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

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

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

Defendants NCS Healthcare, Inc. ("NCS"), and Boake A. Sells and Richard L. Osborne (the "Independent Individual Defendants") (collectively, the "NCS Defendants") respectfully submit this memorandum in opposition to Omnicare, Inc.'s ("Omnicare") Motion to Compel Production of Unredacted Minutes of Meetings of the NCS Board of Directors and Special Committee ("Omnicare's Motion").

BACKGROUND[1]

A. Factual Background

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

Part of the two-year process also involved failed discussions with Omnicare about proposals Omnicare made to purchase NCS's assets under Section 363 of the United States Bankruptcy Code at scavenger prices. Not once in those discussions did Omnicare step forward with a merger proposal that would have resulted in any recovery for NCS shareholders.[2] Late in the business day on July 26, 2002 – after not

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1 The NCS Defendants reject the description of factual and procedural history in Omnicare's motion and rely, instead, on the descriptions herein.

2 For this reason, Omnicare's contention that "NCS knew prior to signing the Genesis Merger Agreement that Omnicare had been expressing strong interest in acquiring NCS since July 2001" (Omnicare's Motion at 1) is misleading.

communicating directly with NCS for almost five months – Omnicare sent NCS a highly conditional indication of interest in acquiring NCS at $3.00 per share in cash.[3] Among other things, Omnicare's expression of interest was conditioned upon expedited due diligence of NCS.

On July 28, 2002, the NCS Board approved the NCS-Genesis Merger. The next morning, on July 29, Omnicare repeated its indication of interest to acquire NCS for $3.00 per share in cash. Again, this expression of interest was conditioned upon completion of due diligence. Thereafter, on August 8, 2002, Omnicare launched an unsolicited tender offer for all outstanding NCS shares for $3.50 per share in cash (the "Tender Offer") by filing with the Securities and Exchange Commission ("SEC") a Tender Offer Statement on Schedule TO, including the offer to purchase, dated August 8, 2002, that forms a part thereof (the "Offer to Purchase"). The Tender Offer contains numerous conditions that cannot possibly be satisfied in light of NCS's binding contractual obligations with Genesis.

On August 19, 2002, the NCS Board met to consider Omnicare's Tender Offer. Among other things, the NCS Board considered that because Omnicare continued to make its various NCS proposals conditional on due diligence and numerous other conditions, these proposals were not likely to lead to a "Superior Proposal" (as defined in

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[3] Even Omnicare admits in its motion that its July 26 letter expressed nothing more than an "offer to negotiate." (Omnicare's Motion at 2)

the NCS-Genesis Merger Agreement). This decision was memorialized in NCS's 14D-9 on August 20, 2002.

Thereafter, on August 29, NCS and Genesis filed the Form S-4, which, among other things, provides a subject matter description of legal counsel's discussions with the NCS Board at the July 28 meeting concerning the NCS-Genesis Merger Agreement and other publicly available transactional documents. (Ex. A)

B. Procedural Background

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

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

Omnicare's refusal to produce responsive documents did not end there. Indeed, upon further review of Omnicare's production, the NCS Defendants also determined that Omnicare failed to produce responsive documents pertaining to a number of

other key allegations in their Amended Complaint. Accordingly, the NCS Defendants wrote Omnicare and requested those documents so they would not be forced to file a second motion to compel. Ultimately, Omnicare capitulated and produced on Saturday, September 7, more than 4,100 additional responsive documents that it had failed to produce by the August 31 deadline. Omnicare also produced approximately 3,000 additional responsive documents on September 11. In total, Omnicare has produced substantially more responsive documents after the August 31 deadline (about 7,100 documents) than before the deadline (about 5,400 documents).[4]

As for the instant motion, the NCS Defendants made every effort to produce responsive board minutes by the August 31 deadline, see, e.g., NCS 00765-767 (Ex. B); NCS 00768-770 (Ex. C), and produced additional responsive board minutes to Omnicare as soon as they were received by counsel.[5] Before producing those minutes, counsel for the NCS Defendants carefully reviewed them, and redacted any privileged or

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[4] And as explained in the NCS Defendants' other pending motions to compel, Omnicare: (1) continues to withhold almost 200 documents under the "business strategy" privilege (despite being the bidder, and despite the majority of those documents being dated prior to 2002); and (2) has waived its attorney client privilege in connection with communications regarding its proposed NCS transactions.

[5] As the NCS Defendants explained to Omnicare's local counsel, additional minutes were not produced until September 3 – the Tuesday following Labor Day weekend – due to a holiday delay experienced by the NCS Defendants' carrier (as well as by Omnicare's own local counsel). (See Ex. D, September 5, 2002 letter from Edward B. Micheletti to David F. Owens)

non-responsive information from the copies that were ultimately produced. The obvious intention of those redactions was to preserve, where necessary, the attorney-client privilege, and to ensure that no extraneous, non-responsive information was disclosed to Omnicare, NCS's largest direct competitor.

On September 6, counsel for Omnicare wrote counsel for NCS, contending that the NCS Defendants had waived their attorney-client privilege by disclosing in the Form S-4 subject matter descriptions of the publicly disclosed Genesis agreements that were provided by NCS's counsel at the July 28 board meetings. Omnicare also claimed that the NCS Defendants had waived their attorney-client privilege by producing minutes of the NCS Board meeting held on August 19 which contained the following resolution:

> **WHEREAS**, in connection with its consideration of the Omnicare Offer, the Board of Directors has received presentations from management and its legal and financial advisors, as well as the recommendation of a committee of the Board of Directors comprised of independent, outside directors (the "Independent Committee"), and the advice of the Independent Committee's legal advisors to the effect that stockholder acceptance of the Omnicare Offer is not in the best interests of the Corporation and its stakeholders, including the Company's creditors and the holders of the Company's 5-3/4% convertible subordinated debentures (the "Notes").

(Ex. E)

Counsel for the NCS Defendants promptly responded to this claim on September 9, noting that "we do not agree that NCS has waived its attorney-client privilege by either the filing of the S-4 or by virtue of the NCS's board resolutions dated August 19, 2002," and provided legal authority in support of that contention. (See Ex. F,

September 9, 2002 letter from Edward B. Micheletti to David F. Owens) Among other things, counsel for the NCS Defendants informed Omnicare that the mere disclosure of subject matter – including descriptions of discussions the NCS Board had with its counsel regarding certain publicly available Genesis agreements – does not waive the attorney-client privilege. (Id.) For example, the subject matter descriptions included the following:

- "Outside legal counsel discussed . . . the material terms of the merger agreement and the related documents, including Genesis' agreement to redeem the notes in accordance with the indenture in the merger agreement and including the terms and effects of the stockholder voting agreements and provisions of the merger agreement affecting NCS' ability to accept superior proposals in the future"; and

- "Legal counsel also discussed the limited circumstances in which NCS could be required to pay a termination fee to Genesis, and noted that a significant reduction in the termination fee from $10 million to $6 million, had been negotiated."

(Ex. A, at 45) Moreover, counsel for the NCS Defendants explained that a phrase in the resolution of the August 19 board minutes was out of place, and that (in light of the substantially similar disclosures in the 14D-9) the obvious intention of that resolution was to explain that the recommendation considered by the NCS Board came from the special committee, not the special committee's counsel.

The next day, during a telephone discussion, counsel for Omnicare was unable to respond to NCS's legal authority concerning the permissibility of subject matter disclosure, and failed to meaningfully explain why, in the face of the NCS Defendants' explanation, Omnicare believed the resolution in the August 19 minutes constituted a

waiver of the attorney-client privilege. Shortly thereafter, Omnicare filed its motion to compel.

As explained further below, Omnicare's Motion to Compel must be denied.

ARGUMENT

A. The NCS Defendants Have Not Waived The Attorney-Client Privilege By Revealing In Their Form S-4 The General Subject Matters Discussed With Counsel at the July 28 Board Meetings.

Omnicare (erroneously) contends that the NCS Defendants have waived the attorney-client privilege by "selectively" disclosing in the Form S-4 "extensive detail" about communications the NCS Board and the NCS special committee had with its counsel at the July 28 board meetings. (Omnicare's Motion at 6-7) This contention must be rejected.

The purpose of the attorney-client privilege is "to encourage full and frank communication between clients and their attorneys." Zirn v. VLI Corp., 621 A.2d 773, 781 (Del. 1993); see also Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (purpose of attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"). The privilege is waived only if the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." D.R.E. 502.

As the party seeking to pierce the attorney-client privilege, Omnicare "bears a particularly high burden." International Bus. Machs. Corp. v. Comdisco, Inc., C.A. No. 91-C-07-199, 1992 WL 52143, at *3, Goldstein, J. (Del. Super. Mar. 11, 1992). Moreover, courts construe the waiver exception to the attorney-client privilege narrowly. See Rollins Props., Inc. v. CRS Sirrine, Inc., 1989 WL 158471, at *5, Herlihy, J. (Del. Super. Dec. 13, 1989); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 156-57 (D. Del. 1977).

At most, the portion of the Form S-4 highlighted by Omnicare contains certain subject matter descriptions of discussions that the NCS Board and special committee had with counsel about publicly available Genesis agreements, including "the material terms of the merger agreement and the related documents, including Genesis' agreement to redeem the notes in accordance with the indenture in the merger agreement and including the terms and effects of the stockholder voting agreements and provisions of the merger agreement affecting NCS' ability to accept superior proposals in the future." (Ex. A at 45-46) The Form S-4 also stated that: "[l]egal counsel . . . discussed the limited circumstances in which NCS could be required to pay a termination fee to Genesis, and noted that a significant reduction in the termination fee from $10 million to $6 million, had been negotiated." (Id.)

Omnicare would have this Court rule – apparently, for the first time – that NCS has waived its attorney-client privilege by making such "subject matter" disclosures

in its S-4. Not surprisingly, Omnicare cites no direct authority for this novel proposition.[6] Rather, it is generally understood that (as here) mere disclosure of subject matter does not suffice to waive the attorney-client privilege. See, e.g., Continental Ins. Co. v. Rutledge & Co., C.A. No. 15539, 1999 WL 66528, at *2, Chandler, C. (Del. Ch. Jan. 26, 1999) (finding fact that client disclosed consultation with attorney about letter was not privileged communication); In re Dairy Mart Convenience Stores, Inc. Deriv. Litig., C.A. No. 14713, 1997 WL 732467, at *2, Chandler, C. (Del. Ch. Nov. 13, 1997) (requiring "specific, detailed descriptions" of the subject matters of privileged communications); Rollins Props, Inc. v. CRS Sirrine, Inc., 1989 WL 158471, at *2 (no waiver of privilege where client testifies as to subject matter of consultations with attorney).

Indeed, the Form S-4 (at most) describes counsel's reiteration of what was already known by the public and Omnicare[7] – namely, the terms and conditions of the merger agreement and other relevant transactional documents. Thus, Omnicare has failed

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6 Omnicare's reliance on Zirn v. VLI Corp., 621 A.2d at 781-82, is misplaced. In Zirn, the defendants had misleadingly disclosed only part of their patent counsel's substantive advice in the company's Schedule 14D-9. The Court found that because the defendants had partially disclosed patent counsel's substantive advice, they were required to provide full disclosure of that advice in order to prevent the partial disclosure from materially misleading shareholders. Unlike the Zirn defendants, the NCS Defendants have not partially disclosed any of their legal counsel's substantive advice.

7 What is most incredible about Omnicare's Motion to Compel, is that Omnicare is claiming the NCS Defendants have waived their attorney-client privilege by including in the Form S-4 factual assertions about the Genesis agreements that are strikingly similar to the allegations found in their own Amended Complaint. See, e.g., Amended Complaint ¶¶ 5-6, 9, 36.

to show that the NCS Defendants have selectively produced any privileged information in their Form S-4 that would somehow waive the attorney-client privilege.[8] Omnicare cannot seriously expect the Court to find that the NCS Defendants waived the attorney-client privilege by disclosing that they consulted with counsel on certain general topics, especially when Omnicare's public filings make very similar disclosures. See, e.g., (Ex. G, Schedule TO at 17) (disclosing that Omnicare hired Dewey Ballantine to assist in acquiring NCS); (Ex. G, Schedule TO at 18) (disclosing that Omnicare and its legal counsel determined that financial forecast prepared by NCS's financial advisor was inadequate); (Ex. H, Schedule TO amendment filed on August 8, 2002, at 6) (responding to question about lawsuit, Joel Gemunder answered "Well, I'm not a lawyer, as you know, but I'm advised by counsel that these kinds of things usually take a couple months to resolve . . . .").

Moreover, there is nothing inherently inconsistent with the subject matter descriptions contained in NCS's Form S-4 and the redacted versions of the minutes of the July 28 board meetings that were produced to Omnicare. Indeed, a simple comparison of

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[8] For this reason, Omnicare's reliance on the cases cited at pages 6 and 7 of the motion are inapposite. See, e.g., Zirn v. VLI Corp., 621 A.2d at 781 (finding partial disclosure of privileged legal advice operated as waiver); Citadel Holding Corp. v. Roven, 603 A.2d 818, 825 (Del. 1992) ("It is clear that the disclosure of even a part of the contents of a privileged communication surrenders the privilege as to those communications.") (emphasis added); In re Unitrin, Inc. S'holders Litig., C.A. Nos. 13658, 13699, 1994 WL 507859, at *2, Chandler, V.C. (Del. Ch. Sept. 7, 1994) (finding waiver where party had introduced actual, privileged advice of counsel).

the two documents undermines Omnicare's argument on this point. For example, just as the Form S-4 disclosed certain subject matter descriptions of the special committee's discussions with counsel (albeit in a somewhat different style of language than the style used to draft minutes), the redacted minutes expressly state that: "The Committee and advisors discussed the material terms of the Merger Agreement, including Genesis' insistence on a restrictive fiduciary out provision and a termination fee, albeit reduced to $6 Million." (Ex. I at NCS 007359) (emphasis added). To the extent the board minutes contained any further exposition about the rote subject matter topics that ultimately appeared in the S-4, such descriptions were inextricably intertwined with substantive legal advice provided by NCS's legal advisors at those meetings, and were not required to be disclosed.

B. The NCS Defendants Have Not Placed Their Privileged Communications With Legal Counsel "At Issue "

Next, Omnicare speculates that the NCS Defendants have waived the attorney-client privilege because they "apparently intend to point to [legal advice received from counsel] to demonstrate that they were 'fully informed' about the course of conduct they chose." (Omnicare's Motion at 8) (emphasis added) Omnicare's conjecture hardly establishes that the NCS Defendants will rely upon their counsel's advice as a defense to Omnicare's claims and, indeed, the NCS Defendants have no present intention to rely on the "advice of counsel" as a defense.

The Court must be skeptical of Omnicare's musings here, as Delaware courts narrowly construe the "at issue" exception to the attorney-client privilege. See, e.g., Continental Cas. Co. v. General Battery Corp., C.A. No. 93C-11-088, 1994 WL 682320, at *8, Carpenter, J. (Del. Super. Nov. 16, 1994) ("An unfettered and careless application [of the "at issue" exception] would destroy the underlying historical rationale for the privileges and could lead to a wholesale general discovery of an opponent's documents."); E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., No. 89C-AU-99, 1994 WL 89447, at *3, Steele, J. (Del. Super. Feb. 15, 1994) ("The argument these documents relate to an issue in the case and therefore are 'at issue' implying a waiver of privilege smacks of the classic exception swallowing the rule.").

The NCS Defendants have not raised (and do not intend to raise) an "advice of counsel" defense to Omnicare's claims. Nor have the NCS Defendants "inject[ed] into the litigation an issue that requires testimony from its attorneys." See, e.g., Sealy Mattress Co. v. Sealy, Inc., C.A. No. 8853, 1987 WL 12500, at *6-7, Jacobs, V.C. (Del. Ch. June 19, 1987). Indeed, the NCS Defendants intend to use the attorney-client privilege only as a shield to protect their confidential (and undisclosed) communications with counsel. According to authority cited by Omnicare, the NCS Defendants' stated intention should be dispositive of the issue. See, e.g., Pfizer v. Warner-Lambert Co., C.A. No. 17524, 1999 WL 33236240, at *1, Chandler, C. (Del. Ch. Dec. 8, 1999) (cited by Omnicare, holding that no waiver of privilege where party represented that it

did not plan to offer attorneys' advice to board as evidence that board made informed decision).[9]

Omnicare's reliance on selective portions of NCS's Form S-4, 14D-9 and August 19, 2002 minutes does not (and cannot) change this reality. As discussed above, the Form S-4 disclosures highlighted by Omnicare were not privileged communications, but, rather, "subject matter" descriptions of certain communications between counsel and the NCS Board and special committee about various publicly available transactional documents. Likewise, Omnicare's claim that the NCS Defendants placed their privileged communications with counsel at issue when they disclosed in their 14D-9 that the NCS Board had considered legal counsel's advice (along with the recommendation of the special committee and its financial advisors) in deciding to reject Omnicare's tender offer, is equally specious.[10]

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[9] For this reason also, Omnicare's reliance on cases where parties were relying on the attorney-client privilege as both a sword and a shield is misplaced. See, e.g., Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992) (party claiming that Schedule 13D was not materially misleading based upon its reliance on advice of counsel could not assert attorney-client privilege with respect to that advice); United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (finding party claiming good faith defense based upon belief that his actions were lawful under securities laws could not use attorney-client privilege to avoid cross-examination regarding that claim).

[10] This is especially so given that at every opportunity, Omnicare has touted in its press releases that it is represented by "Dewey Ballantine, LLP" in connection with its tender offer. See, e.g., (Ex. G, Schedule TO at 18); (Ex. J, Omnicare Press Release dated September 6, 2002); (Ex. K, Omnicare Press Release dated August 27, 2002).

As for the minutes of the August 19 NCS Board meeting, they clearly align with the disclosures in the 14D-9, reflecting that the NCS Board received advice from its financial and legal advisors, and the legal advisors to the special committee (without any explanation of what that advice entailed). Specifically, the resolution highlighted by Omnicare recites that the board received the recommendation of the special committee that "stockholder acceptance of the Omnicare Offer is not in the best interest of the corporation and its stakeholders." Omnicare cites no authority for its assertion that such disclosures place the NCS Board's privileged communications with counsel at issue.[11]

C. The NCS Defendants' Redactions For Non-responsiveness Were Proper.

As explained below, the NCS Defendants have not made improper redactions based upon non-responsiveness. First, Omnicare's claim that "large sections" of minutes of the NCS Board meeting on July 28, 2002 were redacted for non-responsiveness is simply untrue. Indeed, only one paragraph from those minutes was redacted on the basis of non-responsiveness.

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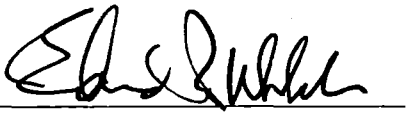
[11] Indeed, the other cases cited by Omnicare on this point are inappropriate. See, e.g., E.I. du Pont de Nemours & Co. v. Conoco, Inc., C.A. No. 17686, 2001 WL 115346, Chandler, C. (Del. Ch. Feb. 6, 2001) (concluding that because both parties placed counsel's representation of the defendant at issue, as a result, both parties had – under these unique circumstances – waived the attorney-client privilege in connection with that representation); Chesapeake Corp. v. Shore, 771 A.2d 293, 301 (Del. Ch. 2000) (not allowing defendants to offer hiring of advisors as evidence because defendants had claimed that they hired reputable investment bankers to evaluate strategic alternatives while simultaneously refusing to disclose any details of those alternatives).

Second, as requested by Omnicare, the NCS Defendants produced responsive, non-privileged NCS Board minutes and NCS Special Committee minutes concerning: (1) the Genesis Merger Agreement or the Proposed Genesis Merger; (2) Omnicare's offers to NCS; (3) offers from other potential bidders; and (4) any proposed, potential, contemplated, hypothetical or actual business combination between NCS and any person (to the extent not already requested). (See Omnicare's Motion at 4) The portions of minutes redacted for non-responsiveness from meetings on July 23, May 23, July 3, and July 28 are simply not responsive to the requests listed above. (Ex. B at NCS 00766-767); (Ex. L at NCS 007364-366); (Ex. M at NCS 007276); (Ex. N at NCS 007368)

Further, Omnicare contends that it is "simply implausible" that the NCS Defendants could redact any information from the July 28 board minutes on the grounds of non-responsiveness. (Omnicare's Motion at 11) In an attempt to put this contention to rest, the NCS Defendants have produced a copy of the July 28 board minutes which includes the text of the paragraph that was originally redacted on non-responsiveness grounds. (Ex. O) A review of this paragraph clearly shows that there was discussion of certain issues relating to NCS's business operations (i.e., in connection with the disposition of NCS's Herrin, Illinois facility and the impact on the D&O insurance coverage) that were completely unresponsive to Omnicare's document requests.

CONCLUSION

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



Edward P. Welch
Edward B. Micheletti
Katherine J. Neikirk
James A. Whitney
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P. O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Attorneys for the NCS Defendants

OF COUNSEL:

Mark A. Phillips
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP
2300 BP Tower, 200 Public Square
Cleveland, Ohio 44114-2378
(216) 363-4500

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