviewed at your request documents 1-16, 18, 19-22, 25, 42, 49, 50, 56, 57, 69-73, 75, 79-80, 92, 98 and 102 on NCS's privilege log, and have confirmed that all of those documents were properly withheld. We are currently in the process of amending our privilege and redaction logs, which will include further clarification of the descriptions of the above referenced documents. We expect to forward NCS's amended privilege and redaction logs to you sometime early next week.

Please contact me if you have any questions or concerns.

Very truly yours,

Edward B. Micheletti

cc: Bruce L. Silverstein, Esquire (by hand)

Exhibit F

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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September 17, 2002

BY HAND

John M. Seaman, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951

Re: Omnicare, Inc. v. NCS Healthcare, Inc.
Delaware Chancery Court, C.A. No. 19800

Dear John:

Enclosed please find the NCS Defendants' amended privilege and redaction logs as well as a key for those logs. Also enclosed are additional responsive documents (mostly duplicative of earlier production) bearing bates numbers NCS 008253 to NCS 008293. In addition, we have also reviewed certain minutes of NCS board meetings (including the meetings held on July 28, 2002), and enclose new documents with modified redactions bearing bates numbers NCS 008253-55 (originally produced as NCS 007351-53), NCS 008256-59 (originally produced as NCS 007357-60), NCS 008260-62 (originally produced as NCS 007361-63) and NCS 008263-66 (originally produced as NCS 007367-70).

Very truly yours,

Edward B. Micheletti

Edward B. Micheletti

cc: David C. McBride, Esquire (by hand)
Joseph A. Rosenthal, Esquire (by hand)

EXHIBIT G

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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September 26, 2002

Via Facsimile

James P. Smith III, Esquire
Dewey Ballantine LLP
1301 Avenue of the Americas
New York, 10019-6092

Re: Omnicare, Inc. v. NCS Healthcare, Inc.,
C.A. No. 19800

Dear James:

We received your letter dated September 26. All of the NCS Defendants' handwritten notes were either produced or designated as privileged weeks ago. The NCS Defendants did not produce any drafts or notes of board minutes because they are privileged. Accordingly, as to your specific question concerning Ms. Mehalko's handwritten notes, we have properly withheld them under attorney-client privilege and work product grounds. See, e.g., Lee v. Engle, C.A. No. 13323, 1995 WL 761222, *5 (Del. Ch. Dec. 15, 1995).

Very truly yours,

Edward B. Micheletti

cc: Jon E. Abramczyk, Esquire (Via Facsimile)
David C. McBride, Esquire (Via Facsimile)
Matthew O'Toole, Esquire (Via Facsimile)
John M. Seaman, Esquire (Via Facsimile)

EXHIBIT H

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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September 5, 2002

David F. Owens, Esq.
Dewey Ballantine LLP
1001 Avenue of the Americas
New York, NY 10019-6092

Re: Omnicare, Inc. v. NCS Healthcare, Inc.
Delaware Chancery Court, C.A. No. 19800

Dear Mr. Owens:

We have received your letter of even date. We are pleased that Omnicare has agreed to promptly produce all of the responsive documents that were the subject of our motion to compel. And although they will come well after the August 31 discovery deadline, we are also pleased that Omnicare will promptly produce all responsive documents in connection with Omnicare's communications with the Ad Hoc Committee, and Omnicare's financing arrangements for its proposed NCS transactions (as detailed in my letter to John Seaman dated September 4).

We are concerned, however, with some of the qualifying language you have used in your letter – namely, that certain of our requests may not be "appropriate" and/or "encompass all the categories" of documents requested in my letter dated September 4. We are similarly concerned about your responses to the NCS Defendants' third document request. Accordingly, we will not withdraw our motion to compel until we have an opportunity to review your supplemental production.

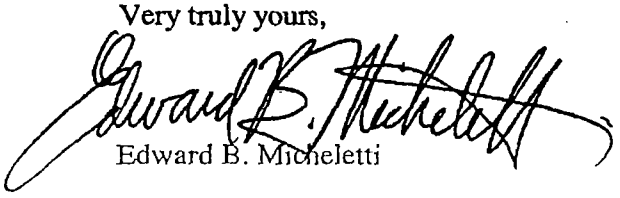
We also write to respectfully correct certain misstatements about the discovery process contained in your letter. First, we did contact your local counsel on Friday, August 30 in an attempt to resolve your objection to our discovery requests before filing our motion to compel. However, when we asked for further clarification about your objection, your response was "it is what it is." We also explained that we had found several cases which countered your objection, but you nevertheless refused to discuss the issue, or provide any authority in support of your objection. Thus, given the expedited discovery track which you requested, we had no choice but to file our motion to compel.

Moreover, as to the exchange of privilege logs, you have completely misrepresented (and taken advantage of) our offer to exchange privilege logs this morning, rather than last evening. Specifically, when we called at the end of the business day yesterday to set up an exchange, your local counsel told us that your privilege log would not be completed until "very late." In response, and in an effort to be reasonable, we noted that although we were ready, willing and able to produce our privilege log, we would be willing to exchange privilege logs the following morning – and you took us up on that offer. And although we produced our privilege log this morning, as of the time of this letter, we have still not yet received your privilege log.

Further, your claim that the NCS Defendants failed to produce documents in accordance with the Court's scheduling order is specious. The NCS Defendants' produced more than 7200 pages (far more than Omnicare's production) by August 31. And unlike Omnicare, the NCS Defendants did not flatly refuse to produce certain categories of responsive documents, which resulted in a (continuing) delay of Omnicare's production. In any event, as we explained to your local counsel, certain documents (less than 150 pages) were produced on the Tuesday following Labor Day weekend as a result of a holiday delay experienced by our carrier – a delay, incidentally, which your local counsel noted was similarly experienced by him over the holiday weekend.

Finally, as for your purported concerns about the extent of the NCS Defendants' production, we will take those under advisement and respond to you promptly. In the meantime, I remain available at the above number if you would like to discuss these or any other discovery issues further.

Very truly yours,



Edward B. Micheletti

cc: David C. McBride, Esq.
John M. Seaman, Esq.

EXHIBIT I

REDACTED

EXHIBIT J

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

Marilyn JEDWAB, Plaintiff,
v.
MGM GRAND HOTELS, INC., Tracinda Corporation, Kirk Kerkorian, James D. Aljian,
Alvin Benedict, Fred Benninger, Barrie K. Brunet, Cary Grant, Peter M. Kennedy, Frank E. Rosenfelt, Bernard J. Rothkopf, Walter M. Sharp, Robert Van Buren, Bally Manufacturing Corporation. and Bally Manufacturing Corporation International, Defendants.

Submitted: March 19, 1986.
Decided: March 20, 1986.

William Prickett of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, for plaintiff.

Edward M. McNally of Morris, James, Hitchens & Williams, Wilmington, for defendants MGM Grand Hotels, Inc., James D. Aljian, Barrie K. Brunet, Cary Grant, Frank E. Rosenfelt, Bernard J. Rothkopf and Walter M. Sharp.

Stephen J. Rothschild of Skadden, Arps, Slate, Meagher & Flom, Wilmington, for defendants Bally Manufacturing Corporation and Bally Manufacturing Corporation International.

MEMORANDUM OPINION

ALLEN, Chancellor.

*1 The amended complaint in this class action brought on behalf of all owners (other than defendants) of the preferred stock of MGM Grand Hotels, Inc. ("MGM Grand") seeks, together with other relief, to enjoin a proposed merger between MGM Grand and Bally Manufacturing Corporation or an entity controlled by it ("Bally"). Plaintiff's application for a preliminary injunction is scheduled to be heard on March 31, 1986 and in preparation for that event, discovery has been proceeding in the matter in a fairly intensive way. Pending currently before the Court is plaintiff's motion to compel Bally to produce certain documents withheld under a claim of attorney-client privilege and pursuant to the qualified immunity from discovery provided by the work-product doctrine.

Broadly speaking, the current motion raises two legal issues. The first question is whether, in the circumstances of this case, the lawyer-client privilege extends to documents prepared by an attorney representing one party to a proposed merger transaction when those documents have been provided to the other party to the transaction or to his attorney. Bally relies upon the language of Rule 502(b) of the Delaware Rules of Evidence in support of its contention that such documents are privileged. The second legal issue here presented is whether drafts of documents, the final versions of which have been filed with the Securities and Exchange Commission are properly discoverable in this case.

I turn first to Bally's claim that our evidence Rule 502(b) has application in this case. That Rule provides in pertinent part as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client ... (3) by him or his representative or his lawyer ... to a lawyer or a representative of a lawyer representing another in a matter of common interest....

In connection with the negotiation and documentation of the merger agreement that forms a part of the subject matter of this litigation, legal counsel for MGM Grand and Bally have communicated not only with their own clients but with the lawyers for the other parties to the transaction. Documents

reflecting communications between Bally's lawyers and MGM Grand's lawyers are now sought by plaintiff and resisted by Bally on the theory that the quoted language of Rule 502(b) protects such documents from production. The "common interest" that is asserted as justifying this expansion of the lawyer-client privilege beyond what I take to be its traditional bounds is the proposed merger itself. Bally contends that all parties to the merger have an interest in seeing the transaction effectuated.

I am unpersuaded that Bally's claim of privilege is well founded. I find it unnecessary here to restate the elements of the client's privilege to protect communications with his lawyer from public disclosure. *See, Texaco, Inc. v. Phoenix Steel Corporation,* Del.Ch., 264 A.2d 523 (1970). Suffice it for the moment to say that an essential condition for the successful invocation of the privilege is that the matter sought to be protected be confidential.

***2** Whether disclosure of a communication beyond the client and lawyer destroys the basis for the claim of privilege or not inevitably involves a judgment as to whether in the circumstances the person making the disclosure in fact regarded that disclosure as confidential and, if there was an expectation of confidentiality, whether the law will sanction that expectation. Thus, for example where a client seeks legal advice as to the proper structuring of a corporate transaction and it is also prudent to seek professional guidance from an investment banker, it would hardly waive the lawyer-client privilege for a client to disclose facts at a meeting concerning such transaction at which both his lawyer and his investment banker were present. Knowledgeable participants in such transactions would themselves regard disclosures at such a meeting as confidential and the law would, in my opinion, tend to validate that judgment.

Rule 502(b) is a recognition that a disclosure may be regarded as confidential even when made between lawyers representing different clients if in the circumstances, those clients have interests that are so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers. The classic case of this kind would be communications relating to the defense of a lawsuit among lawyers for co-defendants. *See,* 3 *Jones on Evidence* § 21:20 (1972).

I regard Bally's claim of privilege in this instance as ill-founded because I cannot conclude that communications between its attorneys and attorneys for MGM Grand with respect to the negotiation and documentation of the proposed merger possessed the requisite confidentiality in these circumstances. With respect to the functions they were performing when the documents sought were prepared, these lawyers obviously represented clients with adverse interests. The fact that both Bally and MGM Grand are defendants in this lawsuit does not render documents relating to the negotiation of the transaction itself confidential. If there is no basis for a finding of confidentiality, there is no basis for the lawyer-client privilege.

Bally also asserts the qualified immunity from discovery afforded to documents prepared in anticipation of or for trial as a basis to resist production in this instance. *See,* Chancery Rule 26(b)(3). I assume for purposes of deciding this claim that this litigation was either pending or anticipated at the time the communications in question were prepared. Nevertheless, I conclude that the work-product doctrine has no proper application in this setting. There has been no showing or even suggestion by Bally that the communications in issue relate to the development of a factual record with respect to this litigation or the development of strategies in that connection. So far as appears from the present record these communications relate to the negotiation and documentation of the underlying transaction. Thus, it would stretch the language of Rule 26(b)(3) and the underlying theory of this immunity (*see, Hickman v. Taylor,* 329 U.S. 495 (1947)) too far to protect on this basis documents relating to the evolution of the terms of the underlying transaction itself.

*3 I turn now to a discussion of the legal issues arising from the assertion of privilege with respect to preliminary drafts of documents later versions of which have been filed with the Securities and Exchange Commission. For the reasons that follow, I conclude that such drafts are the proper subject of a claim of privilege and thus need not be produced.

An appropriate analysis of this issue begins, in my view, with an attempt to focus on what information may be derivable from such drafts. Since plaintiff has available to it the publicly-filed documents, it is apparent that the only information available from prior drafts relates to matters appearing in prior drafts that were deleted, augmented or otherwise modified in the final product. Even a superficial understanding of the process by which SEC filings are prepared by lawyers and other advisors of a client permits one to understand that such modifications are made as a result of communications between a client or its representatives and its lawyers. Thus, new information disclosed from comparing drafts of SEC filings with the filed documents themselves necessarily relates to and may inferentially disclose communications between a client and its lawyers charged with preparing the final documents. Communications of this kind are clearly made "for the purpose of facilitating the rendition of professional legal services" and lie at the heart of the confidential communications that the lawyer-client privilege seeks to protect.

It might be argued that the inference of a privileged communication, as opposed to the communication itself, ought not to be enough to successfully invoke the privilege, and it is doubtlessly true that the simple fact that from a document one may infer a communication from a client to a lawyer would not alone establish a basis to protect such a document from discovery. However, at least where, as here, the document itself is prepared by a lawyer in a setting in which it is intended to remain confidential until a final version is deemed appropriate for public disclosure and where the only pertinence of the document to the discovery process is the inferential disclosure of the communication from a client to its lawyer, it strikes me that the underlying policies of the lawyer-client privilege are properly implicated and that discovery of such a document would inappropriately permit access by third parties to privileged communications.

Applying the foregoing legal analysis to the specifics of this case, I will order that the following documents be produced to plaintiff no later than 5:00 p.m. on March 21, 1986 (the numerical references that follow are to the numbered entries on Exhibit C to Bally's letter memorandum filed on this motion): Documents 6, 7, 8, 9, 10, 11, 23, 24, 25, 27, 28, 31 and 32.

Since there was, at oral argument, some confusion about the numerical sequence of the documents withheld, if either party concludes that in applying the foregoing legal analysis to the documents withheld the Court has incorrectly listed the documents now to be produced, either party may arrange a telephone conference to discuss that matter.

*4 IT IS SO ORDERED.

1986 WL 3426 (Del.Ch.)

END OF DOCUMENT

EXHIBIT K

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

Robert A. LEE, as owner of account Guarantee Trustee and Trust F/B/O Robert Alton Lee Jeremiah O'Connor and Harry Lewis, Plaintiffs,
v.
Clyde Wm. ENGLE, et al., Defendants.
Richard N. FRANK, Plaintiff,
v.
Clyde Wm. ENGLE, et al., Defendants.

Nos. Civ. A. 13323, Civ. A. 13284.

Submitted: Aug. 21, 1995.
Decided: Dec. 15, 1995.

Kevin Gross of Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Robert D. Goldberg of Biggs & Battaglia, Wilmington, for Plaintiffs.

OF COUNSEL: Stephen Lowey, Sherrie Brown of Lowey, Dannenberg, Bemporad & Selinger, P.C., New York, City; Lawrence A. Sucharow, Linda P. Nussbaum, Barbara Hart of Goodkind Labaton Rudoff & Sucharow, New York, City, for Robert A. Lee, as owner of account Guarantee Trustee and Trust FBO Robert Alton Lee.

OF COUNSEL: Michael Fuchs, Roy Jacobs of Wolf Popper Ross Wolf & Jones, New York, City, for John C. Boland.

Clark W. Furlow, Joanne Marie H. Shalk of Smith Katzenstein & Furlow, Wilmington, Delaware. OF COUNSEL: Zwerling, Schachter & Zwerling, New York City for Defendant Sunstates Corporation.

Jesse A. Finkelstein, Matthew J. Ferretti, Lisa A. Schmidt of Richards, Layton & Finger, Wilmington, for Individual Defendants.

Michael D. Goldman, Stephen C. Norman, Kevin R. Shannon of Potter Anderson & Corroon, Wilmington, for Defendants Hickory Furniture Co., Telco Capital Corp., and RDIS Corp.

MEMORANDUM OPINION

STEELE, Vice Chancellor.

CONTENTIONS OF PARTIES

*1 On March 10, 1995, Plaintiffs brought a Motion to Compel Production of Documents they requested in the course of a shareholder derivative suit and class action. Defendants refused to produce the requested documents. Defendants assert the attorney-client privilege, work product doctrine, and accountant- client privilege protect these documents. This is the opinion deciding that motion to compel.

FINDINGS OF FACT

Plaintiff, Richard N. Frank, filed a shareholders' derivative suit and class action ("the Frank Action") on December 8, 1993 against Clyde Wm. Engle ("Engle"), William D. Schubert, Robert J. Spiller, Jr., Howard Friedman, Lee N. Mortenson, Harold Sampson (collectively "the Individual Defendants"), Hickory Furniture Company ("Hickory"), Telco Capital Corporation ("Telco"), and Acton (now Sunstates) Corporation ("Sunstates" or "the Company"). The Frank Action alleges breaches of fiduciary duty, waste of corporate assets, failure to pay dividends on $3.75 cumulative Preferred Stock, and violation of the duty of disclosure with regard to the December 3, 1993 proxy statement. The Frank Action seeks injunctive, declaratory, and monetary relief.

Plaintiffs, Robert A. Lee, John C. Boland, Jeremiah O'Connor, and Harry Lewis filed a shareholders' derivative action ("the Lee Action") against the Individual Defendants, Hickory, Telco, and RDIS Corporation ("RDIS"), naming Sunstates as a nominal defendant. Engle is Chairman of the Board

and Chief Executive Officer of Sunstates. The Lee Action alleges waste and breach of fiduciary duty. It also seeks declaratory and monetary relief. Plaintiffs in the Lee Action served a request for production of documents on February 2, 1994.

Sometime thereafter, the parties entered into a confidentiality stipulation and agreed to arrange discovery in both the Frank and Lee actions. Defendants have produced nearly 30,000 pages of documents to Plaintiffs. On August 19, 1994, Defendants provided Plaintiffs with a detailed privilege list. This list identified all documents which Defendants withheld or produced in redacted form on the basis of privilege. The list provided the date, author, recipient, copy, summary description, and privilege Defendants asserted. Defendants have refused to produce 731 documents based on attorney-client, accountant-client, and work product privilege.

On October 12, 1994, Plaintiffs responded with a letter voicing objections to the privilege list. The Individual Defendants responded to these objections in a letter dated December 2, 1994. Plaintiffs filed a motion to compel production of documents on March 10, 1995. The motion seeks production of every document Defendants withheld on the basis of privilege.

CONCLUSIONS OF LAW

1. Attorney-Client and Work Product Privilege

The attorney-client privilege is "to foster the confidence of the client and enable [him] to communicate without fear in order to seek legal advice." *Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 367-68 (D. Del. 1975). The attorney-client privilege protects legal advice, as opposed to business or personal advice. *Securities and Exch. Comm. v. Gulf & Western Indus., Inc.*, 518 F. Supp. 675, 681 (D.D.C. 1981). This privilege only protects advice which a person gives within "a professional legal capacity." *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984).

*2 Plaintiffs urge this Court to apply the *Valente* standard for attorney-client privilege protection. Absent some special cause, the attorney- client privilege does not protect a corporation's attorney's communications to the client corporation which relate to the subject of a later suit. *Valente*, 68 F.R.D. at 367; *see also Deutsch v. Cogan*, Del. Ch., 580 A.2d 100, 104- 05 (1990). This Court has been reluctant to apply *Valente* broadly. *See Gioia v. Texas Air Corp.*, Del. Ch., C.A. No. 9500, Allen, C. (Mar. 3, 1988) Mem. op. at 6; *In the Matter of Heizer Corp.*, Del. Ch., C.A. No. 7949, Berger, V.C. (Nov. 9, 1987); *Sealy Mattress Co. of N.J., Inc. v. Sealy, Inc.*, Del. Ch., C.A. No. 8853, Jacobs, V.C. (Jun. 19, 1987) Mem. op. at 7; *Tabas v. Bowden*, Del. Ch., C.A. No. 6619, Hartnett, V.C. (Feb. 16, 1982) Mem. op. at 6. In *Deutsch*, this Court announced parties could not discover attorney-client confidential communications automatically in shareholder derivative suits. 580 A.2d at 106.

Although not a binding case, this Court adopted and consistently has followed *Garner v. Wolfinbarger* as opposed to *Valente*. *[FN1] Garner v. Wolfinbarger*, 430 F.2d 1093 (5th. Cir. 1970), *cert denied*, 401 U.S. 974 (1971); *see Deutsch*, 580 A.2d at 106; *Matter of Heizer Corp.*, C.A. No. 7949; *Sealy Mattress Co. of N.J*, C.A. No. 8853 at 7; *Tabas*, C.A. No. 6619 at 6. Under *Garner*, a suing shareholder may overcome corporate claims of attorney-client privilege only if he or she shows "good cause" motivates the discovery. 430 F.2d at 1103. According to the *Garner* court,

> FN1. Even though *Valente* and *Garner* are facially at odds, Vice- Chancellor Hartnett harmonized the two in *Deutsch v. Cogan*, Del. Ch., 580 A.2d 100, 106 (1990). The Vice-Chancellor explained,
> In *Garner* the court was not faced with a clear conflict of interest on the part of the attorneys as existed in *Valente*. The *Valente* court therefore may have just been applying the *Garner* balancing test to a clear conflict of interest and thereby arrived at the conclusion that the plaintiff had shown good cause.

The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its

stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders *to show cause* why it should not be invoked in the particular instance. (emphasis added).

Garner, 430 F.2d at 1103-04. This Court will not diverge from this established line of reasoning. The *Garner* analysis is appropriate. [FN2]

FN2. Although I cannot embrace Plaintiffs' *Valente* argument which would automatically make the attorney-client privilege unavailable to directors, I agree directors owe a strict fiduciary duty to shareholders. They are responsible to minority shareholders. *Valente v. PepsiCo., Inc.*, 68 F.D.R. 361 (1975). This responsibility does not apply *per se*, thereby superseding the burden *Garner* attaches to discovery. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

In *Sealy Mattress Co.*, Vice-Chancellor Jacobs noted three factors of paramount importance to consider when determining whether the requisite good cause is present precluding invocation of the privilege:

(i) 'the nature of the shareholders' claim and whether it is obviously colorable;' (2) 'the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;' (3) 'the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing.' C.A. No. 8853, at 7 (citing *Garner*, 430 F.2d at 1104).

*3 Defendants attempt to use the attorney-client privilege to insulate specific documents - the ones which Secretary and Vice President Leonard authorized or received ("the Leonard documents"). True, Leonard is an attorney. True, Leonard could use both confidentiality protections *if* he were acting as legal counsel to Sunstates. However, Leonard did *not* act in the capacity of Sunstates' in-house counsel. The record does not indicate Leonard prepared or reviewed meeting minutes or documents as an attorney. There was no attorney-client relationship between Leonard and Sunstates. Therefore, Leonard cannot avail himself of the protection associated with the attorney-client privilege or the work product doctrine. Accordingly, the attorney-client privilege cannot shield production of the Leonard documents.

Assuming *arguendo*, Leonard acted in the attorney-client capacity, applying the *Garner* criteria to the facts here, I find Plaintiffs have shown good cause necessitating production of certain withheld documents. First, Plaintiffs are minority shareholders of Sunstates seeking information related to transactions they challenge as breaches of fiduciary responsibility. They clearly have the right to bring a shareholder derivative action under Delaware law. *See Kramer v. Western Pac. Indus., Inc.*, Del. Supr., 546 A.2d 348, 351 (1988). A minority shareholder brings a shareholder derivative action "to enforce a *corporate* cause of action against officers, directors, and third parties." Dennis J. Block, Nancy E. Barton, and Stephen A. Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, (Fourth ed. 1993), p. 709 (citing *Kamen v. Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1716 (1991) (emphasis in original, and quoting *Ross v. Bernhard*, 396 U.S. 531, 534 (1970))). The fact the Frank action and the Lee Action have progressed this far indicates viability. Otherwise, they may not have survived a motion to dismiss had one been presented. Plaintiffs' suit is, therefore, a "colorable claim."

Second, after careful scrutiny of the record, I find Plaintiffs have genuine cause for seeking production of the documents in question. It is both necessary and desirable for the plaintiff-shareholders to have the information. The withheld documents may lead to the discovery of information relevant to the transactions Plaintiffs contest as breaches of fiduciary duty. Furthermore, these documents may be the best evidence of the facts they contain which otherwise would be unavailable from any other practical source. The only *possible* alternative to this information may be an avoidable, unnecessarily cumbersome and expensive route of deposing in detail the individual directors.

Third, the record does not leave me with the impression Plaintiffs' request for document production constitutes a blind "fishing expedition." The record indicates Plaintiffs' desired documents are related to pursuit of their claims, even if they ultimately prove unsuccessful.

*4 Furthermore, a fiduciary owes an obligation of complete candor and openness to its beneficiary. *See, e.g., Riggs Nat'l Bank of Washington, D.C. v. Zimmer,* Del. Ch., 355 A.2d 709 (1976). A corporation and its directors are fiduciaries. *Valente,* 68 F.R.D. at 367-68. The Board of Directors, as fiduciaries, owe Frank, a stockholder, complete candor and openness.

Alternatively, Defendants attempt to shield documents which Leonard prepared or reviewed behind the work product doctrine. The work product doctrine only applies to materials an attorney assembled and brought into being in anticipation of litigation. *United States v. El Paso Co.,* 682 F.2d 530, 542 (5th Cir. 1982), *cert denied,* 466 U.S. 944 (1984). The work product doctrine protects "'the privacy of lawyers in their work and encourages ... freedom ... from interference in the task of preparing their clients' cases for trial.'" *E.I. DuPont de Nemours & Co. v. Admiral Ins. Co.,* Del. Super., C.A. No. 89C- AU-99, Steele, J. (Dec. 23, 1992) Mem. op. at 6 (citing *Riggs Nat'l Bank of Washington, D.C. v. Zimmer,* Del. Ch., 355 A.2d 709, 715 (1976)), *interlocutory appeal denied,* Del. Super., 622 A.2d 1095 (1993). "It protects factual material gathered in preparation of a case and specifically shelters 'opinion' work product which includes attorneys' mental impressions, conclusions, opinion, and legal theories." *Id.* (citing *Hickman v. Taylor,* 329 U.S. 495, 510-11 (1947).

The work product doctrine is broader than the attorney-client privilege which protects only communications between the attorney and client. *Id.* at 7 (citing *In re Grand Jury Proceedings,* 604 F.2d 798, 801 (3d. Cir. 1979)). The work product doctrine consists of "factual" information and "opinion" information. *Id.*

Factual or 'ordinary' work product includes "written witness statements and all other trial preparation material not involving an attorney's thought processes...." 4 James W. Moore, et al., *Moore's Federal Practice* ¶ 26.15[3.- 2], at 26-316 (2d ed. 1994). The party seeking discovery must show substantial need and inability to obtain the substantial equivalent without undue hardship. *E.I. DuPont de Nemours & Co.,* C.A. No. 89C-AU-99 at 7-8. Even if a party sufficiently demonstrates his or her need to obtain the draft work product, the work product doctrine protects "opinion" work product. *Id.* at 7. Opinion work includes "attorneys' mental impressions, conclusions, opinions, and legal theories." *Id.* (citing *Hickman,* 329 U.S. at 510-11). The policy behind this theory encourages lawyers to maintain their freedom to express and to record mental impressions and opinions for the benefit of their clients without fear of their impressions and opinions being used against their clients. *Id.* at 8.

The work product doctrine cannot shield the Leonard documents from production. The record shows no evidence Leonard interacted with Sunstates as an attorney until after this litigation began. By Defendants' own admission, the word "Counsel" does not appear in Leonard's title. Therefore, Leonard could not have been an attorney assembling and bringing into being materials in anticipation of litigation. Although he had his legal degree, his relationship with Sunstates did not relate to delivery of legal services.

*5 Plaintiffs urge the above privilege protections do not apply to documents intended for public disclosure. *See In re Micropro Sec. Litig.,* 1988 WL 109973 [[[1988-89 Transfer Binder] *Fed. Sec. L. Rep.* (CCH) ¶ 93,986 (N.D. Cal. 1988). According to Plaintiffs, "handwritten notations on preliminary drafts are generally for the purpose of conveying factual data, not seeking legal advice." Their insistence seems consistent with the *Micropro Sec.* court who wrote,

[T]hese communications, consisting as they do of factual information, do not call for a legal opinion or analysis. Such a communication does not constitute legal advice or a request for legal advice. Rather, the purpose of the

communication is to furnish the information necessary to compile the offering materials required by the federal securities laws. Thus, the principle purpose for making the communication is not to secure legal advice but to secure what is essentially a business service (that, is to compile business data for disclosure in order to comply with the requirements of the federal securities laws). In receiving this information, the attorney herein were essentially serving as a conduit for factual data, and were not acting primarily as lawyers. *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 147 (D.Del. 1977); *Hewlett Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 542 (N.D. Cal. 1987).
MicroPro, at 90,593. The *MicroPro* court also emphasized,
the information given the [attorney] was to assist in preparing such prospectus which was to be published to others and was not intended to be kept in confidence. That is the critical circumstance, to wit, the absence of any intent that the information was to be kept in confidence. (citation omitted).
Id.

Although *MicroPro* is compelling, it is not binding on this Court. Chancellor Allen articulated this Court's position on the issue of producing draft documents in *Jedwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426, Del. Ch., C.A. No. 8077, Allen, C. (Mar. 20,1986) Mem. op. at 6-7. Defendants, following the Chancellor's reasoning, argue the attorney-client privilege and work product doctrine protect the preliminary drafts of the board meeting documents and the publicly-filed documents they withheld. I agree.

In *Jedwab,* this Court held preliminary drafts of documents a company later files with the Securities and Exchange Commission "are the proper subject of a claim of privilege and thus need not be produced." *Id.* at 6. Chancellor Allen based his decision on the fact that a plaintiff has available to it the publicly-filed documents. *Id.* Chancellor Allen wrote,
[T]he only information available from prior drafts relates to matters appearing in prior drafts that were deleted, augmented or otherwise modified in the final product. ... [S]uch modifications are made as a result of communications between a client or its representatives and lawyers. Thus, new information disclosed from comparing drafts of SEC filings with the filed documents themselves necessarily relates to and may inferentially disclose communications between a client and its lawyers charged with preparing the final documents. Communications of this kind are clearly made "for the purpose of facilitating the rendition of professional legal services" and lie at the heart of the confidential communications that the lawyer-client privilege seeks to protect.
*6 ... [W]here... the document itself is prepared by a lawyer in a setting in which it is intended to remain confidential until a final version is deemed appropriate for public disclosure and where the only pertinence of the document to the discovery process is the inferential disclosure of the communication from a client to its lawyer, it strikes me that the underlying policies of the lawyer-client privilege are properly implicated and that discovery of such a document would inappropriately permit access by third parties to privileged communications.
Id. at 6-7.

Similarly, the work product doctrine protects the draft documents from production. Chancery Court Rule 26(b)(3) specifies,
[A] party may obtain discovery of [relevant] documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
Ch. Ct. R. 26(b)(3).

Here, the draft documents consist of both factual and opinion work product. As for the factual ones, Plaintiffs have not sufficiently shown why they would be unable to discover the same information without undue hardship. Our Courts have held a party may only compel production of opinion work product when a party puts that privileged information directly "at issue." *E.I. DuPont de Nemours & Co.*, C.A. No. 89C-AU-99 at 7-8. At this time, the record does not indicate whether the party seeking the protection of the work product doctrine put opinion work, in fact, "in issue." A more careful analysis is unnecessary in any event. The attorney-client privilege shields the draft documents which Defendants intended for public disclosure. Defendants properly withheld the draft documents from Plaintiffs' scrutiny.

2. Accountant-Client Privilege

Finally, I turn to Plaintiffs request for the 110 documents which Defendants claim the Illinois Accountant-Client privilege protects. Delaware does not recognize the accountant-client privilege; nor do the Federal Courts. *State of Del. v. Wright*, Del. Super., C.A. No. K94-02-0196I-0201I, Goldstein, J. (Jul. 20, 1994) (citing *U.S. v. Arthur Young & Co.*, 464 U.S. 805, 817 (1984), *Couch v. United States*, 409 U.S. 322, 335 (1973)).

Nevertheless, Defendants argue this Court should apply Illinois law which does recognize the accountant-client privilege, because "[Illinois] is the state with the most significant relationship to the communications in issue." I disagree.

*7 According to the Restatement of Conflicts, [FN3] a court should weigh four factors when determining whether it should apply law other than that of the forum state: (1) the number and nature of the contacts that the forum state has with the parties and the transaction involved; (2) the relative materiality of the evidence that is sought to be excluded; (3) the kind of privilege involved; and (4) fairness to the parties. *Restatement (Second) of Conflicts*, § 139(2), Comment. Applying these factors to the factual record, I find Delaware law applies.

FN3. Delaware follows the Restatement's choice of law principles and the Restatement's "most significant relationship" test. *Certain Underwriters at Lloyd's, London and London Market Insurance Cos.*, Del. Supr., 1994 LEXIS 355, Veasey, C.J. (Nov. 10, 1994) Slip op. (citing *Oliver B. Cannon & Son v. Dorr-Oliver, Inc.*, Del. Supr., 394 A.2d 1160, 1166 (1978).

First, Sunstates is a Delaware corporation. Incorporation in Delaware constitutes a knowing and voluntary request for the widely recognized benefits and advantages flowing from the application of Delaware general corporate law to the governance of the incorporator's business entity. Sunstates' principal place of business is in North Carolina, not in Illinois. Apparently, Illinois's only connection with Sunstates is that Illinois accountants originally generated or received the documents Defendants attempt to protect behind the accountant-client privilege. However, as Plaintiffs highlight in their Reply Memorandum in Support of Plaintiffs' Motion to Compel the Production of Documents, Sunstates' 1990 and 1991 Annual Reports state Ernst & Young, Raleigh, North Carolina are actually Sunstates' accountants. The Company's 1993 and 1994 SEC filings list Greensboro, North Carolina accountants as Sunstates accountants. [FN4] It seems, second only to Delaware, North Carolina, not Illinois, has the most significant relationship to the communications which Defendants claim the accountant-client privilege protects. [FN5] That circumstance is irrelevant, however. Delaware has the most significant contacts with the Sunstates documents in question. Second, Defendants have not refuted Plaintiffs' argument these documents are material to Plaintiffs' case. I see no reason why they are not material. Third, while I can readily understand why some find the accountant-client privilege an important one, it is not the determining factor. Fourth, I see no reason why it is unfair to apply the law of the forum state - Delaware - here. If Sunstates did not intend to abide by Delaware law and anticipate Delaware law governing the conduct of its affairs, the Company would have

incorporated elsewhere.

FN4. Not surprisingly, an entity called "Sunstates" would necessarily be hard pressed to identify with Illinois.

FN5. North Carolina does not recognize the accountant-client privilege. *State v. Agnew,* 241 S.E.2d 684, 692 (N.C. 1978), *cert. denied, Agnew v. N.C.,* 439 U.S. 830 (1978).

After weighing the evidence and applying it to the Restatement's four criteria, Delaware, not Illinois, is the state with the most significant relationship to the communications for which Defendants assert the accountant-client privilege. Since Delaware law recognizes no such privilege, there is no need to decide whether the privilege inures solely to the accountant or otherwise.

Accordingly, I grant in part and deny in part Plaintiffs' Motion to Compel Production of Documents. Plaintiffs are entitled to production of all documents they have specified in their Motion to Compel Production of Documents *excluding* the drafts of documents the Company intended for public disclosure. A separate order will follow reflecting this opinion.

ORDER

*8 For the reasons set forth in the Court's Memorandum Opinion dated December 15, 1995:

This Court grants in part and denies in part Plaintiffs' Motion to Compel the Production of Documents -

Defendants are to produce, at their own expense, those documents Plaintiffs demanded as part of its request for documents *excluding* the preliminary drafts of the board meeting documents and the publicly-filed documents they withheld.

Defendants are to produce these documents within seven working days of receipt of this order.

IT IS SO ORDERED.

1995 WL 761222 (Del.Ch.), 64 USLW 2479, 21 Del. J. Corp. L. 709

END OF DOCUMENT

EXHIBIT L

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

PFIZER INC.
v.
WARNER-LAMBERT CO., et al.

No. CIV.A.17524.

Dec. 8, 1999.

R. Franklin Balotti, Richards, Layton & Finger, Wilmington.

Michael D. Goldman, Potter Anderson & Corroon, Wilmington.

Joseph A. Rosenthal, Rosenthal, Monhait, Gross & Goddess, Wilmington.

A. Gilchrist Sparks, III, Morris, Nichols, Arsht & Tunnell, Wilmington.

Pamela S. Tikellis, James C. Strum, Chimicles & Tikellis LLP, Wilmington.

CHANDLER, Chancellor.

*1 Dear Counsel:

Pfizer Inc. (" 'Pfizer") and the plaintiff shareholders have asked the Court to compel production of a variety of documents including, but not limited to, drafts of the Merger Agreement between Warner-Lambert Company ("Warner") and American J Iome Products Corp. ("AHP"), documents indicating or relating to Warner's own internal valuation, and directors' notes taken at board meetings. After carefully considering the arguments made during our teleconference of December 7, 1999 and the papers submitted to the Court, I have concluded that plaintiffs' motion to compel production should be granted in part and denied in part.

The scope of discovery pursuant to Court of Chancery Rule 26(b) is broad and far-reaching. Rule 26(b) generally provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, ..." Moreover, the Rule renders discoverable any information that "appears reasonably calculated to lead to the discovery of admissible evidence." Consequently, absent injustice or privilege, the Rule instructs the Court to grant discovery liberally.

At this relatively nascent stage of the litigation,, the plaintiffs apparently anticipate the defendants' attempt to invoke the business judgment rule. Consequently, the plaintiffs seek information they allege: may demonstrate that the directors were uninformed when they made their business judgments. Additionally, the plaintiffs likely will ask the Court to apply the *Unocal* standard to this case. Accordingly, the plaintiffs covet valuation information to determine whether Warner's actions were reasonable in relation to a reasonably perceived threat,

I acknowlodge that the information which plaintiffs seek to compel may uncover whether the directors made informed decisions, or whether they reasonably perceived a threat. Nothing in this letter, however, should be read to imply that either the business judgment rule or the *Unocal* standard is the appropriate legal standard for this case. I mention these standards merely to demonstrate explicitly the relevance of the information plaintiffs seek.

Despite the relevance of the information, Rule 26 carves out certain exceptions for privileged in formation. Where information falls within a privilege, that information is not available for discovery. [FN1] Warner has raised two such privileges-the attorney-client privilege and the business strategies privilege-to explain why Pfizer is not entitled to certain information.

FN1. Ct. Ch. R. 26(b).

Delaware Uniform Rule of Evidence 502 defines the breadth of the attorney- client privilege. The elements of the privilege include a communication, that is confidential, made for the purpose of rendering legal services to the client and that occurs between the client and his or her attorney. [FN2]

FN2. *Moyer v. Moyer,* Del.Supr., 602 A.2d 68, 72 (1392).

Pfizer questions whether Warner has waived or will waive the privilege. A party cannot use the attorney-client privilege as both a sword and shield. In other words, "a party cannot take a position in litigation and then erect the attorney-client privilege in order to shield itself from discovery by an adverse party who challenges that position." [FN3] Pfizer anticipates that in order to demonstrate that its board made informed, decisions, Warner will proffer evidence of attorneys' discussions with Warner's board. Therefore, Pfizer argues, Warner would have placed the attorneys' conversations with board members at issue rendering those conversations discoverable. If Warner submits such evidence, I would indeed consider Pfizer's concerns legitimate. Warner has represented, however, that it does not plan to use its attorneys' advice to the board in this manner. Warner warrants that it will use the attorney-client privilege only as a shield, and not as a sword. Consequently, Warner has not waived this privilege.

FN3. *Scaly Mattress Co. of New Jersey, Inc. v. Sealy, Inc., Del.* Ch., C.A. No. 8853, Jacobs, V.C. (June 19, 1987).

***2** The business strategies immunity entitles a target corporation to shield itself from discovery of time-sensitive information in the takeover context, including delicate financial information, defensive strategies, and potential responses to hostile bids. [FN4] The Court's authority to protect information under this immunity resides in Court of Chancery Rule 26(c), which authorizes the Court to enter protective orders as "justice requires" to shield the parties from prejudice. The Court employs a balancing process to assess immunity claims under this doctrine. The factors the Court considers include the importance of the matter sought to be discovered to the patty seeking it; the risk of non-litigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company's efforts as well as the stage of the litigation. [FN5] Delaware courts considering this immunity have granted protection to companies' ongoing strategies still being contemplated, but not plans that have already been made. [FN6] Here, I conclude that the risk of non-litigation injury and the early stage of this litigation outweigh Pfizer's need for such information. Consequently, the immunity protects any in formation relating to ongoing strategies and all information regarding Warner's internal financial valuations. The immunity does not, however, protect information relating to plans that Warner has already implemented.

FN4. *See* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 7-3 al 292 (1938).

FN5. *Grand Metropolitan PLC v. Pillsbury Co.,* Del. Ch., C.A. No. 10319, Allen, C. (Nov. 22, 1988).

FN6. *Atlantic Research Corp. v. Clabir Corp.,* Del. Ch., C.A. No. 8783, Jacobs, V.C. (Feb. 10, 1987).

I also remind Warner that Pfizer's right to discover information remains quite broad under Rule 26. Therefore, I direct Warner, as a general rule, to disclose to Pfizer any and all information that falls outside either the attorney-client privilege or the business strategies privilege, I will address each specific discovery dispute below.

Pursuant to Court of Chancery Rule 37(a) defendants *Warner and AHP* are ordered to produce:

1. All drafts of the Merger Agreement and al.1 agreements related thereto, including agreements by which Warner and AHP granted each other stock options.
2. All documents relating to Warner's already completed decision to enter into the Merger Agreement.

3. All documents relating to Warner's osscrtion that Pfizer has breached or may have breached existing contracts with Warner.
4. All documents discussing, addressing, referring or relating to the relationships, connections; or ties between any member of the Warner board and any officer or executive of Warner,

Pursuant to Court of Chancery Rule 37(a), defendant *Warner* is ordered to produce:
1. All documents relating to the AHP Drug Litigation, including the Memorandum of Understanding, the Settlement Agreement and any drafts thereof or documents relating to opt-outs from the settlement.
2. Any documents relating to Warner officers', directors' and executives' rights to employment, payment, benefits or severance agreements or as a result of the Warner-AHP Merger.
3. Any documents relating to the Warner-Lambert Stock Options, the Warner- Lambert Stock Options Plans or any other stock option plans or agreements referred to in the Merger Agreement,
*3 4. Notes, documents and testimony reflecting what the Warner directors were told about the proposed Merger Agreement including all notes taken at board meetings by directors, persons acting as secretaries, and attorneys. (Attorneys' notes need be produced to the extent they constitute factual accounts but not to the extent they constitute legal conclusions, propositions, and advice developed in anticipation of litigation.)

Plaintiffs Motion to Compel is granted with respect to all interrogatories.

Plaintiffs' Motion to Compel is denied with respect to all materials and requestsregarding Warner's internal valuation information referenced in paragraph 23 of Plaintiffs' Motion to Compel.

I trust this letter will resolve all of the issues advanced in the Motion to Compel. If any issues remain unresolved, the parties may sock further direction from this Court.

1999 WL 33236240 (Del.Ch.)

END OF DOCUMENT

Exhibit M

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Richard N. FRANK, as owner of account Guarantee Trustee and Trust F/B/O Robert Alton Lee, Ira rollover, et al., Plaintiff,
v.
Clyde Wm. ENGLE, et al., Defendants.
Richard N. FRANK, Plaintiff,
v.
Clyde Wm. ENGLE, et al., Defendants.

No. C.A. 13323, C.A. 13284.

March 30, 1998.

Kevin Gross of Rosenthal Monhait Gross & Goddess, P.A., Wilmington, Delaware; Biggs & Battaglia, Wilmington, Delaware. Of Counsel: Silverman, Harnes & Harnes, New York, N.Y.; Lowey Danenberg Bemporad & Selinger, White Plains, N.Y. Attorneys for Plaintiffs.

Stephen E. Herrmann of Richards, Layton & Finger, Wilmington, Delaware. Attorney for Defendants.

MEMORANDUM OPINION

STEELE, V.C.

*1 Plaintiffs in these actions (consolidated for purposes of discovery) have filed derivative actions on behalf of Sunstates. The suit names as defendants Sunstates' CEO and controlling shareholder, Clyde Wm. Engle (Engle), the individual members of Sunstates' board, and three holding companies, Hickory Furniture Co. (Hickory), RDIS Corp. (RDIS), and Telco Capital Corp. (Telco). Engle controls Hickory, RDIS and Telco, which are parents of Sunstates. Plaintiffs allege that Engle, with the help of the Sunstates board and the parent companies, has engaged in a systematic looting of Sunstates by causing Sunstates to make bogus loans, engage in sham transactions, award undeserved bonuses, and waste its assets in sundry ways. Plaintiffs now seek an order compelling discovery of various documents pertaining to the alleged looting of their company. Some of the document requests are duplicative, and some ask for documents outside the scope of this litigation. However, I conclude that defendants have been remiss in not turning over other documents in their possession. I order defendants to turn those documents over now. For the reasons set forth below, plaintiffs' motion is *granted in part; denied in part.*

I. Plaintiffs' Discovery Requests & the Court's Rulings

In evaluating plaintiffs' requests for production of documents, the Court must follow the language in Court of Chancery Rule 26: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." CH. CT. R. 26(b). The rule mandates a liberal approach, favoring production of all documents that might reasonably relate to the subject matter of the pending action. Nonetheless, Rule 26 is restricted in two fundamental ways--the rule's practical application and defendants' right to raise affirmative defenses. [FN1]

FN1. The analysis of Rule 26 applies to discovery in general, but the Court focuses on discovery of documents and affirmative defenses peculiar to that form of discovery.

The scope of Rule 26 is limited by the language of the rule itself and by supplemental rules pertaining to specific types of discovery. Rule 26 states that documents must be "relevant to the subject matter." And, under Rule 34 (which applies specifically to document production), the documents must be "in the possession, custody, or control of the party upon whom the request is served." "Party" as used in Rule 34 is not restricted in meaning to the litigants, but it is effectively so restricted because the Court can compel production only from those persons over whom the Court can assert personal jurisdiction.

[FN2] Consequently, document discovery is limited in scope to production of documents (i) relevant to the subject matter of the litigation and (ii) within the control of a party to the action. [FN3]

FN2. *See Rosenblatt v. Getty Oil Co.*, Del. Ch., C.A. No. 5278, mem. op. at 5, 6 DEL. J. CORP. L. 362, 364, Brown, V.C. (April 8, 1981) (holding that plaintiff could not compel defendant to produce affiliate's documents, but leaving open possibility that plaintiff seek subpoenas directly against nonparty affiliate).

FN3. *Accord Camden Iron & Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 441-44 (D.N.J.1991) (examining relevancy and control issues in document production and applying alter ego test to determine if U.S. subsidiary had control over Japanese parent's documents).

The scope of allowable discovery is limited further by the wide discretion allowed the Court. The Court's oversight is necessary because of the potential that a party will use discovery as an offensive weapon to overwhelm the opponent with the effort and cost of complying with overbroad document requests. To guard against this abuse, Rule 26 directs the Court to limit the range of discovery to what is reasonably necessary and to prevent duplicative, unduly expensive, unnecessary, or otherwise burdensome production. [FN4]

FN4. CH. CT. R. 26(b)(1).

*2 The second limitation upon Rule 26's liberal policy is the right of the responding party to protect relevant documents, if the circumstances allow the responding party to raise an affirmative defense such as attorney-client privilege. Attorney-client privilege, the defense raised by defendants in this motion, protects communications between an attorney and client. [FN5] A party who successfully asserts attorney-client privilege can deny the other party access to otherwise relevant documents.

FN5. *Bren v. Berkowitz*, Del.Supr., No. 479, 1996, slip copy at 9, --- A.2d ----, ----, Veasey, C.J. (Feb. 27, 1998) (*en banc*) ("The main purpose behind the attorney-client privilege is 'to promote freedom of consultation of legal advisers by clients." ') (citing 8 WIGMORE, EVIDENCE § 2291, at 545 (McNaughton rev.1961)).

In examining the plaintiffs' specific document requests, I must balance the plaintiffs' need to examine documents pertaining to the alleged claims against the defendants' right to refuse documents outside the scope of Rule 26 (and Rule 34) and to refuse production of protected documents. Delaware case law has evaluated many, but not all of the permutations the of discovery issues raised in this case. But, our discovery rules are fashioned after the rules used in the federal courts; and, therefore, I turn to that fountainhead of judicial wisdom to assist my analysis.

1. Draft Minutes

Plaintiffs request "draft" minutes for meetings of the Sunstates board and its committees. [FN6] 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.

FN6. For the purposes of this Opinion, board minutes shall include minutes for board committee meetings as well as meetings of the entire Board of Directors.

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.

Defendants decline to address the substantive arguments made by plaintiffs. Instead, in a cursory fashion, they state that the Court should not rehear an issue previously decided because plaintiffs provide no compelling reason to do so and because plaintiffs waited two years to contest the lack of finalized minutes, even though plaintiffs, defendants contend, knew that finalized minutes were not in existence. Defendants' arguments do not respond to the issues raised by plaintiffs. I conclude from defendants' failure to address Leonard's testimony and plaintiffs' accusations of stonewalling that there may be merit to plaintiffs' contentions.

*3 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 my confidence in that ruling. Moreover, plaintiff show 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. That process is not the type of legal review for which defendants are entitled to assert attorney-client privilege as a protection against inappropriate discovery. Defendants shall produce all minute drafts as well as Leonard's meeting notes. For the reasons explained in subsection 2 below, this order shall apply to meetings after the filing of plaintiffs' complaints.

2. Post-Complaint Documents

Plaintiffs ask for various materials (Sunstates board & committee meetings, board packages, records of affiliate transactions, and documents relating to management or consulting fees charged to Sunstates by affiliates) created or approved after the filing of their complaints. Defendants object to producing anything created after January 10, 1994, contending that any information created after the filing of the complaints is not relevant to the acts about which plaintiffs complain. [FN7] Defendants also argue that complying with plaintiffs' request would be overly burdensome and that plaintiffs are using discovery as an offensive weapon. Plaintiffs state that information created after the filing of a complaint can be subject to discovery if the information pertains to the acts described in the complaint or if the complaint alleges misconduct that the defendants are likely to continue after plaintiffs' filings.

FN7. Although Rule 26 limits discovery to documents relevant to the subject matter, defendants attempt to transform that limitation to a limit on the time period for which documents may be discovered. They do this by asserting that documents created after the filing of a complaint cannot be relevant to acts that occurred before the filing and that only acts occurring before the filing fall within the subject matter of the complaint.

I conclude that plaintiffs' claim describes a pattern of conduct which, it is reasonable to suppose, defendants may be continuing. Furthermore, I conclude that documents created after the filing of plaintiffs' complaints may describe matters relevant to the events described in the complaint. Either conclusion provides a basis for me to exercise discretion in allowing discovery past the filing date . [FN8] The fact that defendants have imposed an information blackout on Sunstates' shareholders by discontinuing Sunstates' public disclosure is critical to my analysis. Discovery is vital in this action, as it is the only means for shareholders to inform themselves of the board's actions. This would not necessarily be the case where a company makes public disclosures on a timely basis. When there is little or no public disclosure, as here, the Court should be less reluctant to give

plaintiffs wide latitude in the scope of their discovery.

> FN8. *In re Tri-Star Pictures, Inc.*, Del. Ch., C.A. No. 9477, mem. op. at 4, Jacobs, V.C. (Feb. 4, 1991) (allowing discovery of documents dated after the filing of the complaint because they may be relevant to past acts alleged in complaint); *accord Southwest Hide Co. v. Goldston,* 127 F.R.D. 481, 463-84 (N.D.Tex.1989) (holding that allegations of ongoing wrongful conduct alleged in complaint constitutes reasonable grounds for allowing discovery).

It is reasonable in these circumstances to grant plaintiffs the opportunity to examine recent information pertaining to the continuing wrongs alleged in their complaint. There must be some cut off date for discovery, however, or else defendants would be forced to engage in periodic discovery updates throughout the litigation process. Therefore, I order the time period for discovery to run up until four weeks before the pretrial conference. In the meantime, defendants must turn over all documents (regardless of date of creation) relating to Sunstates board & committee meetings, board packages, records of affiliate transactions, and documents relating to management or consulting fees charged to Sunstates by affiliates.

3. Valuation of Sew Simple

*4 Plaintiffs allege Sunstates committed waste when it acquired Hickory's subsidiary, Sew Simple. Hickory bought Sew Simple for $2 million in 1986 and sold it to Sunstates in 1986 for $17 million. Plaintiffs allege that the Sunstates board knew Sew Simple was not worth the price paid. They seek production of documents created by Sunstates' indirect subsidiary, Alba, to substantiate their assertion. Alba had also considered purchasing Sew Simple at (and after) the time that Sunstates acquired Sew Simple from Hickory. Plaintiffs assert that Alba is wholly-owned by Sunstates (partly through direct holdings and partly through holdings of another Sunstates subsidiary). They allege that Alba rejected the acquisition because a financial analysis of the deal provided to the Alba board by an outside financial advisor showed Sew Simple to be worth less than the price demanded. Plaintiffs seek access to the advisor's valuation of Sew Simple, alleging that Sunstates' top people, who also worked at Alba, knew of the valuation when they approved Sunstates' purchase of Sew Simple. Plaintiffs believe that the valuation will reveal that defendants intentionally overpaid for Sew Simple. Therefore, they request that Alba produce all documents relating to the Alba board's consideration of acquiring Sew Simple; all Alba board meeting packages; and all documents given to Alba by the financial advisor who valued Sew Simple (the valuation materials). Defendants object to production of the valuation materials because the documents are in the possession of Alba, not Sunstates. They also attempt to set an arbitrary cut-off date for production of any documents at April 13, 1992, the day the Sunstates board approved Sew Simple's acquisition. Defendants also object to the discovery of the valuation materials because defendants assert that the request is overly broad and duplicative of requests made to Alba and Sew Simple for the same documents.

Both sides' briefs are unclear as to whether the target of the discovery requests is Alba or Sunstates and the other named defendants; therefore, I assume the motion to be directed to all. Plaintiffs concede, however, that Alba produced all relevant documents in response to plaintiffs' subpoenas. Alba's cooperation moots this motion as to it.

Alba's production also impacts this Court's analysis of what the named defendants must produce. It goes without saying that defendants must respond appropriately to requests for production, but that obligation may be circumscribed where production would be duplicative and, therefore, wasteful or frivolous. I therefore order the named defendants to turn over all valuation materials in their possession not already produced by Alba (or any other party or nonparty).

As to defendants' argument that the discovery should be restricted to before April

13, 1992, I have already explained why this State's liberal discovery rules permit discovery of materials reasonably likely to relate to the subject matter in dispute, even if the materials were created after the filing of the complaint. The same reasoning applies to documents created or acquired by Sunstates after its decision to approve the merger. Though created after the fact, the documents may relate to Sunstates' prior decision to acquire Sew Simple. [FN9] . Therefore, the Court orders Sunstates to turn over all discoverable documents in its possession regardless of when created or when obtained.

FN9. *In re Tri-Star Pictures, Inc., supra* note 8, mem. op. at 4.

4. Payments from Hickory, RDIS, Telco & Other Affiliates to Engle

*5 Plaintiffs ask for all information pertaining to affiliate use of Sunstates' funds. They seek to show that funds siphoned off from Sunstates were improperly channeled to Engle. Defendants object that the claim is overly broad and not related to Sunstates' alleged wrongdoing.

I cannot agree with defendants' assertion that, even if proved, facts showing funds moved through a series of transactions between affiliates from Sunstates to Engle's back pocket are irrelevant to plaintiffs' claims. These facts, I find, would be highly probative.

Plaintiffs' request asks for documentation of payments to all companies controlled by Engle. The breadth of that request does raise the possibility that those "controlled" companies--which are not defendants in this action-- might get unfairly ensnared by this discovery order. Engle, a named defendant, however, can direct compliance from companies that he in fact controls and provide a complete accounting of his (and their) compensation from other affiliates. He can also inform plaintiffs of the timing of any special fees and should be able to trace the ultimate source of payments made to him. If the issue of whether any particular company is controlled by Engle comes into dispute, the Court will address that issue at that time. Otherwise, I direct defendants to produce all records of Sunstates' payments to affiliates and all transfers by affiliates to companies controlled by Engle (or to Engle himself).

5. Sunstates' Bankrupt Subsidiary

Sunstates' insurance subsidiary, Coronet, is in the process of being liquidated by the Illinois Insurance Department. Plaintiffs believe that Coronet's improper investments in affiliates may have drained the company's assets and precipitated its 1996 bankruptcy. They contend that this misconduct is one more instance of Engle looting Sunstates. Plaintiffs seek Coronet's 1995 and 1996 financial statements and documents pertaining to questionable transactions and investments by Coronet that precipitated its receivership with the Illinois Insurance Department.

I can only order discovery of materials relevant to matters raised in the complaint. Coronet is not a defendant, and plaintiffs do not allege that Coronet is an alter ego of Sunstates. Therefore, even though Coronet's financial improprieties may have affected the value of a Sunstates asset, that fact alone does not bring the Coronet problems within the scope of plaintiffs' derivative action against Sunstates. Plaintiffs make allegations that would appear to be proper in a derivative suit brought by Coronet's shareholders on behalf of Coronet, or, if brought by these plaintiffs, in a double derivative suit brought on behalf of Coronet. The alleged wrongdoing is outside the scope of plaintiffs' current complaint, which alleges that defendants looted Sunstates. Therefore, I deny the motions to compel discovery as to Coronet and its activities.

6. Financial Statements for Telco, Hickory, Indiana, RDIS, Coronet & Engle

*6 Plaintiffs ask this Court to compel production of the most recent audited financial statements for Telco, Hickory, RDIS, Indiana, Coronet and Engle. Defendants object that this discovery is not reasonably likely to lead

to admissible evidence in this action because the basis of the claim is that Sunstates made wrongful payments, not that the other defendant corporations wrongly used those funds.

First, I deny the request as it pertains to Indiana because Indiana is not named in this action, [FN10] and plaintiffs have made no showing that Indiana is a wholly-owned subsidiary or alter ego of a named defendant.

FN10. Plaintiffs' Opening Brief does not list Indiana as a named defendant in the "Nature and Stage of the Proceedings." Exhibit "A" to Plaintiffs' Reply Brief lists Indiana Financial Investors, Inc., as a 24.6% owner of Sunstates and 50% owned by Hickory. For the purposes of this motion, plaintiffs have failed to show that Indiana is controlled by a defendant over whom I have personal jurisdiction.

Secondly, as to the other corporate defendants, I must reject discovery of their financial statements as overly broad and duplicative. The basis for granting plaintiffs' request as to this matter would be the need to trace defendants' use of Sunstates' funds. That is a legitimate reason to order discovery (as explained in subsection 4 above), but the scope of the information requested by plaintiffs is overly broad. Not every aspect of the corporate defendants' financial picture is related to the claims of Sunstates' shareholders. To give the shareholders access to such a wide range of information would expand the litigation into the other corporate defendants' financial situation. That information is not relevant to the issues arising in this suit and need not be produced. [FN11]

FN11. In other words, audited statements must be produced beginning with the quarter after the last 10-k until the most recent available statement. Defendants must also produce unaudited statements for any quarter for which an audited statement is unavailable, including the most recent unaudited statements.

In rejecting this request, I am reassured that my decision is not overly restrictive because I granted plaintiffs' request (in subsection 4) for all documents pertaining to money flows from Sunstates to Engle through the web of affiliates. The scope of that request is reasonable in light of this action's subject matter (the alleged looting of Sunstates). Moreover, insofar as this request is relevant to plaintiffs' consolidated action, it is duplicative of subsection 4's request for information pertaining to money flows. And, to the extent that this request is not duplicative, it does not pertain to Sunstates' money flows and is irrelevant to this action. Therefore, I deny the request for financial statements of the defendant corporations. Engle's personal financial statements will be produced in redacted form, subject, if demanded, to *in camera* inspection, to the extent they reflect income received from defendant Sunstates or its affiliates.

7. Corporate Fact Book

Sunstates maintains a corporate fact book that contains a list of employees with knowledge of issues raised in this litigation. Plaintiffs seek access to this book to identify people whom they may wish to depose. Defendants contend that the request is late and overly broad (because the book also contains unrelated materials) and, moreover, that the book was created after the filing of this litigation.

Turning over this book is a simple affair. The book contains information reasonably related to this litigation. I have already rejected defendants' arguments for limiting discovery to before the filing date of the complaint. If the book contains material that is clearly unrelated to these proceedings, the production of which would disclose confidential business information, defendants may prepare a "privilege log," produce what is relevant, and inform plaintiffs of the nature of the log's entries. I order Sunstates to make the book otherwise available to plaintiffs.

8. Defendants' General Objections

*7 This motion contained a section in which plaintiffs asked for an order to compel production for particular discovery requests

(dealt with above) and a section criticizing defendants' general objections to past discovery. The latter section asked the Court to order defendants to provide details as to what documents had not been produced under defendants' general objections. Defendants generally objected to requests for documents because the requests were (1) not relevant; (2) overly burdensome; or (3) in the possession of non-defendant affiliates. Plaintiffs demand that defendants specifically describe the documents withheld on these grounds, but defendants have mooted the issue by stating in the answering brief that plaintiffs were refused no documents solely on the grounds of relevancy or burden. The earlier portions of this opinion dealt with all discovery objections based on defendants' lack of control over affiliates. Thus, the general objections are, for all purposes, mooted by defendants' Answering Brief and earlier parts of this Opinion.

II. Conclusion

In evaluating plaintiffs' requests, I have kept in mind the liberal nature of this Court's discovery rules and the fact that the "scope of inquiry for purposes of discovery is broader than the test for admissibility at trial." [FN12] At the same time, I have tried to strike a balance by ordering only discovery relevant to the claims alleged in the complaint. I hereby order the parties to comply with the discovery requests granted above. Plaintiffs' motion is *granted in part; denied in part.*

FN12. *Southwest Hide Co.*, 127 F.R.D. at 483.

IT IS SO ORDERED.

1998 WL 155553 (Del.Ch.), 24 Del. J. Corp. L. 223

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, Katherine J. Neikirk, hereby certify that I caused to be served two copies of The NCS Defendants' Memorandum in Opposition To Plaintiff Omnicare's Motion to Compel on October 15, 2002, by hand, upon the following counsel of record:

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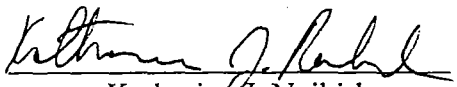

Katherine J. Neikirk

CERTIFICATE OF SERVICE

I, Katherine J. Neikirk, hereby certify that I caused to be served one copy of the public version of The NCS Defendants' Memorandum in Opposition to Plaintiff Omnicare's Motion to Compel on October 17, 2002, by hand, upon the following counsel of record:

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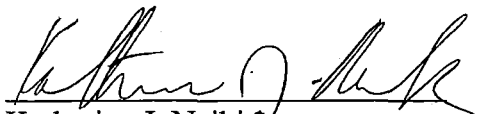

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