draft
3/26

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

IN RE NCS HEALTHCARE, INC. SHAREHOLDERS LITIGATION	)	CONSOLIDATED
	)	C.A. No. 19786

MEMORANDUM OF OMNICARE, INC. AND NCS HEALTHCARE, INC. IN OPPOSITION TO PLAINTIFFS' FEE APPLICATION

POTTER ANDERSON & CORROON LLP
Donald J. Wolfe, Jr.
Kevin R. Shannon
Michael A. Pittenger
John M. Seaman
Hercules Plaza
1313 N. Market Street
P. O. Box 951
Wilmington, DE 19899
(302) 984-6000

Attorneys for Omnicare, Inc. and NCS HealthCare, Inc.

Of Counsel:

Robert C. Myers
James P. Smith III
Erick M. Sandler
DEWEY BALLANTINE LLP
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000

March 26, 2003

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Pages

Pages

Other Authorities

PRELIMINARY STATEMENT

Omnicare Inc. ("Omnicare") and NCS HealthCare, Inc. ("NCS") respectfully submit this memorandum in opposition to Plaintiffs' application for an award of $13.5 million in attorneys' fees and expenses. The fee request is excessive on a percentage of recovery basis when compared with other Delaware cases involving large common funds. Moreover, the fee request is unreasonable under the *Sugarland* factors established by the Delaware Supreme Court and from a *quantum meruit* standpoint.

One point should be made at the outset: Omnicare respects and is grateful for the efforts of Plaintiffs' counsel. They worked hard to help achieve a superb result and, without their efforts, stockholders of NCS would likely have been relegated to an inferior stock-for-stock merger with Genesis Health Ventures, Inc. ("Genesis").

For their contributions, Plaintiffs' counsel deserve to be rewarded, but not to the extent of $13.5 million. Omnicare and NCS submit that, for the following reasons, a reasonable and generous award would be $3.5 million plus expenses:

- Plaintiffs' counsel have grossly overstated the extent to which they are responsible for the ultimate merger price and ignore the at least equally important role of Omnicare and the NCS board of directors ("NCS Board") in creating that fund. Omnicare had offered $3.00 per NCS share in cash prior to the commencement of this litigation, and Omnicare's decision to increase its offer for NCS to $5.50 per share occurred after the Supreme Court's ruling in this case. Although Plaintiffs' victory in this action was a decisive factor in enabling NCS stockholders to take advantage of Omnicare's $5.50 per share cash tender offer, Plaintiffs' counsel had no role in Omnicare's decision to make these offers and no influence on the amount that Omnicare ultimately chose to offer.

- From the outset this was a high value, low cost case for Plaintiffs' counsel. The principal "contingency" that faced Plaintiffs' counsel was how the Delaware courts would rule on the question of whether the NCS Board could

completely "lock up" the Genesis Merger Agreement. Plaintiffs' counsel never faced the prospect that a higher bid might not emerge for NCS.

- Although hotly contested, the central legal issue involved was straightforward. Indeed, a member of this Court had recently published an article analyzing the central issue in this case in the context of existing Delaware precedent. Hon. Vice Chancellor Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919 (2001). This was not a case that involved complex proof, novel legal issues or expert testimony.

- Although the proceedings were expedited, Plaintiffs' counsel received powerful assistance from two law firms representing Omnicare. Plaintiffs will be promptly compensated for their efforts; this is not a case where they will go years without seeing any reward for their efforts.

- Finally, the percentage sought -- 13.5% of the fund, even as Plaintiffs' counsel calculate it (or over $4,000 per hour) -- is wildly in excess of the range of fees typically awarded by this Court in cases of this size. Omnicare and NCS submit that with a common fund of this size, a lower percentage is appropriate, which translates to a more than reasonable hourly rate of approximately $1,000 per hour.

STATEMENT OF FACTS

A. Omnicare Offers To Acquire NCS

Beginning in July 2001, Omnicare entered into a series of discussions with NCS, its advisors and creditors with a view toward acquiring NCS or its assets. Early in the week of July 22, 2002, Omnicare learned that NCS and Genesis might be close to completing a merger agreement. Over the next few days, Omnicare conferred with its advisors and decided to make an offer for NCS that it was confident would be well in excess of any Genesis proposal. Accordingly, on July 26, 2002, Omnicare made an all-cash offer of $3.00 per share to the NCS Board to acquire NCS.

Notwithstanding that generous offer, on July 28, 2002, two days after receiving Omnicare's offer, the NCS Board approved a merger agreement with Genesis (the "Genesis Merger Agreement") pursuant to which NCS stockholders would receive Genesis Common Stock then worth approximately $1.60 per share. In addition, two directors of NCS, Jon Outcalt and Kevin Shaw, who collectively held 65% of the voting power of NCS by reason of their holdings of Class B Common Stock of NCS (having ten votes per share) also entered into certain voting agreements (the "Voting Agreements") with Genesis. The Genesis Merger Agreement and the Voting Agreements were structured to preclude acceptance of any offer made by Omnicare. To achieve this, these agreements:

(1) granted Genesis an irrevocable proxy to vote the shares of Outcalt and Shaw in favor of the Genesis Merger Agreement and against any other proposal;

(2) obligated the NCS Board to convene a stockholders' meeting to vote on the Genesis Merger Agreement, even if the NCS Board withdrew its support for the transaction; and

(3) prohibited the NCS Board from terminating the Genesis Merger Agreement prior to the stockholder vote to approve the merger.

On July 29, 2002, NCS publicly announced its approval of the Genesis Merger Agreement. That same day, Omnicare's C.E.O., Joel Gemunder, sent a letter to the NCS Board expressing disappointment that NCS had refused to consider Omnicare's offer and making explicit that Omnicare's willingness to negotiate quickly and to execute a mutually acceptable definitive merger agreement subject only to confirmatory due diligence. Omnicare made this letter public the day of its release.

On or after July 30, 2002, once the terms of the Genesis Merger Agreement and Omnicare's offer of $3.00 per share were made publicly available, several NCS stockholders filed class actions in this Court against NCS and the NCS Board seeking, *inter alia*, to enjoin the Genesis Merger Agreement. On August 30, 2002, the Court consolidated these actions and Lowey Dannenberg Bemporad & Selinger, P.C. and Beatie and Osborn LLP were appointed Co-Lead Counsel for Plaintiffs. Rosenthal, Monhait, Gross & Goddess, P.A. and Chimicles & Tikellis LLP were designated Co-Liaison Counsel for Plaintiffs.

On August 1, 2002, Omnicare, in furtherance of its efforts to acquire NCS, announced its intention to commence a tender offer for all outstanding shares of NCS common stock and to raise its offer from $3.00 to $3.50 per share. On the same day, Omnicare commenced an action in this Court alleging that the approval of the Genesis Merger Agreement and the Voting Agreements under such circumstances constituted breaches of fiduciary duties on the part of the NCS directors. Thus, without any prompting or input by Plaintiffs or their counsel, by August 1, 2002, Omnicare had issued

a $3.50 per share, all cash offer for NCS, instantly and unilaterally creating a "fund" of approximately $45 million.[1]

Omnicare's tender offer at $3.50 per share commenced on August 8, 2002. On August 12, 2002, Omnicare amended its complaint to allege that the execution of the Voting Agreements resulted in the automatic conversion of Outcalt and Shaw's Class B Common Stock into shares of Class A Common Stock. On August 12, 2002, Omnicare moved to expedite the proceedings; that motion was granted on August 19, 2002. Plaintiffs' motion to expedite was granted a month later on September 12, 2002.

Because of NCS's stated concerns about Omnicare's request for confirmatory due diligence as a condition to entering into a negotiated merger agreement, on October 1, 2002, Omnicare took the unprecedented step of delivering a signed merger agreement to NCS for $3.50 per share in cash, with the only material contingency being the termination of the Genesis Merger Agreement and the Voting Agreements. Plaintiffs and their counsel played no role in Omnicare's decision to deliver the signed merger agreement.

B. The Proceedings In Plaintiffs' And Omnicare's Actions

With their interests strongly aligned, Plaintiffs' counsel coordinated their discovery and other efforts with Omnicare's counsel, Potter Anderson & Corroon LLP and Dewey Ballantine LLP. Bemporad Aff. at ¶¶4,8.[2] While proceedings were expedited, there was ample time to conduct necessary discovery and prepare motion papers. Between September 25, 2002 and November 6, 2002, seventeen depositions,

---

[1] This is calculated as follows: ($3.50 -$1.60) (23,716,809 shares of NCS common stock outstanding) = $45,061,937.10.

[2] Citations to the affidavit of Richard Bemporad in support of Plaintiffs' application for attorneys' fees and expenses are cited as "Bemporad Aff. at ¶__."

twelve of which were taken or defended principally by Omnicare's counsel, were conducted in Ohio, New York City, Boston and Wilmington. A briefing schedule set by this Court on September 16, 2002, gave Omnicare and Plaintiffs until November 3, 2002 to file their opening briefs in support of their motions for a preliminary injunction.

On October 25, 2002, this Court issued a ruling dismissing Omnicare's breach of fiduciary duty claims because Omnicare was not a stockholder of NCS on July 28, 2002, the date on which the NCS Board approved the Genesis Merger Agreement, and that Omnicare therefore lacked standing to pursue such claims. *Omnicare, Inc. v. NCS HealthCare, Inc.*, 809 A.2d 1163 (Del. Ch. 2002) (the "October 25 Order").

Both Omnicare and the Plaintiffs moved for summary judgment on their claims seeking a declaratory judgment that the Voting Agreements between Genesis, NCS and the Director Defendants violated the transfer restrictions in the NCS Amended and Restated Certificate of Incorporation and caused the Class B Common Stock (having ten votes per share) subject to the Voting Agreements to be converted to Class A Common Stock (having one vote per share). Omnicare submitted its motion for summary judgment on September 30, 2002 and the Plaintiffs followed suit on October 2, 2002. On October 29, 2002, the Court denied the motions and granted summary judgment, *sua sponte*, for the defendants. *Omnicare, Inc. v. NCS HealthCare, Inc.*, 2002 WL 31445163 (Del. Ch.) (the "October 29 Order"). On October 30, 2002, Omnicare filed a notice of appeal with the Delaware Supreme Court from both the October 25 and October 29 Orders. The Supreme Court granted Omnicare's request and ordered that the appeal

proceed on an expedited basis in light of the impending vote of NCS stockholders with respect to the Genesis Merger Agreement.[3]

Because of the October 25 and October 29 Orders, Plaintiffs' pursuit of a preliminary injunction against the Genesis Merger Agreement became critically important to Omnicare's ability to acquire NCS. As a result, Omnicare's active participation in this litigation, including its close cooperation with Plaintiffs' counsel, continued, a fact straightforwardly acknowledged by Plaintiffs' counsel. Bemporad Aff. at ¶¶12-14,17.

Plaintiffs' counsel worked in tandem with Omnicare's counsel to have the preliminary injunction opening brief ready for November 3. Bemporad Aff. at ¶12. After defendants served their opposing briefs on November 10, 2002, attorneys for both Omnicare and Plaintiffs contributed to the reply brief submitted on November 13, 2002. Bemporad Aff. at ¶13. At the hearing, the Court invited further briefing on the relative values of the Omnicare offer and the Genesis Merger Agreement. Omnicare's counsel prepared a draft letter memorandum to be submitted by the Plaintiffs to the Court. Bemporad Aff. at ¶14. On November 22, 2002, the Court denied Plaintiffs' motion for a preliminary injunction enjoining the Genesis Merger Agreement and the Voting Agreements. *In re NCS HealthCare, Inc. S'holders Litig.*, 2002 WL 31720732 (Del. Ch.) (the "November 22 Order").

On November 25, 2002, Plaintiffs filed motions in both this Court and the Supreme Court seeking certification of an interlocutory appeal of the November 22 Order. Plaintiffs' counsel accepted the offer from Omnicare's counsel to provide

---

[3] A successful appeal would have "unlocked" the Genesis Merger Agreement since the Voting Agreements would no longer be able to deliver an affirmative vote on the merger.

working drafts of the motions over the November 23-24 weekend. Bemporad Aff. at ¶17. Both this Court and the Supreme Court denied Plaintiffs' motions.

On December 3, 2002, Omnicare's counsel argued its appeals of the October 25 and October 29 Orders before the Supreme Court. After Omnicare's arguments, the Supreme Court was unable to reach a decision and scheduled an *en banc* argument for the next day, December 4, 2002. At the time scheduled for that argument, the Supreme Court announced that it would rescind its earlier refusal to grant Plaintiffs' request for leave to pursue their appeal of the November 22 Order and consolidate it with the pending appeals in the Omnicare action; that it would hear argument *en banc* on each appeal; and that it would enjoin the scheduled meeting of NCS stockholders with respect to the Genesis Merger Agreement in the absence of an agreement of NCS and Genesis to postpone it in order to permit the Supreme Court to rule in advance of that meeting. *Omnicare, Inc. v. NCS HealthCare, Inc.*, Del. Supr., C.A. No. 605, 2002, Veasey, C.J. (Dec. 4, 2002) (ORDER). The Supreme Court ordered supplemental briefing with respect to Plaintiffs' appeal from the November 22 Order and scheduled arguments for each appeal for December 10, 2002. *Id.* NCS and Genesis also agreed to postpone the scheduled meeting of NCS stockholders.

While the Supreme Court's order on December 4 was unexpected, Plaintiffs were well prepared for the expedited briefing and hearing that followed, because Omnicare's counsel had already completed a working draft of the opening brief for the appeal. Omnicare's working draft had in fact been circulated to Plaintiffs' counsel over the November 23-24 weekend when Omnicare and Plaintiffs were hopeful that Plaintiffs' expedited interlocutory appeal of the November 22 Order would be

granted. Bemporad Aff. at ¶20, n.6. And since Omnicare had already submitted its briefs for its appeals of the October 25 and October 29 Orders, its attorneys also helped to finalize the opening brief before the December 6, 2002 submission deadline and assisted with the reply brief submitted on December 9, 2002.

The consolidated appeals were argued before the Supreme Court on December 10, 2002. That same day the Supreme Court, in a 3-2 decision, issued a summary order reversing this Court's denial of the preliminary injunction, holding that the NCS Board had acted unreasonably in approving "deal protection measures" that "irrevocably locked up the [Genesis] [M]erger" and "precluded the directors from exercising their continuing fiduciary obligation to negotiate a sale of the company in the interest of the shareholders." *Omnicare, Inc. v. NCS HealthCare, Inc.*, 2002 WL 31767892 (Del.). The matter was remanded to this Court with directions to enter a preliminary injunction "precluding implementation of the NCS/Genesis merger." *Id.* This Court entered the order on December 11, 2002. The Delaware Supreme Court has not yet issued an opinion explaining its decision.

C. The Post-Opinion Bidding Contest

Shortly after the December 11 Order was issued, a bidding contest ensued at the urging of the NCS Board. Genesis matched Omnicare's $3.50 per share proposal with a stock-for-stock proposal also valued at $3.50 per share. On December 12, 2002, Omnicare increased its Offer to $5.50 per share in cash.

On December 18, 2002, NCS announced that it had terminated the Genesis Merger Agreement and had executed a merger agreement with Omnicare, pursuant to which holders of NCS common stock would be entitled to receive $5.50 per

share in cash. Plaintiffs had no role in the bidding contest which followed this Court's December 11 Order.

D. Plaintiffs' TRO And Fee Application

On December 27, 2002, Plaintiffs filed a complaint and a motion for a temporary restraining order in this Court seeking an order enjoining Omnicare from distributing $13,500,000 of the amount otherwise payable to NCS stockholders and requiring the deposit of this sum into an escrow account pending this Court's determination of Plaintiffs' right to allowance of fees and expenses in connection with this action. On January 2, 2003, this Court granted the TRO and directed that $13,500,000 of the acquisition funds be placed in an escrow account. *Dolphin Ltd. P'ship I L.P. v. NCS Acquisition Corp.*, Del. Ch., C.A. No. 20101, Lamb, V.C. (Jan. 2, 2003) (TRANSCRIPT). This Court made it clear at the time that it was making no determination as to whether the $13,500,000 withheld from NCS stockholders represented an appropriate fee for Plaintiffs' counsel. *Id.* at 30.

Pursuant to a modified Temporary Restraining Order entered by this Court on January 6, 2003 and a letter agreement dated January 5, 2003 between Omnicare and NCS, Omnicare contributed $4,500,000 into the escrow fund; the balance of $9,000,000 was set aside from the funds otherwise payable to NCS stockholders in the tender offer and merger and to holders of "in the money" options to acquire shares of common stock of NCS (the "Stockholder Escrow Amount"). Pursuant to the letter agreement, Omnicare will pay the first $2,500,000 awarded to Plaintiffs' attorneys and an additional 18.18% of any award exceeding that amount up to a maximum of $11,000,000. The Stockholders Escrow Amount will be charged with 81.82% of any award exceeding $2,500,000 up to a maximum of $11,000,000. If the award is less than $13,500,000, the amount remaining

in the escrow fund after payment of the award and expenses shall be distributed to Omnicare and the NCS stockholders in the ratio of 18.18% and 81.82%, respectively, except that, if the amount awarded is less than $2,500,000, Omnicare will receive 100% of the difference between the amount awarded and $2,500,000.

On February 21, 2003, Plaintiffs' counsel submitted their fee application requesting the full $13,500,000 escrow fund be awarded as attorneys' fees. Plaintiffs' counsel contend that they are solely responsible for creating the entire difference between the $1.60 per share price of the Genesis Merger Agreement and the end product of the bidding contest between Omnicare and Genesis, the final $5.50 per share price of the Omnicare offer, a difference they estimate to be $102,000,000 in value to the former stockholders of NCS. Based on their calculation of the common fund claimed to have been created by their efforts, Plaintiffs are requesting that their attorneys receive 13% of the increase in consideration paid by Omnicare to NCS stockholders, or the entire Stockholder Escrow Amount. In their supporting affidavit, Plaintiffs' counsel submit that the law firms involved worked 3,263.99 hours on this case, a figure presumably including work conducted by associates and paralegals, and accumulated $93,967.82 in expenses. Bemporad Aff. at Ex. 4.

ARGUMENT

I. Plaintiffs' Fee Application Is Excessive And Unreasonable By Any Measure

When reviewing an application for attorneys' fees based on the creation of a common fund, the Court must independently determine the reasonableness of the fee. *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1046 (Del. 1996). In determining a reasonable fee, the Court attempts to approximate at what point appropriate incentives for shareholders and their attorneys to bring meritorious lawsuits are produced without also producing a windfall for shareholders' counsel. *Seinfeld v. Coker*, 2000 WL 1800214, at *2-3 (Del. Ch.).

A. Plaintiffs Overstate The Causal Relationship Between The Efforts Of Plaintiffs' Counsel And The Benefits Realized By NCS Stockholders

Omnicare's acquisition of NCS resulted in an increase of approximately $100 million in value to NCS stockholders over and above the consideration payable under the Genesis Merger Agreement. Plaintiffs' counsel, however, mistakenly claim that they are solely (or primarily) responsible for creating *all* of the difference between the $1.60 per share NCS stockholders would have received under the Genesis Merger Agreement and the $5.50 per share ultimately paid by Omnicare. Pls. Br. at 13.[4] As demonstrated below, Delaware courts have consistently required a much stronger causal relationship between a fee applicants' contribution and the size of the common fund than is present here before adopting this simplistic analysis. *See, e.g., In re Digex S'holders Litig.*, Del. Ch., C.A. No. 18336, Chandler, C. (Apr. 6, 2001) (TRANSCRIPT) at 125 (no one party was solely responsible for the entire benefit, even though common fund could

---

[4] Citations to Plaintiffs' Brief in Support of Application for Attorneys' Fees and Expenses are cited as "Pls. Br. at __."

not have been achieved without the plaintiffs' counsel filing and prosecuting the lawsuit); *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *2 (Del. Ch.) (while "but for" the litigation, there would likely have been no benefit to the class at all, plaintiffs' counsel were not the sole cause in creating the benefit).

This was not a situation where plaintiffs sue defendants for compensation for harm done to a class and obtain a judgment or settlement. Rather, this was a fund created by Omnicare and, to some extent, the NCS Board.

1. Plaintiffs' Counsel Had No Role In Launching Omnicare's Pre-Litigation Bid For NCS

On July 26, 2002, before execution of the Genesis Merger Agreement or initiation of any litigation, Omnicare presented the NCS Board with a $3.00 per share all-cash offer. And it was Omnicare that, without any prompting or input from Plaintiffs or their counsel, thereafter decided to launch a $3.50 per share all-cash tender offer for NCS, thereby creating a "fund" of approximately $45 million. This additional value for NCS shareholders was created solely by Omnicare before any significant legal proceedings and completely independent of any actions of Plaintiffs' counsel. Under similar circumstances, this Court has squarely rejected claims by plaintiffs' counsel that they should be credited for the full value created by a bidder's offer made prior to the commencement of litigation. *See In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 359 n.3 (Del. Ch. 1999) (criticizing proposed measure of common fund based on hostile bidder's offer price because "the litigation had nothing to do with [the hostile bidder] making a premium offer"); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 857 (Del. Ch. 1998) ("plaintiffs' counsel can claim no credit for the increased bidding level resulting from [bidder's] pre-lawsuit $72 offer").

2. Plaintiffs Were Not Responsible For Creating The Additional $2.00 Per Share Benefit Resulting From The Post-Litigation Bidding Contest For NCS

After the December 11 Order enjoined the Genesis Merger Agreement, the bidding contest was renewed. After Genesis matched Omnicare's pre-existing $3.50 per share offer, Omnicare increased its offer to $5.50 per share, the price at which a deal was finally struck. While Plaintiffs' counsel contributed to the creation of the opportunity for continued bidding, they had no involvement in or influence over these critical final stages of the battle to acquire NCS and should therefore not be compensated for the $2.00 per share post-litigation increase in Omnicare's offer. *See In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *3 (Del. Ch.) ("what is relevant is the benefit achieved by the litigation, not simply a benefit that, *post hoc ergo procter hoc*, is conferred after the litigation commences"). They were neither solely nor primarily responsible for either (a) the $3.50 fund already in existence at the inception of the litigation, or (b) the $2.00 per share post-litigation increase in Omnicare's offer.

B. The *Sugarland* Factors Do Not Support A Fee Award of $13.5 Million

Delaware courts consider the following factors in determining a reasonable attorneys' fee award in common fund cases: (1) the results accomplished for the benefit of the shareholders; (2) the efforts of counsel and the time spent in connection with the case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel. *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 293 (Del. 2002) (citing *Sugarland Indust., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980)). None of these factors supports the exorbitant fee sought by Plaintiffs' counsel here.

1. The Results Accomplished

The burden is on the Plaintiffs, as proponents of the fee application, to establish the value of the claimed benefit. *In re American Real Estate Partners, L.P. Litig.*, 1997 WL 770718, at *6 (Del. Ch.). As discussed above, while Omnicare's acquisition of NCS resulted in a benefit of approximately $100 million over and above the Genesis Merger Agreement, Plaintiffs' counsel were, at best, only *partly* responsible for the creation of only a *portion* of that total benefit. As noted above, it was in fact *Omnicare* – not Plaintiffs' counsel – that created the initial $3.50 per share fund in the first place. And it was *Omnicare*, along with the NCS Board, that produced the final $5.50 per share acquisition price at the end of the post-litigation Omnicare/Genesis bidding contest.

2. Attorney Time And Effort

a. No Extraordinary Time Or Effort Was Required Here

The 3,263.99 hours logged by the seven law firms representing the Plaintiffs, a number that presumably includes work done by associates and paralegals, is not unusual for litigation of this sort and does not support an attorneys' fee award at the excessive level Plaintiffs request. *Compare Dow Jones*, 1992 WL 44907, at *1 (time expended deemed "adequate" where plaintiffs' counsel worked approximately 3,394 hours challenging tender offer price) *with Smith v. Van Gorkom*, 1985 WL 22040, at *2 (Del. Ch.) (plaintiffs' counsel expended 12,000 hours challenging a cash-out tender offer against the corporation and its officers, plus an additional 4,000 hours prosecuting securities claims in federal court). Further, this action was resolved in a mere four months. Plaintiffs' counsel never faced the prospect that their resources would be tied up for years on end while they investigated and prosecuted their claims without reward. Nor

was there anything unusual about the extent of document discovery or the number and location of depositions taken. The preliminary injunction schedule was straightforward and afforded counsel for both Plaintiffs and Omnicare ample time to prepare and collaborate on their briefs.

b. Plaintiffs And Omnicare Coordinated Their Efforts

As evidenced by Plaintiffs' counsel's affidavit, they substantially benefited from the resources made available to them by Omnicare. *See Robert M. Bass Group, Inc. v. Evans*, 1989 WL 137936, at *4 (Del. Ch.) (plaintiffs' counsel expended 4,000 hours in obtaining two preliminary injunctions but were only awarded $2 million because they worked in conjunction with bidders who "possessed far greater resources ... that better enabled them to carry the burden of the litigation"). The efforts of Plaintiffs' counsel and Omnicare's counsel were coordinated throughout this litigation. Discovery efforts were coordinated with Omnicare's counsel. Twelve of the seventeen depositions, including those of all of the individuals centrally involved in the dispute, were conducted or defended by Omnicare's counsel. Omnicare's counsel took the lead in producing a working draft of the preliminary injunction opening and reply briefs filed in this Court. When the preliminary injunction motion was denied, Plaintiffs received critical assistance from Omnicare's counsel in preparing their appeals over the November 23-24 weekend.

The five-day briefing schedule set by the Supreme Court on December 4 presented Plaintiffs' counsel with perhaps their greatest challenge during the course of this action. Because Omnicare's counsel had previously circulated to Plaintiffs a working draft of the opening brief over the November 23-24 weekend, however, this challenge was significantly mitigated. Bemporad Aff. at ¶20, n.6. By December 4, the appellate brief was ready to go. This advance preparation, and further assistance lent by

Omnicare's counsel over the December 7-8 weekend, alleviated the time pressure Plaintiffs' counsel may have otherwise experienced in preparing for the Supreme Court arguments.[5]

None of this, of course, is to detract in any way from the efforts of Plaintiffs' counsel or to suggest that they are not entitled to a reasonable fee. As Plaintiffs themselves acknowledge, however, this litigation was a combined effort to defeat the Genesis Merger Agreement, with Omnicare's counsel providing substantial assistance at many critical stages. In determining a reasonable fee to compensate Plaintiffs' counsel for their efforts, it is entirely appropriate for the Court to consider the extent of Omnicare's cooperation and the degree to which it eased any burdens placed on Plaintiffs' counsel during the course of this litigation.

3. The Contingent Nature Of The Fee

On the very day on which the shareholder action was commenced, the common fund - reflecting the additional value that would be paid to NCS stockholders under the Omnicare offer - had already been created. As a result, Plaintiffs knew that, if they were successful, they stood to recover at least the difference between the $1.60 per share Genesis proposal and Omnicare's outstanding offer of $3.50 per share in cash, the value of their claim the day they filed suit. The sole contingency they faced was the determination of a rather discrete legal issue framed by the NCS Board's undisputed lock-up of the Genesis Merger Agreement.

---

[5] Therefore, to the extent that Plaintiffs' counsel merit enhanced compensation by reason of the expedited nature of the appellate proceedings, a smaller premium than that requested by Plaintiffs is appropriate. *See Digex*, Tr. at 126 (noting that premiums for attorney billing rates in expedited matters can range from 50 percent to 400 percent *in exceptional circumstances*) (emphasis added).

This was a case that "teed up" an important, if controversial, legal issue; there was no risk that the litigation would become protracted or unusually costly or that in the event Plaintiffs were successful, Plaintiffs' counsel would not be fairly and promptly compensated. In other words, this was most decidedly *not* a case in which "plaintiffs faced a serious risk that their hard fought victory would be a hollow one." *See Smith*, 1985 WL 22040, at *2. To the contrary, from inception, it was a low-risk, high-yield case.

Plaintiffs' counsel were presented with a ready-to-litigate claim in their primary area of expertise that not only had the potential for a high pay-off, but could be litigated at a relatively low cost. The purpose of a fee award is to create the proper incentives to encourage meritorious suits. *See Seinfeld*, 2000 WL 1800214, at *5. Here, there is simply no reason to compensate Plaintiffs' counsel at the exorbitant rate they have proposed.

4. The Difficulty Of The Litigation

As discussed above, Plaintiffs' counsel were already very familiar with the corpus of Delaware law on fiduciary duties owed by corporate boards to their stockholders and have extensive experience litigating in this area. Nor was there any need for expert testimony or technical analysis in this case. The legal arguments, as noted, were straightforward. And while the outcome may have been uncertain, it was ultimately a "thumbs-up or thumbs-down" determination for the courts on the permissibility of this particular brand of lock-up.

Plaintiffs' counsel did not have to engage in any intensive factual investigation to uncover the core facts at issue. The Genesis Merger Agreement and the Omnicare offer could be laid side-by-side and compared, and the underlying actions of

the NCS Board in analyzing, accepting or rejecting those offers were not in dispute. And nothing about the structure of these two competing transactions was particularly complex or required sophisticated analysis to discern the value they offered to NCS stockholders. *See In re QVC, Inc. S'holders Litig.*, 1997 WL 67839, at *3 (Del. Ch.) (case involved analysis of no more than two different transactions and two revised proposals, and "[t]here seems nothing particularly complicated about the mechanics of either"). In sum, this was a significant case, but not one that was particularly difficult to analyze or present for decision.

5. The Standing And Ability Of Counsel

There can be no question of the high standing of Plaintiffs' counsel in this Court, their ability or their handling of these proceedings.

II. Plaintiffs' Fee Application Exceeds By Orders of Magnitude What the Courts Of This State Have Deemed Reasonable In "Megafund" Cases Such As This One

By any measure - whether expressed in terms of its absolute value, as a percentage of the benefit to NCS stockholders, or translated into an hourly rate and viewed from a *quantum meruit* perspective - Plaintiffs' request for $13.5 million is excessive and unreasonable. The requested fee would dwarf - in absolute dollars - the $5 million fee awarded in *Dow Jones*, where a $95 million common fund was involved, *Dow Jones*, 1992 WL 44907, and top the fee awarded in *Digex*, where plaintiffs' counsel produced not only a *$165 million* settlement fund, but also created benefits in the form of various commercial agreements between Digex and WorldCom that may have enriched Digex stockholders by over *$400 million*. *Digex*, Tr. at 133. In settling on a $12.3 million fee award in *Digex*, Chancellor Chandler noted that the willingness of plaintiffs'

counsel not to apply the percentage awarded against this additional $400 million benefit contributed to the reasonableness of the otherwise high *7.5 percent* award. *Id.*

Here, even by their own calculation, Plaintiffs' counsel are requesting a whopping *13 percent* of the benefit they claim to have created. A 13 percent award is itself clearly excessive in a "megafund" case like this one (*see infra*). But the actual percentage represented by the $13.5 million Plaintiffs' counsel have requested, based on the size of the benefit *actually* attributable to Plaintiffs' efforts, would be much higher, since Plaintiffs' counsel cannot possibly claim credit for the full additional $100 million paid by Omnicare to NCS stockholders.

The fee awards Plaintiffs cite to support the reasonableness of their request in this case involve much smaller recoveries and, accordingly, provide little guidance here. *See In re Intek Global Corp. S'holders Litig.*, Del. Ch., Cons. C.A. No. 17207, Strine, V.C. (Apr. 24, 2000) (ORDER) (33% of $4.3 million); *In re Corporate Software, Inc. S'holders Litig.*, Del. Ch., C.A. No. 13209, Allen, C. (Nov. 15, 1994) (ORDER) (30% of $1.1 million); *In re USACafes L.P. Litig.*, Del. Ch., C.A. No. 11146, Jacobs, C. (June 22, 1994) (ORDER) (33% of $2.1 million); *Braunschweiger v. American Home Shield Corp.*, Del. Ch., C.A. No. 10755, Allen, C. (July 27, 1992) (ORDER) (30% of $2.7 million); *Weigand v. Berry Petroleum Co.*, Del. Ch., C.A. No. 9316, Jacobs, V.C. (Nov. 25, 1991) (ORDER) (30% of $5 million).

Delaware (and other) courts quite appropriately apply a sliding-scale approach to fee awards pursuant to which, as the size of the common fund increases, the size of the percentage of the overall benefit achieved decreases. *See Goodrich*, 681 A.2d at 1048; *Digex*, Tr. at 129; *Seinfeld*, 2000 WL 1800214, at *5; *In re. North Am. Philips*

S'holders Litig., 1987 WL 28434, at *4 (Del. Ch.); *accord In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 736 (3d Cir. 2001). Application of a declining percentage in multimillion dollar "megafund" cases such as this one is consistent with the concept of reasonableness that guides all fee award determinations, as it recognizes that beyond a certain point, the effort and risk required to produce a higher or incremental benefit do not normally increase in proportion to the increase in the benefit itself. *Fox v. Chase Manhattan Corp.*, 1986 WL 673, at *4 (Del. Ch.). An award that, based on Plaintiffs' calculation, amounts to 13 percent of a $100 million fund would be well outside the parameters of typical fee awards in megafund cases like this one.

Applicable precedent indicates that the appropriate percentage to apply to the common fund is between three and seven percent. *See, e.g., Digex*, Tr. at 130 (noting that the typical common fund percentage fee awarded is in the range of 3-7%); *Dow Jones*, 1992 WL 44907 (awarding a fee of 5.3% of a $95 million common fund). Accordingly, Omnicare and NCS submit that $3.5 million plus expenses should be awarded in this case. First, a substantial portion of the $100 million benefit realized by NCS stockholders cannot be attributed to this litigation. Second, even that portion attributable to this litigation is not solely attributable to the efforts of Plaintiffs' counsel. Thus, although the total increase in consideration paid by Omnicare to NCS stockholders was approximately $100 million, Plaintiffs' counsel cannot possibly claim credit for that entire amount. Giving them generous credit for three-fifths of that amount, or $60 million, a $3.5 million award (plus expenses) would amount to 5.8%, falling squarely within the appropriate percentage range established for common fund cases.

Finally, while the hourly rate produced by a fee award may not be determinative of its reasonableness, it is nevertheless a useful cross-check to ensure that the award produces the appropriate level of incentives. *See Digex*, Tr. at 130; *Seinfeld*, 2000 WL 1800214, at *6 (award amounting to about $1,300 per hour "more than offsets the opportunity costs of plaintiffs' counsel"). Indeed, here, given the difficulty in determining the exact percentage of the fund attributable to the litigation, and the exact percentage of the litigation benefit attributable to Plaintiffs' counsel's efforts, a *quantum meruit* approach may be appropriate to determine a proper fee award. Plaintiffs' fee request here would lead to an award equating to more than *$4,100 an hour* (for time that presumably was not limited to partners but included associates and legal assistants as well). That is wholly excessive and unsupportable based on the factors discussed above. Omnicare and NCS respectfully submit that an award of $3.5 million plus expenses, which would equate to an hourly rate of over $1,000 per hour, would be appropriate. *See First Interstate Bancorp,* 756 A.2d at 363 (applying *quantum meruit* approach to award $1.75 million for 2,928 hours worked); *United Vanguard Fund,* 727 A.2d at 857 (applying *quantum meruit* approach to award $602,097 based on hours worked); *Robert M. Bass Group*, 1989 WL 137936, at *4 (applying *quantum meruit* approach to award $2 million for 4,000 hours worked).

CONCLUSION

For all of the foregoing reasons, Omnicare and NCS respectfully request that the Court enter an order awarding plaintiffs' counsel fees in an amount not exceeding $3.5 million plus expenses.

POTTER ANDERSON & CORROON LLP

By _____

Donald J. Wolfe, Jr.
Kevin R. Shannon
Michael A. Pittenger
John M. Seaman
Hercules Plaza
1313 N. Market Street
P. O. Box 951
Wilmington, DE 19899
(302) 984-6000

Attorneys for Omnicare, Inc. and NCS HealthCare, Inc.

Of Counsel:

Robert C. Myers
James P. Smith III
Erick M. Sandler
DEWEY BALLANTINE LLP
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000

March 26, 2003

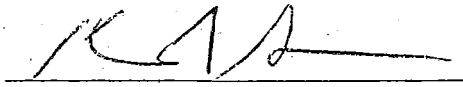
CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2003, I caused two copies of the foregoing document to be served by hand delivery upon the following counsel of record:

Joseph A. Rosenthal, Esquire
Rosenthal, Monhait, Gross & Goddess, P.A.
919 North Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899

Robert J. Kriner, Jr., Esquire
Chimicles & Tikellis LLP
One Rodney Square
P.O. Box 1035
Wilmington, DE 19899

Edward P. Welch, Esquire
Skadden Arps Slate Meagher & Flom LLP
One Rodney Square
P.O. Box 636
Wilmington, DE 19899



Kevin R. Shannon