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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CHIEF JUSTICE VEASEY: Mr. Wolfe?

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

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

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

The first issued on October 25, 2002, dismissed several of the counts of that complaint on the grounds that Omnicare acquired its NCS shares on the date following the execution of the Genesis merger agreement and, therefore, was without standing to assert a variety of individual fiduciary-duty claims relating to the ensuing series of actions of the NCS board to thwart Omnicare's considerably richer tender offer and to preclude it from reaching the stockholders of NCS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WOLFE: It's not consistent with the purposes of the charter. I would concede that it's consistent with the purposes of the voting agreement, no question. But I think that the stockholders who bought shares at a public offering of NCS had reason to believe that this kind of transaction, the one represented by the voting agreement, would not take place.

JUSTICE (unable to tell from tape): Mr. Wolfe, I'm a little confused by your reference to transfer of an exercise of discretion. This agreement didn't call for Genesis to cast a vote in whichever way Genesis thought in its discretion was appropriate, did it? The two shareholders said, just as if they might have voted, we're entering into this agreement committing to vote this way. That is the exercise of discretion. And the fact that Genesis might cast the ballot for them is more implementation of the shareholders' exercise of discretion than a transfer of an exercise of discretion. Isn't it?

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

Perhaps that argument would have greater purchase, it seems to me, if it were not for the fact that this voting agreement is so clearly designed to go beyond the specific transaction that's going to be placed before the shareholders shortly. And it doesn't say who has that discretion, but I must assume that Genesis, as the holder of the irrevocable and unconditional proxy, in fact has the discretion to decide, for example, what transaction, what other transaction might, and I don't mean just a tender offer, impede or delay or put off or interfere with the Genesis merger, and, as I've said, there are a whole list of other possibilities that this company, particularly a company in financial straits, might desire to do under the circumstances. Frankly, that's up to Genesis.

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

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

JUSTICE WALSH: Yes.

MR. WOLFE: Would those shares be voted for? If Your Honors were to uphold the voting agreement, I suspect they would, yes, but it would not be necessarily a result of the exercise of the discretion of Outcalt and Shaw. It would be a contractual obligation. And we think for the same reason that the voting agreements would be invalid in that circumstance, too. But Your Honor's question was premised upon the assumption that the voting agreements were valid.

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

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

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

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

Now, perhaps, Your Honor, maybe --

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

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

JUSTICE WALSH: So they are linked?

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

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

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

MR. WOLFE: Other than the ones we set

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

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

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

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

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

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

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

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

Thank you, Your Honors.

CHIEF JUSTICE VEASEY: Thank you, Mr. Wolfe.

Mr. Mirvis?

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

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

The key is to vote for the merger agreement. If anyone was drafting a charter, I submit, intending to prohibit a voting agreement, wouldn't the simple way to do that be simply to say no voting agreement? What conceivable draftsperson, anyone in this room, who intended to prohibit voting agreements if they wanted to require the B holders to remain free and flexible to change their mind at any point if something else came down the road, what conceivable draftsperson would try to accomplish that objective by using standard transfer restrictions under 202 of the statute against the transfer of the shares and just add in the words which Mr. Wolfe said earlier, the key to his argument, the words "or any interest."

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

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

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

The cases that say any deprivation of stockholder rights expressly granted by the statute and, of course, the right to enter into a voting agreement is expressly granted by 218, and the right to grant a proxy including an irrevocable proxy is granted in 212. The cases say that, if you're going to deprive stockholders of those statutorily granted rights, the language has to be clear and convincing and the words have to be certain and unambiguous.

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

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

There was the 1986 decision in *Garrett v. Brown*, including this Court's affirmance which dealt precisely with the very same words "or any interest," and the earlier decisions in *Chilson* and *Brady*. Those cases made crystal clear that voting agreements are not a transfer of any interest in the shares, that voting agreements simply imposes a contractual obligation on the stockholder, that a voting agreement is the exercise of voting power, not a transfer of an interest in the shares.

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

Garrett v. Brown, the stockholder agreement in *Garrett v. Brown* prohibited the transfer of shares or any interest therein. Precisely the words in this charter. And the Chancery Court held and this Court affirmed that a stockholder's contractual commitment to a third party to vote on a certain matter, a voting agreement, was not a transfer. The Court noted that the stockholder's agreement, the parallel to the charter here, does not limit the stockholder's agreement to vote their shares as they see fit, just as certainly this charter does not prohibit Mr. Outcalt and Shaw from making decisions with respect to their vote as they see fit. And the Court held in two sentences that the revisions as to the manner in which (inaudible) were voted stock cannot reasonably construe to constitute a transfer, it would be inappropriate to read the definition of "transfer" to include a voting agreement. It took the Court all of two sentences because that's how clear it was.

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

And the question indeed is not -- it really isn't whether *Garrett v. Brown* is correctly decided. I submit that it was and there's no argument to the contrary. The point is that the drafters of the charter used the same words, "or any interest," and they could not possibly have intended to prohibit voting agreements when the Delaware courts had said before that these words do not prohibit voting agreements.

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

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

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

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

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

Brady, but the charter didn't do that.

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

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

MR. MIRVIS: This proxy was given, the proxy that's in the voting agreement indeed was given, as the Court below found, in connection with a solicitation of proxies under Section 14 of the act. The B shares, of course, are not registered under Section 14, but as the Court indicated, you can't read these words to mean that they only apply to B shares that are registered under Section 14 because they never have been, they never were contemplated to be. Indeed, they can't be transferred. They were never suitable for public trading. They never would have been registered under the Exchange Act.

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

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

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

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

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

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

One word perhaps on the beneficial ownership argument that has been made. Genesis does not possess the power to direct a director to vote the shares. It is subject to a contract. A proxyholder does not possess the power to vote a direct of shares. The statute puts it that a proxyholder acts for such stockholder. Indeed, below, and it's in the record here at AR 160, Omnicare concedes that a proxyholder is not a beneficial owner. Wholly apart from the point made by the Court below that Section 7(e) only -- I'm sorry. The definition of 7(g) only ties into the definition in 7(e) of beneficial ownership which has the effect under the charter of giving you the right, the right, to have the shares registered in your name.

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

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

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

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

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

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

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

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

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

Let me pause for a moment and respond to the proposition that's been put forward that there are really two issues whether there's a violation of 7(a) versus 7(d). I submit that there is not and that that is entirely a nonissue. In its complaint in this case, in its motion below and in the oral argument below, Omnicare took the position that 7(a) and 7(d) were synonymous that whatever 7(a) prohibited was the same thing that 7(d) converted. At AR 152 in the transcript Omnicare said to the Court below, "To give meaning to the revisions or any interest in 7(a), you should also imply that provision in 7(d)."

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

In this Court Omnicare is doing a 180. That should be very clear to all of us. Now it is saying no, there are some things that might be prohibited under 7(a) but not converted under 7(d). I think besides being a nonissue -- the reason I say that it's a nonissue is that I submit that it's clear as a bell that however you read the two sections, together or apart, it's not the transfer of the shares, clearly not. That's not even argued anymore. It was argued below. It's not the transfer of a substantial part of the total ownership interest in the shares. I think the Court's decision below is just demolishing on that. And I would submit, as the Court below also held in several places, it's not the transfer of an interest at all.

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

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

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

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

But the concluding point is with respect to the charter issue, certainly, and I'm not going to overstep into the fiduciary issue that was argued this morning, but no matter how much Omnicare is offering now, whether it's $3.50, $4, $5, or $10, it doesn't change the words in the page of the charter. It cannot make the words "no voting agreements" magically appear, and I would submit that it cannot overrule well-settled rules of construction that require that transfer restrictions be narrowly construed.

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

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

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

CHIEF JUSTICE VEASEY: Finish your sentence.

MR. MIRVIS: I suppose it is conceivable that Omnicare could take the position that, if its claims were reinstated and the Genesis-NCS merger closed, it could continue to pursue a damage remedy on a fiduciary theory. It's a wild idea, but I don't foreclose anything.

CHIEF JUSTICE VEASEY: Thank you.

Mr. Welch?

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

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

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

This Court's decisions have also been

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

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

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

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

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

MR. WELCH: In my judgment, Your Honor, I think the answer to that is no. We're here because Omnicare pressed an appeal on this issue and we feel compelled to respond. I do not think that the Court has to address this issue. If it does, I think the reasoning of the Court below is powerful. It was consistent with all the cases. It just makes perfect sense. It makes common sense and obviously applies the profoundly common-sense principle that buying a lawsuit is not something that that Court or this Court wants to consider.

CHIEF JUSTICE VEASEY: Thank you.

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

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

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

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

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

I would conclude by saying that standing is important. It's the device that the courts use, I think, to maintain integrity of the process. Even if it's a small stockholder's interest, it still is what holds the integrity of the process together. Where would it stop? What about a community activist? Community activists are motivated. A lot of them are well-financed. They have a huge interest. It simply doesn't make sense. If the decision of the Court below is correct, if you're going to sue for breach of fiduciary duty, you should be owed a fiduciary duty as of the time of the events complained of.

With that I'll conclude.

CHIEF JUSTICE VEASEY: Mr. Wolfe?

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

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

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

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

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

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

Thank you, Your Honor.

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

(End of tape.)

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CERTIFICATE

STATE OF DELAWARE)
)
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

Kimberly A. Hurley

Certification No. 126-RPR
(Expires January 31, 2005)

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