

BEFORE THE SUPREME COURT OF THE STATE OF DELAWARE

In the matter of	)	
	)	
OMNICARE,	)	Appeal No. 605, 02
	)	
Appellant,	)	ENV, JTW, RJH, MTS
	)	
v.	)	
	)	
NCS HEALTHCARE,	)	
	)	
Appellee.	)	

Tuesday, December 10, 2002

BEFORE:

CHIEF JUSTICE E. NORMAN VEASEY
 JUSTICE JOSEPH T. WALSH
 JUSTICE RANDY J. HOLLAND
 JUSTICE MYRON T. STEELE

APPEARANCES:

DONALD J. WOLFE, JR., ESQUIRE
 T.N. MIRVIS, ESQUIRE
 EDWARD P. WELCH, ESQUIRE

TRANSCRIPT OF PROCEEDINGS
 (Transcribed from a tape-recording.)

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1 CHIEF JUSTICE VEASEY: Mr. Wolfe?

2 MR. WOLFE: Your Honor, as I was saying... I
3 should say that oral argument this morning is essentially
4 the same as it was last week and, therefore, no better,
5 I'm afraid. For those members of the Court who will be
6 hearing it for the second time, I should say my
7 apologies. For those of Your Honors who will be hearing
8 it for the first time, my apologies ~~too~~,

9 I began my argument in this ~~matter~~ th last
10 week by expressing gratitude to the Court for its
11 willingness to hear and resolve this matter on an
12 accelerated basis, and I want to begin this one by
13 extending our appreciation to the Court as a whole for
14 what has now become a truly extraordinary effort to
15 respond to parties' needs. It's very much appreciated.

16 Your Honor, Omnicare is here to challenge
17 two separate decisions of the Court of Chancery that
18 together resulted in the denial of all of the claims
19 asserted in Omnicare's second amended complaint.

20 The first issued on October 25, 2002,
21 dismissed several of the counts of that complaint on the
22 grounds that Omnicare acquired its NCS shares on the date
23 following the execution of the Genesis merger agreement
24 and, therefore, was without standing to assert a variety



1 of individual fiduciary-duty claims relating to the
2 ensuing series of actions of the NCS board to thwart
3 Omnicare's considerably richer tender offer and to
4 preclude it from reaching the stockholders of NCS.

5 That offer, as Your Honors are now, I'm
6 sure, well aware, was not commenced until 10 days after
7 Omnicare became an NCS stockholder, and, in our view, the
8 great bulk of the challenged actions of the directors
9 came thereafter. That challenge conduct included the
10 Board's continuing insistence on abiding by what we
11 believe were Draconian and are Draconian lockups, even as
12 the board found itself forced unanimously to revoke its
13 recommendation of the Genesis merger and to recant its
14 earlier declaration that the Genesis merger was fair to
15 NCS stockholders.

16 The second opinion was issued on October 28
17 and it denied our motion for partial summary judgment
18 and, to our unhappy surprise, entered summary judgment
19 sua sponte in favor of defendants with respect to the
20 only remaining count of our complaint which asserted that
21 the voting agreements entered into by defendants Outcalt
22 and Shaw and the attending issuance to Genesis of
23 irrevocable proxies violated the restrictions imposed
24 upon the transfer of supervoting Class B NCS shares in



1 the NCS charter.

2 As I'm sure Your Honors understand,
3 defendants Outcalt and Shaw are the holders of a majority
4 of the supervoting Class B shares, though not a majority
5 of the outstanding NCS equity.

6 Your Honors, in light of the proceedings
7 earlier this morning, I will dispense with recitation of
8 facts except as they come up in the legal analysis and
9 turn instead to the arguments, and I would propose to
10 address first as I did last week the transfer restriction
11 issue and then turn to the question of Omnicare's
12 standing to assert its claims for breach of fiduciary
13 duty.

14 CHIEF JUSTICE VEASEY: Is the standing
15 issue moot because we now have the stockholders before
16 us?

17 MR. WOLFE: Your Honor, I would hope we
18 would have something to contribute. I think it is also
19 an important issue to be resolved. I don't believe this
20 Court has spoken except in *Alabama Byproducts*, but
21 certainly not with respect to the contemporaneous
22 ownership provisions of 327 and its general application.
23 So I would say it is not moot.

24 Your Honors, our argument that the voting



agreements violate the provisions of Article 4, Section 7 of the NCS charter is fairly straightforward. It requires reference primarily to sections 7(a) and 7(d) of Article 4 of the charter and to sections 2(b) and (c) of the voting agreements. The charter appears in its entirety at Appendices 22 and 40 of our appendix, and the two voting agreements which are identical may be found at pages 128 through 133 and 134 through 139, respectively, of our appendix.

I want to note at the outset that our contentions with respect to the transfer restrictions in Section 7 present the Court with two discrete possibilities. Three, of course, if we lose everything, but I prefer to concentrate on the first two.

The first is that the voting agreements are rendered invalid and unenforceable by reason of the provisions of Section 7(a). If we are correct in this contention, defendants Outcalt and Shaw would be left with their Class B shares but released from their contractual obligation to vote those shares in favor of the Genesis merger and instead free to support the Omnicare transaction or any other that might arise as they choose.

The second possible conclusion relates to



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1 our contention that the voting agreements violate
2 section 7(d) of the charter and that the, quote,
3 purported transfer of the Class B shares-void, we say, by
4 reason of Section 7(a)-have also affected the conversion
5 of those B shares to A shares in the hands of Outcalt and
6 Shaw so that they are now entitled to only one vote per
7 share for whatever deal they may now wish to support. We
8 think both conclusions are warranted, and I ^{will}~~won't~~ explain
9 why.

10 I begin with reference to the relevant
11 provisions of the charter which I will paraphrase but I
12 think fairly so.

13 Article 4, Section 7(a) provides that "No
14 person holding any shares of Class B common stock may
15 transfer shares of Class B common stock or any interest
16 therein except to a permitted transferee." There is no
17 dispute on this record that Genesis is not a permitted
18 transferee.

19 Article 4, Section 7(b) provides that "Any
20 purported transfer of shares of Class B common stock
21 other than to a permitted transferee shall automatically
22 result in the conversion of such shares into shares of
23 Class A common stock effective upon the date of such
24 purported transfer."



1 We believe, Your Honors, that it is
2 critically important to have in mind as well the
3 provisions of Section 7(g) of Article 4 which the Court
4 below chose simply to read out of the charter. That
5 paragraph states that "The possession of power to vote or
6 to direct the vote of the shares of Class B common stock
7 shall constitute beneficial ownership of such shares for
8 purposes of Section 7 of Article 4 and that persons
9 having some power are deemed to hold beneficial ownership
10 of such Class B shares."

11 With respect to the voting agreements
12 themselves, Genesis in its papers goes to rather
13 extraordinary lengths, I think, to summarize these
14 agreements so as to suggest that they are really quite
15 limited and ministerial in nature. They're really just
16 an overnourished errand list by which Outcalt and Shaw
17 have merely asked Genesis to drop off their ballot eight
18 months hence, of course, but come what may, and it's
19 simply a request that Genesis perform menial, ministerial
20 acts on their behalf.

21 But these agreements in fact are quite
22 broad and have application to a sweeping variety of
23 significant corporate matters, most of which have yet to
24 arise and had not arisen at the time of their execution.



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Specifically, Section 2(b) of those agreements provides that "The stockholder agrees irrevocably and unconditionally to vote or cause to be voted all of his shares at the meeting," then scheduled for December 5, "or at any other annual or special meeting of

shareholders of the company where any such proposal is submitted and they are required to vote as follows: In favor of the Genesis merger; against approval of any proposal made in opposition to or in competition with the merger in the transactions contemplated thereby; against any merger, any consolidation, any sale of assets, any business combination, any share exchange, any reorganization, any recapitalization of the company or any of its subsidiaries, except as provided in the merger agreement; against any liquidation or lining up any extraordinary dividend, any change in the capital structure of the company, and any other action that may be reasonably expected to impede, interfere with, delay, postpone, or attempt to discourage the consummation of the transactions contemplated by a merger."

In Section 2(c) of the voting agreements



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1 the stockholder grants to Genesis an irrevocable proxy
2 coupled with an interest to vote all of the shares in
3 accordance with the provisions of Section 2(b) and
4 ratifies and approves of each and every action taken by
5 the proxyholder pursuant to the foregoing proxy.

6 In Section 6 of the voting agreements it
7 provides that Genesis shall be entitled to specific
8 performance and injunctive relief or other equitable
9 relief in the event that the stockholders should fail to
10 vote as required.

11 Now, as I mentioned, our argument is
12 twofold. First, we assert that the voting agreements are
13 void and unenforceable by virtue of the provisions of
14 Section 7(a).

15 Second, we contend that the purported
16 transfer of what amounts to beneficial ownership of those
17 shares under the terms of the charter owned by Outcalt
18 and Shaw converts the shares, Class B shares, supervoting
19 shares, to Class A shares by virtue of the provisions of
20 Section 7(d).

21 CHIEF JUSTICE VEASEY: Help me understand
22 your response to Genesis' argument at page 19 of their
23 brief. They say Genesis has acquired no dominion of any
24 kind over the Class B shares owned by Outcalt and Shaw.



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1 Genesis has none of the powers of ownership of the
2 shares, none of the shares, nor any interest in the
3 shares, none of any economic nature, nor of any voting
4 power. That's the heart of their argument.

5 MR. WOLFE: Yes, sir. I think that's true,
6 and our response is essentially that reading through the
7 laundry list of powers that were given over by these
8 voting agreements, it's rather hard to reach that
9 conclusion, in our view, but, more importantly, we're
10 dealing with a specific charter that has specific
11 definitions in it and among those definitions is the
12 definition of 7(g) which defines transfer of the power to
13 vote or direct the vote as constituting beneficial
14 ownership in those shares.

15 Now, 7(a) says you may not transfer any
16 interest. It seems to me the only way that you can
17 conclude that 7(a) has not been violated is if you
18 conclude that the transfer of a beneficial ownership
19 interest for purposes of Section 7 does not constitute
20 any interest in the shares. We feel that's stretching
21 the point. It may well be --

22 CHIEF JUSTICE VEASEY: Is the emphasis on
23 the verb "transfer" or the noun "interest"? Is your
24 emphasis on the verb "transfer" or the noun "interest"?



1 MR. WOLFE: "Interest.." I don't think
2 there's any question that the voting agreements do
3 constitute the transfer of power to direct the vote in a
4 whole list -- with respect to all of the matters I've
5 just mentioned.

6 But the point of 7(a) is that it precludes
7 the transfer of any interest that's really quite broad.
8 And I think when combined with reading Section 7(g), it's
9 very difficult to come to the conclusion that this was
10 not the transfer of an interest. It was in fact, for
11 purposes of this charter, the transfer of a beneficial
12 ownership interest in those shares to Genesis. We
13 believe as a result the voting agreements and the
14 irrevocable proxy are, therefore, rendered void and
15 unenforceable under the terms of the charter.

16 JUSTICE WALSH: Well, what do you consider
17 to be the primary purpose for the voting agreement?

18 MR. WOLFE: There's nothing in the record
19 to that effect, as I'm sure the Court understands. But I
20 would be surprised if it were not like many transfer
21 provisions of this sort designed to ensure the public
22 that the controlling interest and the power to direct the
23 future of this company would be vested in these two
24 individuals who have owned those two shares since the



1 company went public, in fact.

2 What's happened here, seems to us, is that
3 the owner of those shares, Outcalt and Shaw, who were the
4 designated controlling parties, have basically given up
5 their discretion to vote a controlling interest in the
6 shares and they have given it up to a bidder, a bidder
7 that has only its own interest at heart, unlike Outcalt
8 and Shaw who, presumably, own or owe the same duties as
9 other shareholders, have a common interest in getting the
10 highest price. They have given their interest and their
11 ability to vote these shares to the bidder who has its
12 own set of priorities, obviously, that clearly conflict
13 with those of the shareholders.

14 JUSTICE WALSH: But relating back to the
15 first argument, it seems to tie in with the desire of
16 these two director shareholders in effect to control that
17 situation as well, namely, the Genesis acquisition, and
18 if so, what's wrong with that? Isn't that consistent
19 with the purpose of the voting agreement?

20 MR. WOLFE: It's not consistent with the
21 purposes of the charter. I would concede that it's
22 consistent with the purposes of the voting agreement, no
23 question. But I think that the stockholders who bought
24 shares at a public offering of NCS had reason to believe



1 that this kind of transaction, the one represented by the
2 voting agreement, would not take place.

3 JUSTICE (unable to tell from tape):

4 Mr. Wolfe, I'm a little confused by your reference to
5 transfer of an exercise of discretion. This agreement
6 didn't call for Genesis to cast a vote in whichever way
7 Genesis thought in its discretion was appropriate, did
8 it? The two shareholders said, just as if they might
9 have voted, we're entering into this agreement committing
10 to vote this way. That is the exercise of discretion.
11 And the fact that Genesis might cast the ballot for them
12 is more implementation of the shareholders' exercise of
13 discretion than a transfer of an exercise of discretion.
14 Isn't it?

15 MR. WOLFE: Well, during the course of the
16 ensuing six months within which Genesis holds those
17 shares, Outcalt and Shaw clearly would have had in the
18 normal course the opportunity, for example, to vote
19 against this transaction and take our money instead and
20 considerably more of it.

21 Perhaps that argument would have greater
22 purchase, it seems to me, if it were not for the fact
23 that this voting agreement is so clearly designed to go
24 beyond the specific transaction that's going to be placed



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1 before the shareholders shortly. And it doesn't say who
2 has that discretion, but I must assume that Genesis, as
3 the holder of the irrevocable and unconditional proxy, in
4 fact has the discretion to decide, for example, what
5 transaction, what other transaction might, and I don't
6 mean just a tender offer, impede or delay or put off or
7 interfere with the Genesis merger, and, as I've said,
8 there are a whole list of other possibilities that this
9 company, particularly a company in financial straits,
10 might desire to do under the circumstances. Frankly,
11 that's up to Genesis.

12 JUSTICE WALSH: That brings up an
13 interesting point. Suppose for purposes of argument that
14 this Court decides that the Genesis transaction is
15 unfairly locked up and we now have a new open bidding
16 opportunity for Genesis. Genesis comes in two days later
17 and tops the Omnicare people and we uphold this voting
18 agreement. Is this going to be voted for, that new deal?

19 MR. WOLFE: If Your Honors were to
20 invalidate the merger agreement but uphold the voting
21 agreement?

22 JUSTICE WALSH: Yes.

23 MR. WOLFE: Would those shares be voted
24 for? If Your Honors were to uphold the voting agreement,



1 I suspect they would, yes, but it would not be
2 necessarily a result of the exercise of the discretion of
3 Outcalt and Shaw. It would be a contractual obligation.
4 And we think for the same reason that the voting
5 agreements would be invalid in that circumstance, too.
6 But Your Honor's question was premised upon the
7 assumption that the voting agreements were valid.

8 JUSTICE WALSH: Yes. We now have a new
9 ball game, a new contest. Genesis comes in with a new
10 bid and it says to these two individuals, we're going to
11 vote your shares in favor of our new bid. They can do
12 it, can't they?

13 MR. WOLFE: Yes, I believe they can,
14 Justice Walsh.

15 JUSTICE (unable to tell from tape):
16 Mr. Wolfe, do I take it from your answer that the voting
17 agreements and the merger agreement are not inextricably
18 linked?

19 MR. WOLFE: I think they are linked.
20 Whether it's inextricable or not, I'm not quite sure.
21 But certainly the merger agreement contemplates the
22 execution of the voting agreements and the voting
23 agreements are attached to the merger agreement.

24 Now, perhaps, Your Honor, maybe --



1 JUSTICE (unable to tell from tape): I
2 thought the voting agreement said there was a commitment
3 to vote for that merger as contemplated by the agreement,
4 not for some other alternative down the road.

5 MR. WOLFE: I'm mistaken. Your Honor is
6 right. And I think the voting agreements also terminate
7 upon the termination of the merger. So I may have --

8 JUSTICE WALSH: So they are linked?

9 MR. WOLFE: Yes, sir. Yes, they are. I
10 apologize. I misapprehended the question and completely
11 blew the answer, frankly.

12 I think that they would terminate. There
13 are some rather technical provisions in the voting
14 agreements that I think provide and reference back to the
15 merger agreement when that merger agreement is terminated
16 and under what circumstances. I think, generally
17 speaking, those agreements would disappear upon
18 invalidation of the merger agreement.

19 JUSTICE WALSH: But let's take it a step
20 further. Assuming that they are linked, it does
21 disappear, would there be any reason why Genesis could
22 not come back and try to restore that voting agreement in
23 their new deal, assuming they made a new deal?

24 MR. WOLFE: Other than the ones we set



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1 forth in our briefs for why they're void, I don't think
2 there is.

3 Let me, if I may, turn quickly to 7(c)(5),
4 which is the primary basis on which the defendants claim
5 that this is not a void circumstance under 7(a) and 7(c).

6 The response from defendants is that
7 Section 7(c)(5) of the charter exempts unconditional
8 voting agreements and irrevocable proxies of this sort
9 from invalidation and conversion. Indeed, they go so far
10 as to say that our failure to acknowledge that (c)(5)
11 applies is frivolous, by which I choose to believe they
12 mean merry and full of cheer. There may indeed be some
13 frivolity afoot, but I think it's the defendants who are
14 having the fun.

15 Section 7(c)(5) states that the giving of a
16 proxy in connection with the solicitation of proxies
17 subject to the provisions of Section 14 of the Securities
18 and Exchange Act of 1934 shall not be deemed to
19 constitute the transfer of an interest in the shares of
20 Class B stock which are the subject of the proxy.

21 Genesis flatly states that this makes it,
22 quote, clear that the grant of a proxy by the holder of
23 Class B shares is not a transfer of an interest in the
24 shares within the intended meaning of the transfer



1 prohibition.

2 That's just wrong. It does no such thing.
3 Quite to the contrary, it provides a rather strictly
4 defined limited category of proxies does not constitute a
5 transfer of an interest in the process, we submit
6 necessarily implying that the transfer of a power to vote
7 constitutes -- I'm sorry, that there are other kinds of
8 proxies that clearly fall outside the exception and that
9 constitute the transfer of an interest; indeed, in our
10 view, a beneficial ownership interest for purposes of
11 Section(a) and (d).

12 CHIEF JUSTICE VEASEY: Do you want to save
13 the rest of your time, Mr. Wolfe, for your rebuttal?

14 MR. WOLFE: Yes, sir. If I may just add
15 one comment. It's important, I think, to remember that
16 this was not a solicitation under Section 14. No one was
17 conducting a solicitation at the time that these
18 interests were transferred.

19 Thank you, Your Honors.

20 CHIEF JUSTICE VEASEY: Thank you,
21 Mr. Wolfe.

22 Mr. Mirvis?

23 MR. MIRVIS: If I may begin again by
24 thanking the Court for the opportunity to give argument



1 here.

2 On the charter claim, the issue before this
3 Court is simply whether Section 7 of the charter
4 prohibited the B stockholders from entering into a voting
5 agreement. A voting agreement is always something that
6 takes away the flexibility of the stockholder. The
7 stockholder saying I will not no longer be free to change
8 my mind, I'm entering into a voting agreement. Here the
9 voting agreement is limited to the NCS-Genesis merger.
10 Everything else in the voting agreement, the picket fence
11 that Mr. Wolfe referred to, yes, the stockholders agreed
12 to vote for the merger and not to vote for a competing
13 transaction, some other alternative that would rob the
14 company of the economic value in the merger.

15 The key is to vote for the merger
16 agreement. If anyone was drafting a charter, I submit,
17 intending to prohibit a voting agreement, wouldn't the
18 simple way to do that be simply to say no voting
19 agreement? What conceivable draftsman, anyone in this
20 room, who intended to prohibit voting agreements if they
21 wanted to require the B holders to remain free and
22 flexible to change their mind at any point if something
23 else came down the road, what conceivable draftsman
24 would try to accomplish that objective by using standard



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1 transfer restrictions under 202 of the statute against
2 the transfer of the shares and just add in the words
3 which Mr. Wolfe said earlier, the key to his argument,
4 the words "or any interest."

5 That's Omnicare's position. Section 7 does
6 not say that voting agreements are prohibited. It
7 doesn't say proxies are prohibited. It says just the
8 opposite in Section 7(c)(5).

9 I submit that this Court's statement in
10 Avatex is the key to this rather simple issue. The Court
11 there said that this Court's function is essentially one
12 of contract interpretation against the background of
13 Delaware precedent. And there are two separate lines of
14 Delaware precedent that I think control the decision
15 here.

16 The first are all the cases on how you read
17 transfer restrictions. To read into these three words,
18 "or any interest," a prohibition against voting
19 agreements would contravene all of those cases, the cases
20 that say transfer restrictions are to be construed
21 narrowly.

22 The cases that say any deprivation of
23 stockholder rights expressly granted by the statute and,
24 of course, the right to enter into a voting agreement is



1 expressly granted by 218, and the right to grant a proxy
2 including an irrevocable proxy is granted in 212. The
3 cases say that, if you're going to deprive stockholders
4 of those statutorily granted rights, the language has to
5 be clear and convincing and the words have to be certain
6 and unambiguous.

7 Thirdly, this Court emphasized both in
8 *Kaiser* and in *Avatex* charter provisions that are claimed
9 to restrict stockholders must do so clearly. Why? So
10 stockholders will know what they can and cannot do to
11 protect their reasonable expectations.

12 But there's a second line of precedents
13 that I think are called for consideration under the
14 Court's statement in *Avatex*. Because when people draft
15 charters, they indeed function against the background of
16 Delaware precedents because Delaware cases tell them what
17 words mean and what they don't mean. And what are those
18 precedents? And, more importantly, what were they in
19 1996 when this charter was written?

20 There was the 1986 decision in *Garrett v.*
21 *Brown*, including this Court's affirmance which dealt
22 precisely with the very same words "or any interest," and
23 the earlier decisions in *Chilson* and *Brady*. Those cases
24 made crystal clear that voting agreements are not a



1 transfer of any interest in the shares, that voting
2 agreements simply imposes a contractual obligation on the
3 stockholder, that a voting agreement is the exercise of
4 voting power, not a transfer of an interest in the
5 shares.

6 To respond quickly to a point made by
7 Mr. Wolfe, there is nothing in this voting agreement that
8 gives Genesis any discretion whatsoever. If you look on
9 2(b)(b), the so-called what I refer to as the picket
10 fence. 2(b)(a) is the obligation to vote for the merger.
11 2(b)(b) is the obligation not to vote for a competing
12 transaction or any other corporate act that would rob the
13 merger of its value. Those are decisions that were made
14 by Outcalt and Shaw. There is zero discretion granted to
15 Genesis.

16 *Garrett v. Brown*, the stockholder agreement
17 in *Garrett v. Brown* prohibited the transfer of shares or
18 any interest therein. Precisely the words in this
19 charter. And the Chancery Court held and this Court
20 affirmed that a stockholder's contractual commitment to a
21 third party to vote on a certain matter, a voting
22 agreement, was not a transfer. The Court noted that the
23 stockholder's agreement, the parallel to the charter
24 here, does not limit the stockholder's agreement to vote



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1 their shares as they see fit, just as certainly this
2 charter does not prohibit Mr. Outcalt and Shaw from
3 making decisions with respect to their vote as they see
4 fit. And the Court held in two sentences that the
5 revisions as to the manner in which (inaudible) were
6 voted stock cannot reasonably construe to constitute a
7 transfer, it would be inappropriate to read the
8 definition of "transfer" to include a voting agreement.
9 It took the Court all of two sentences because that's how
10 clear it was.

11 Notwithstanding that, the Lacadana-
12 Craig (phonetic) agreement that was claimed to be a
13 transfer in that case contained a voting agreement that
14 was at least as broad, at least as broad as the voting
15 agreements here, and we have quoted from the language in
16 our brief on page 21, notes 15 and 16, that concluded
17 both affirmative voting obligations to vote for
18 particular people for directors and negative obligations,
19 again, a picket fence that is virtually in (inaudible),
20 the same language that's in this voting agreement in
21 2(b)(b).

22 And the question indeed is not -- it really
23 isn't whether *Garrett v. Brown* is correctly decided. I
24 submit that it was and there's no argument to the



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1 contrary. The point is that the drafters of the charter
2 used the same words, "or any interest," and they could
3 not possibly have intended to prohibit voting agreements
4 when the Delaware courts had said before that these words
5 do not prohibit voting agreements.

6 Omnicare totally ignored *Garrett v. Brown*
7 below, and I didn't hear anything about it here this
8 morning. They argue in their brief that somehow *Brown*
9 suggests that the voting parts of the *Lacadana-*
10 *Craig* (phonetic) agreement may well have violated the
11 prohibition on transfer of an interest. That is just
12 plain wrong. *Brown* does note that the purchase option
13 should not be read to apply to certain nonsale transfers,
14 and the *Brown* opinion may have treated some of the
15 nonvoting parts of the *Lacadana-Craig* (phonetic)
16 agreement has prohibited, albeit nonsale transfers, but
17 it's clear as a bell that on the voting parts of the
18 *Lacadana-Craig* (phonetic) agreement, which is the only
19 thing at issue here, the Court held squarely that those
20 are not the transfer of an interest of the shares.

21 Omnicare in its reply brief refers to that
22 ruling as conclusory. I would submit it may be short,
23 but it is short and sweet and it's dead on point here and
24 it was affirmed by this Court, and I think



1 Vice Chancellor Lamb was entirely correct in relying on
2 that decision in his interpretation of this charter.

3 Beyond that, on the *Brady* case, *Omnicare*,
4 of course, ignores the fact that *Brady* expressly
5 reaffirms *Chilson* for the specific proposition that, if
6 voting trustees have nothing but voting rights, the
7 transfer of voting rights is not sufficient to raise an
8 interest. Instead, they pull out language from *Brady*
9 where the Court referred to the blanket proxy that was at
10 issue in that case and the issue in that case was whether
11 the voting trustee had the power to delegate discretion
12 on the shares, had purported to give a blanket proxy, and
13 the Court said no, the voting trustee couldn't do that.
14 Why? Because the voting trust agreement obligated the
15 voting trustees to exercise their best judgment from time
16 to time to select suitable directors and on other matters
17 it required the voting trustees to exercise like
18 judgment.

19 Of course, there's no such requirement in
20 the charter here. There's no requirement on the B
21 stockholders that they must remain free at all times to
22 exercise their judgment from time to time. If that had
23 been intended, obviously a charter could have been
24 provided that used the same language that was used in



1 Brady, but the charter didn't do that.

2 With respect to 7(c)(5), which is perhaps
3 the plainest language of all in the charter, it's crystal
4 clear that the transfer of an interest in the shares is
5 not -- I'm sorry. That a proxy is not the transfer of an
6 interest of the shares. And here I would emphasize that
7 this is not a blanket proxy, that in fact Genesis' use of
8 the proxy is limited and I don't think it's been
9 disputed, and the plain words make it clear, it's limited
10 to the same degree that Outcalt and Shaw have agreed to
11 vote.

12 CHIEF JUSTICE VEASEY: On 7(c)(5), excuse
13 me for interrupting, help the Court to understand the
14 function of the clause about in connection with the
15 solicitation of proxies subject to the provisions of
16 Section 14 of the '34 Act. How does that function here?
17 That's not applicable here. That's not what's going on
18 here.

19 MR. MIRVIS: This proxy was given, the
20 proxy that's in the voting agreement indeed was given, as
21 the Court below found, in connection with a solicitation
22 of proxies under Section 14 of the act. The B shares, of
23 course, are not registered under Section 14, but as the
24 Court indicated, you can't read these words to mean that



1 they only apply to B shares that are registered under
2 Section 14 because they never have been, they never were
3 contemplated to be. Indeed, they can't be transferred.
4 They were never suitable for public trading. They never
5 would have been registered under the Exchange Act.

6 The key point on that is that the charter
7 does not say, as our friends would read it, that this
8 rule only applies to proxies that are in response to a
9 solicitation, that a response to a solicitation from NCS
10 that are given to NCS. It uses the words "in connection
11 with."

12 CHIEF JUSTICE VEASEY: It doesn't use
13 "pursuant to."

14 MR. MIRVIS: Does not use "pursuant to."
15 And indeed I would simply point out this Court in its
16 recent decision in *Parafee* (phonetic) *Holdings v. Mirror*
17 *Image*, just as the Chancery Court used the (inaudible)
18 Insurance case and other cases from the securities cases
19 in the securities area, this Court in *Parafee* (phonetic)
20 *Holdings v. Mirror Image* said the words "in connection
21 with" mean, quote, touching in the *Slip* opinion at 12. I
22 don't think there could be anything broader than that.

23 The only argument that's left on 7(c)(5),
24 and there were many and they have been demolished by the



1 Court below and I think dealt with at some length in our
2 brief, the only argument that's left is that it should
3 matter that the proxy was given to Genesis rather than to
4 NCS. There are no words in 7(c)(5) that support that
5 distinction, and I would submit that what possible
6 difference could it make whether the charter is given to
7 Genesis or NCS? If the proxy had been given to NCS, that
8 would be okay? But to Genesis not? That at best, at
9 best, Your Honors, I would submit that's hairsplitting,
10 and we know that transfer restrictions have to be
11 construed narrowly.

12 Of course, if any part of 2(b)(b), the
13 picket fence, is considered overly broad or somehow
14 deemed to constitute a transfer of interest, and I submit
15 that it cannot be, then under the agreement itself
16 Section 4, the severability provision, the only result of
17 that is to sever and declare invalid that portion of the
18 agreement.

19 One word perhaps on the beneficial
20 ownership argument that has been made. Genesis does not
21 possess the power to direct a director to vote the
22 shares. It is subject to a contract. A proxyholder does
23 not possess the power to vote a direct of shares. The
24 statute puts it that a proxyholder acts for such



1 stockholder. Indeed, below, and it's in the record here
2 at AR 160, Omnicare concedes that a proxyholder is not a
3 beneficial owner. Wholly apart from the point made by
4 the Court below that Section 7(e) only -- I'm sorry. The
5 definition of 7(g) only ties into the definition in 7(e)
6 of beneficial ownership which has the effect under the
7 charter of giving you the right, the right, to have the
8 shares registered in your name.

9 So aside from the words, if anyone suggests
10 that Genesis as a party to a voting agreement is a
11 beneficial owner of the shares and, therefore, entitled
12 to go to NCS today and have the shares registered in its
13 name, that Genesis now owns the shares and, as the Vice
14 Chancellor pointed out, it's very clear under the charter
15 there can be only one person owning the shares at a time.

16 JUSTICE WALSH: Mr. Mirvis, every spoke of
17 the picket fence, so to speak, constitutes a benefit or
18 interest to Genesis, does it not?

19 MR. MIRVIS: I would say every spoke of the
20 picket fence provides some protection to Genesis; that
21 the core obligation, the obligation to vote for the
22 merger, will not be undermined.

23 JUSTICE WALSH: To that extent it confers a
24 benefit on Genesis.



1 MR. MIRVIS: It's a contractual obligation
2 that Genesis wanted and Genesis got. And are there
3 several things that stockholders could vote for that
4 would undermine the obligation to vote for the merger?
5 What are the specifics of the picket fence? They can't
6 vote for a competing proposal. They can't vote for other
7 transactions, mergers, consolidations, share exchanges,
8 all of which would most directly interfere with the core
9 obligation to vote for the merger. They can't vote to
10 liquidate the company which would make the merger
11 obviously impossible. They can't vote for extraordinary
12 dividends, pay out the value of the company which would
13 make the merger economics (inaudible). They can't change
14 the capital structure which would have the same effect.

15 But, indeed, are there several things that
16 could do to undermine the voting agreement? Yes. Are
17 they all caught by the picket fence? I hope they are.

18 The key here is I think that if there ever
19 were a disagreement between Outcalt and Shaw and Genesis
20 about what is and isn't caught by the picket fence, it's
21 not Genesis' discretion to decide. That's not what the
22 contract says. It doesn't say if in the opinion of
23 Genesis. It's clearly the decision of Outcalt and Shaw.

24 Mr. Wolfe referred to the state of affairs



1 when this charter was first entered in 1996 and these
2 shares were issued. I think the important point about
3 that is to look at the prospectus under which they were
4 issued. If there was any intent here to prevent the
5 holders, not just Outcalt and Shaw, but any of the other
6 B holders, from entering into voting agreements, wouldn't
7 there have been a word, something, a hint, a smell, an
8 aroma in the prospectus under which the shares were
9 issued that this was something that the words "or any
10 interest" intended to convey to the stockholders?

11 We have put the prospectus into the record.
12 It's at DG 263-64. It describes the terms of the
13 B shares and the transfer restrictions. There is no
14 suggestion at all that a B holder can't enter the voting
15 agreement, grant a proxy. It refers to conversion only
16 with respect to sale of the shares.

17 Let me pause for a moment and respond to
18 the proposition that's been put forward that there are
19 really two issues whether there's a violation of 7(a)
20 versus 7(d). I submit that there is not and that that is
21 entirely a nonissue. In its complaint in this case, in
22 its motion below and in the oral argument below, Omnicare
23 took the position that 7(a) and 7(d) were synonymous that
24 whatever 7(a) prohibited was the same thing that 7(d)



1 converted. At AR 152 in the transcript Omnicare said to
2 the Court below, "To give meaning to the revisions or any
3 interest in 7(a), you should also imply that provision in
4 7(d)."

5 Vice Chancellor Lamb in his opinion took
6 Omnicare's position at face value, harmonized 7(a) and
7 7(d) and, as we know from reading the opinion, determined
8 that transfers of interest that were less than full
9 equitable ownership were prohibited but only if they
10 involved a substantial part of the total ownership
11 interest associated with the (inaudible) in question.
12 And he went on to hold that the voting agreement did not
13 transfer either an interest and certainly not a
14 substantial part of an interest.

15 In this Court Omnicare is doing a 180.
16 That should be very clear to all of us. Now it is saying
17 no, there are some things that might be prohibited under
18 7(a) but not converted under 7(d). I think besides being
19 a nonissue -- the reason I say that it's a nonissue is
20 that I submit that it's clear as a bell that however you
21 read the two sections, together or apart, it's not the
22 transfer of the shares, clearly not. That's not even
23 argued anymore. It was argued below. It's not the
24 transfer of a substantial part of the total ownership



1 interest in the shares. I think the Court's decision
2 below is just demolishing on that. And I would submit,
3 as the Court below also held in several places, it's not
4 the transfer of an interest at all.

5 One final point. I would submit that there
6 is no fiduciary overlay to the question of how to read
7 this charter. There is not one word in the charter and
8 there was no record adduced by Omnicare, notwithstanding
9 they took everyone's deposition, that it would be even
10 conceivable to say that Omnicare -- that the purpose of
11 this charter was that Outcalt and Shaw or any other
12 B holders should be obliged to remain free to vote for a
13 substantively higher deal. Omnicare never argued that
14 below.

15 The only argument that Omnicare made below
16 as to purpose was to say that the provisions of this
17 charter were intended to protect the A holders by
18 eliminating the possibilities that the B shares could be
19 transferred to someone, literally sold to someone, and
20 the B holders keep their premium all for themselves. And
21 they argue below that Outcalt and Shaw had actually done
22 that because they argued that there were payments that
23 Outcalt and Shaw were receiving other than the merger
24 consideration and that fed into that theory.



1 That argument was demolished as a factual
2 matter below. It's abandoned on this appeal. But the
3 fact that it's abandoned I would submit proves to us
4 fairly well that there is no underlying purpose of this
5 charter that can be identified that supports the reading
6 that Omnicare is advancing. If there is a connection at
7 all to the fiduciary appeal that was argued this morning,
8 I think it's an irony and it's a great irony.

9 The irony is that now you have Omnicare
10 coming in to this Court in an effort to construct an
11 argument that the NCS charter prohibits voting
12 agreements. I submit a thoroughly frivolous argument,
13 but that's their basic position. The irony is that if
14 the charter had prohibited voting agreements, Genesis
15 would never have made a bid in the first place. That's
16 the record and that's clear as a bell. And if Genesis
17 had never made a bid in the first place, neither would
18 Omnicare have come forward with even one penny for the
19 equity. That's the record and that's not been disputed
20 by anything said here this morning.

21 But the concluding point is with respect to
22 the charter issue, certainly, and I'm not going to
23 overstep into the fiduciary issue that was argued this
24 morning, but no matter how much Omnicare is offering now,



35
1 whether it's \$3.50, \$4, \$5, or \$10, it doesn't change the
2 words in the page of the charter. It cannot make the
3 words "no voting agreements" magically appear, and I
4 would submit that it cannot overrule well-settled rules
5 of construction that require that transfer restrictions
6 be narrowly construed.

7 I submit that the decision of the Court
8 below should be affirmed.

9 CHIEF JUSTICE VEASEY: Thank you,
10 Mr. Mirvis. On the standing argument, is that now moot,
11 in your opinion?

12 MR. MIRVIS: I don't think it's literally
13 moot, and Mr. Welch will address it. I think as a
14 practical matter it's moot. There never were arguments
15 made on a fiduciary level by Omnicare that weren't
16 addressed and pressed by the stockholder plaintiffs. I
17 hesitate to say it's literally moot because I suppose
18 it -- I'm sorry.

19 CHIEF JUSTICE VEASEY: Finish your
20 sentence.

21 MR. MIRVIS: I suppose it is conceivable
22 that Omnicare could take the position that, if its claims
23 were reinstated and the Genesis-NCS merger closed, it
24 could continue to pursue a damage remedy on a fiduciary



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1 theory. It's a wild idea, but I don't foreclose
2 anything.

3 CHIEF JUSTICE VEASEY: Thank you.

4 Mr. Welch?

5 MR. WELCH: Mr. Chief Justice. Again, may
6 it please the Court. I have in mind addressing the
7 standing motion very briefly.

8 Our motion below was fairly basic.
9 Omnicare has tried to buy itself a lawsuit. It was not a
10 shareholder at the time of the events it complains about.
11 When we looked at the case law, it seemed to us to be
12 very clear if you're going to complain about breach of
13 fiduciary duty, you have to be owed a breach-of-fiduciary
14 duty. Omnicare was not owed anything. It complains
15 about events that occurred on July the 26th and July the
16 28th and events which are derivative of those dates. Its
17 stock, by its admission in its brief, was not purchased
18 until the 30th.

19 Now, the reasoning of the Court below I
20 think was consistent with what we have been seeing in the
21 cases now for years. If you're going to claim breach of
22 fiduciary duty, you have to have been a person to whom
23 fiduciary duties were owed.

24 This Court's decisions have also been



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1 consistent with that principle. We know that directors
2 owe fiduciary duties, care, loyalty, and good faith to
3 stockholders, but under *Anadarko*, they don't owe them to
4 future stockholders. In the decision in *Leeward* the
5 Court below is to the same effect. You owe fiduciary
6 duties to stockholders. You don't owe fiduciary duties
7 to persons who are not or might become such in the
8 future.

9 That's been consistently applied in the
10 bidder context. There's a whole host of cases. The
11 *U-Haul* case, the *Tate Lyle* case. The bidder had 5 to
12 10 percent of the stock. In *McAnders* the bidder had
13 30,000 shares of stock. The *GM Sub* case, the Court took
14 pains to note that the bidder was a substantial
15 stockholder --

16 CHIEF JUSTICE VEASEY: Well, Mr. Welch, we
17 heard a lot of arguments this morning from stockholders
18 with standing, right?

19 MR. WELCH: Yes, sir, we did, Your Honor.

20 CHIEF JUSTICE VEASEY: Do we need to reach
21 this point?

22 MR. WELCH: In my judgment, Your Honor, I
23 think the answer to that is no. We're here because
24 Omnicare pressed an appeal on this issue and we feel



1 compelled to respond. I do not think that the Court has
2 to address this issue. If it does, I think the reasoning
3 of the Court below is powerful. It was consistent with
4 all the cases. It just makes perfect sense. It makes
5 common sense and obviously applies the profoundly
6 common-sense principle that buying a lawsuit is not
7 something that that Court or this Court wants to
8 consider.

9 CHIEF JUSTICE VEASEY: Thank you.

10 MR. WELCH: Your Honor, I would just make
11 two or three other quick points.

12 First of all, the principle is consistent
13 with the *Beatrice* opinion that this Court decided some
14 years ago. In other words, one challenging a merger has
15 to be a stockholder at the time of the merger. They're
16 essentially challenging a merger agreement I should say.
17 By that I mean you have to be a stockholder at the time
18 the merger agreement terms were approved.

19 They raise a continuing wrong theory. It
20 simply doesn't work. First of all, it was not raised
21 below. We make that clear. We explain in our brief why
22 that was the case. It wasn't covered in their brief.
23 Wasn't covered in their argument until the very end.

24 The most important thing, though, is when



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1 did the acts occur. And under the continuing wrong
 2 theory *Beatrice* is powerful on that point, and I don't
 3 think I have to say anything more about it. Everything
 4 they complain about here, everything, was a consequence
 5 of what took place on July 28th in its continuing wrong
 6 theory. For that reason as well, as a matter of common
 7 sense, just doesn't work.

8 They rely on upon two cases. The *Levine*
 9 case, which was a 1956 decision by the Court of Chancery.
 10 The law has come a very, very long way since then. We
 11 had *Beatrice* decided by this Court which effectively
 12 overrules *Levine*. So does the *Brown* case. *Alabama*
 13 *Byproducts*, that was an appraisal case. The Court took
 14 pains to point out, of course, you didn't have to be a
 15 stockholder, a continuing stockholder at the time. You
 16 were a creditor as such under the statutory scheme there.

17 I would conclude by saying that standing is
 18 important. It's the device that the courts use, I think,
 19 to maintain integrity of the process. Even if it's a
 20 small stockholder's interest, it still is what holds the
 21 integrity of the process together. Where would it stop?
 22 What about a community activist? Community activists are
 23 motivated. A lot of them are well-financed. They have a
 24 huge interest. It simply doesn't make sense. If the



1 decision of the Court below is correct, if you're going
2 to sue for breach of fiduciary duty, you should be owed a
3 fiduciary duty as of the time of the events complained
4 of.

5 With that I'll conclude.

6 CHIEF JUSTICE VEASEY: Mr. Wolfe?

7 MR. WOLFE: Chief Justice, very briefly.
8 My friend, Mr. Mirvis, eloquent as ever, starting ~~and~~ out by
9 saying you know this charter shouldn't say this. Why
10 does it say this? What we don't hear from the other side
11 is how do you get around what it says? We don't have
12 anything in this record that talks about the purpose for
13 this. We can speculate that there are reasons that
14 compel us to various conclusions about that, but the
15 charter says you can't transfer any interest and it
16 defines beneficial ownership as the power to direct the
17 vote.

18 I don't think there's any dispute that my
19 friends transferred the power to direct the vote, and I
20 don't know what the answer is to that other than the one
21 Mr. Mirvis gave which is this charter shouldn't say this.
22 It does say this. And we think that the voting
23 agreements clearly and the irrevocable proxy clearly
24 violate the restriction.



1 Section 7(c)(5) the Chief Justice asked a
2 question about in connection with. I think that the
3 Court below in its construction of the phrase, commonly
4 understood I thought, "in connection with" stretched that
5 beyond any useful meaning in determining that this voting
6 agreement -- and incidentally, (c)(5) doesn't cover
7 voting agreements. It talks about charters. It doesn't
8 accept voting agreements as it does with respect to
9 proxies.

10 Under the definition of "in connection
11 with," it's hard to imagine any transfer of any voting
12 interest, no matter how remote in time or purpose, from
13 an actual solicitation that would not be deemed to be in
14 connection with a Section 14 solicitation. It would
15 create, I would submit, an exception that would swallow
16 the rule. An exception necessarily recognizes that it
17 does not apply to every proxy or to every transfer, only
18 those given in connection with the Section 14
19 solicitation.

20 We submit that no reasonable investor would
21 have assumed that Section 7(c)(5) would have so broad an
22 application and for that reason alone we suggest that the
23 strained interpretation of the phrase "in connection
24 with" should be rejected under *Kaiser* and *Avatex*.



1 Garrett v. Brown. Garrett v. Brown gives
2 me a headache, and I suspect that former
3 Vice Chancellor Berger probably still has one from having
4 dealt with it. The defendants attempt to elevate its
5 rather narrow and specific finding with respect to a
6 unique shareholders' agreement to the level of a legal
7 doctrine, and I would suggest that that is an exercise in
8 wild oversimplification. The case is of passing
9 interest. It deals with a voting agreement, as I recall,
10 or a stockholders' agreement that like that one appeared
11 to have a broad prohibition with respect to outright
12 sales and more limited nonsale transfers. But the case
13 did not involve the transfer of voting rights, it
14 involved the pledge of shares, and I would suggest that
15 it is impossible to draw the point the defendants would
16 draw from having read the opinion several times.

17 Thank you, Your Honor.

18 CHIEF JUSTICE VEASEY: The Court recognizes
19 the exigencies of time here and will take this case under
20 advisement and render a decision as soon as practicable.

21 (End of tape.)

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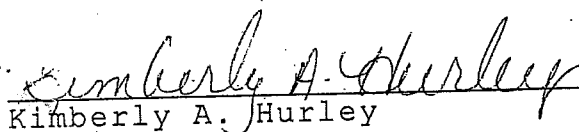
STATE OF DELAWARE)

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NEW CASTLE COUNTY)

I, Kimberly A. Hurley, Registered Merit Reporter and Notary Public, do hereby certify that the foregoing record, pages 1 to 43 inclusive, is a true and accurate transcription of a tape recording of December 10, 2002, in the above-captioned matter before the Supreme Court of the State of Delaware.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31st day of December, 2002, at Wilmington.


Kimberly A. Hurley

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