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

OMNICARE, INC.,	:	
Plaintiff,	:	
-vs.-	:	C.A. No. 19800
NCS HEALTHCARE, INC., *et al.*,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH AND IN OPPOSITION TO THE MOTIONS OF GENESIS AND GENEVA SUB FOR COMMISSIONS

Plaintiff Omnicare, Inc. ("Omnicare") respectfully submits this Memorandum of Law (i) in support of its motion (the "Motion to Quash") to quash certain subpoenas from this Court (the "Subpoenas") issued by defendants Genesis Health Ventures, Inc. and Geneva Sub, Inc. (collectively, "Genesis") and (ii) in opposition to certain of Genesis' motions for commissions (the "Commission Motions").

PRELIMINARY STATEMENT

Genesis seeks commissions to obtain out-of-State discovery from Banc One Capital Markets, Inc. ("Banc One Capital Markets"), Bank One Corporation ("Bank One Corporation"), Bank One, N.A. ("Bank One, N.A."), Deutsche Bank Securities, Inc. ("Deutsche Bank") and Lehman Commercial Paper, Inc. ("Lehman"), and has served the Subpoenas upon Banc One Capital Markets, Bank One Corporation and Deutsche Bank.[1] The third-party

[1] The subpoenas at issue are annexed as Exhibits A through C. Omnicare does not oppose Genesis' motion for a commission with respect to (and is not moving to quash the subpoena from this Court that Genesis has served upon) Merrill Lynch & Co.

discovery that Genesis seeks by means of the Commission Motions and Subpoenas is (i) not reasonably calculated to lead to admissible evidence regarding *any* issue arising from Omnicare's claims or any potential defenses thereto and, (ii) in any event, duplicative of discovery that Omnicare has already provided.

In response to Omnicare's request for an explanation of the relevance of these third-party discovery requests to the issues in this case, Genesis has stated that it is seeking third-party discovery from "Omnicare's financiers ... about Omnicare's bid for NCS"[2] in the purported belief that such discovery may lead to admissible evidence. Given that Omnicare's pending tender offer for all outstanding shares of NCS common stock is *not* subject to any financing condition, and that the defendant NCS Board members have *not* asserted that they rejected Omnicare's superior offer based upon any concern over any financing condition, the discovery being sought is irrelevant to any issue in dispute. Moreover, even *if* that issue were relevant, which it is not, Omnicare has already produced all non-privileged documents relating to its lenders' consent with respect to the financing of Omnicare's proposed acquisition of NCS.[3] Accordingly, the Commission Motions should be denied and the Motion to Quash should be granted.

BACKGROUND

1. This litigation arises out of the NCS Board's breaches of its fiduciary and statutory duties in connection with its rejection of Omnicare's superior offer to acquire NCS, its

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[2] *See* September 18, 2002 letter from Christian Douglas Wright to David F. Owens (Ex. L).

[3] The one exception is a fee letter between Omnicare and Bank One, N.A., which is subject to a confidentiality agreement with Bank One, N.A. and which, in any event, is not responsive to any request and not relevant to this litigation. *See* September 9, 2002 letter from David F. Owens to Edward B. Micheletti (Ex. I).

attempt to lock up an inferior merger with Genesis at a price of approximately $1.60 per share in Genesis stock (the "Proposed Genesis Merger"), its unlawful steps to prevent NCS shareholders from even considering Omnicare's superior offer, and Genesis' aiding and abetting of these breaches.

2. On July 26, 2002, Omnicare sent a letter to the NCS Board proposing a merger transaction in which Omnicare would pay NCS stockholders $3.00 per share in cash and assume and/or retire existing debt. That proposal made no reference to any financing condition, and was not in fact subject to any financing condition. *See* Ex. D.

3. On July 29, 2002, compelled by NCS's failure to respond to the July 26th letter, Omnicare sent another letter, which Omnicare made public, expressing disappointment that NCS continued to refuse to meet with Omnicare and noting that Omnicare's $3.00 per share offer represented more than four times NCS's current stock price, which was already at a two-year high. Again, Omnicare said nothing about its proposal being subject to any financing condition, and, again, there was no such condition. *See* Ex. E.

4. On August 8, 2002, Omnicare, through a wholly owned subsidiary, commenced a tender offer for all outstanding shares of NCS common stock, offering $3.50 per share and expressly stating in the Offer to Purchase that "[t]he offer is not subject to any financing conditions." *See* Ex. F at 16.

5. Genesis has received copies of all documents that Omnicare has produced in response to the discovery requests of defendants NCS Healthcare, Inc. ("NCS"), Boake A. Sells and Richard L. Osborne (collectively, the "NCS Defendants"), as well as copies of all correspondence between Omnicare and the NCS Defendants regarding discovery issues.

6. On September 4, 2002, the NCS Defendants wrote to Omnicare requesting production of documents, in addition to those previously produced, relating to Omnicare's credit facility, the financing of Omnicare's proposed acquisition of NCS and the approval of Omnicare's lenders in connection therewith, as referenced in a letter to Omnicare from Banc One Capital Markets produced in Omnicare's initial production. *See* September 4, 2002 letter from Edward B. Micheletti to John M. Seaman (Ex. G).

7. On September 5, 2002, Omnicare responded to that letter by stating that, while Omnicare disagreed with NCS's characterizations of the issues in this case and the status of discovery thus far, Omnicare would, nonetheless, to avoid unnecessary disputes, produce any non-privileged responsive documents relating to the consent referenced in the Banc One letter cited by NCS. *See* September 5, 2002 letter from David F. Owens to Edward B. Micheletti (Ex. H). On September 9, 2002, Omnicare confirmed that those documents would be produced the following day. *See* September 9, 2002 letter from David F. Owens to Edward B. Micheletti (Ex. I).

8. Those documents were produced on September 10, 2002 (with the one exception noted in footnote 3).

9. Throughout this entire process, Genesis has stood on the sidelines, seeking no discovery from Omnicare relating to any topic.

10. On September 11, 2002, Genesis filed the Commission Motions, and, two days later, on September 13, 2002, served the Subpoenas.

11. Also on September 13, 2002, Genesis wrote to Omnicare requesting Omnicare's consent to the Commission Motions. *See* September 13, 2002 letter from Christian Douglas Wright to Donald J. Wolfe, Jr. (Ex. J).

12. On September 17, 2002, Omnicare responded by requesting that Genesis explain what information it deems it necessary to seek by means of the Commission Motions. *See* September 17, 2002 letter from David F. Owens to Christian Douglas Wright (Ex. K).

13. Genesis responded the following day with the unhelpful explanation that

> Omnicare's financiers . . . are likely to have information and knowledge about Omnicare's bid for NCS – information and knowledge which are relevant to this litigation, or, at a minimum, are reasonably calculated to lead to the discovery of admissible evidence, the criteria for discoverability under Court of Chancery Rule 26(b)(1).

See September 18, 2002 letter from Christian Douglas Wright to David F. Owens (Ex. L). Genesis provided no further elaboration.

ARGUMENT

14. The Commission Motions should be denied, and the Subpoenas should be quashed, on either of two independent grounds. *First*, the Commission Motions and the Subpoenas seek only information that is entirely irrelevant to Omnicare's claims and the defenses thereto. *Second*, in any event, they seek only information that is duplicative of discovery Omnicare has already provided. As a result, the requested discovery will accomplish nothing other than harassment of Omnicare and interference with Omnicare's commercial relationships with its lenders, and should, therefore, be denied.

15. Omnicare's July 26 and 29, 2002 letters to the NCS Board proposing a merger transaction made no reference to that proposal being subject to any financing condition. *See* Exs. D, E. Moreover, Omnicare's Offer to Purchase in connection with its pending tender offer expressly states that "[t]he offer is not subject to any financing conditions." *See* Ex. F at 16.

16. Indeed, the defendant NCS Board members have *not* asserted that they rejected Omnicare's superior offer based upon any concern over any financing condition. Specifically, on August 20, 2002, NCS filed its Schedule 14D-9 (*see* Ex. M at 3-12) in response to Omnicare's tender offer, in which it set forth the purported reasons for recommending that NCS stockholders reject Omnicare's offer, including claims that Omnicare's offer contained conditions not capable of being satisfied in light of the illegal agreements that the NCS Board itself had erected as barriers to the Omnicare offer. Nowhere in that list of purported reasons, however, is any reference to a belief that Omnicare's offer was subject to any financing condition.

17. Consequently, the issue of Omnicare's financing is not a proper subject for discovery because it is completely irrelevant to any claim or defense. *See Schreiber v. Carney*, 1983 WL 17998, at *2 (Del. Ch.) (limiting scope of document requests and stating that purpose of discovery is not to search for possible new issues, but to gather information relating to issues that have already been raised by the pleadings).

18. In determining whether information being sought is reasonably calculated to lead to the discovery of admissible evidence, the Court must look to the issues raised by the operative pleadings. *See, e.g., East v. Tansey,* 1993 WL 330063, at *1-2 (Del. Ch.) (quashing subpoena *duces tecum* seeking financial records unrelated to the claims asserted in the complaint); *Delmarva Drilling Co., Inc. v. American Water Well Systems*, 1988 WL 7396, at *3 (Del. Ch.) (limiting scope of interrogatories to exclude matters not likely to be relevant to any factual allegation in the complaint).

19. Here, Omnicare's claims and the defenses asserted in response to those claims relate to the following matters:

- whether, under the terms of NCS's Amended and Restated Certificate of Incorporation, the defendants have triggered a conversion of certain shares of NCS Class B common stock into Class A common stock by entering into certain voting agreements as part of their scheme to lock up the Proposed Genesis Merger;

- whether the NCS Board has breached its fiduciary and statutory duties in connection with that attempted lock-up and the rejection of Omnicare's superior offer; and

- whether Genesis has aided and abetted those breaches.

20. Omnicare's financing of the NCS acquisition is not even on the periphery of any of these issues. Neither Genesis nor any other defendant has attempted to premise a defense to Omnicare's claims on issues relating to financing.

21. The issues in dispute here involve whether the members of the NCS Board of Directors breached their fiduciary duties of loyalty and care in approving the Proposed Genesis Merger and rejecting the superior Omnicare offer. What these directors considered and what they knew at the time of the operative decisions are, therefore, relevant to this action, but issues that they did *not* have any reason to consider – and do not even claim that they considered – are not relevant. In *Atlantic Research Corp. v. Clabir Corporation*, this Court rejected a similar attempt by a target to take discovery from a hostile acquirer's financing sources. *See* 1987 WL 758584, at *1-4 (Del. Ch.). In doing so, Vice Chancellor Jacobs stated:

> Atlantic [the target] claims that the discovery that it seeks from the two banks is relevant because it tends to confirm the reasonableness of the threat that the Atlantic directors concluded would be posed by Clabir [the bidder].
>
> In my opinion, while the argument is logically true, it is not in technical terms legally relevant, because the decision of the Atlantic directors as to whether and the extent to which Clabir constituted a threat, and the need to adopt the pill in response, is a decision the validity of which has to rise or fall on what the directors knew and considered at the time that they adopted the pill, and should not be considered on

> the basis of what they did not know and what they did not consider.

Id. at *1. Here, there is no financing condition, no discussion of any financing condition, and no claim that the NCS Board considered a financing condition in agreeing to lock up the Proposed Genesis Merger. Consequently, the details of Omnicare's relationship with its lenders have no relevance to this litigation, either.

22. Accordingly, the third-party discovery that Genesis seeks, but for which it can articulate no need, simply has no relevance to this litigation. Genesis should not be permitted to harass Omnicare, interfere with Omnicare's commercial relationships with its lenders, and inject unnecessary and vexatious delay into the resolution of the real issue here, namely, that Genesis has aided and abetted the defendant NCS Board members in breaching their fiduciary and statutory duties to NCS stockholders by rejecting Omnicare's superior offer and attempting to lock up the inferior Proposed Genesis Merger.

23. In any event, all non-privileged documents relating to the consent of Omnicare's lenders with respect to the financing of Omnicare's proposed acquisition of NCS have been produced. Accordingly, these duplicative discovery requests will only serve to harass Omnicare's lenders and interfere with Omnicare's relationships with them.

CONCLUSION

24. For all the foregoing reasons, Omnicare respectfully requests that the Court grant this motion to quash the Subpoenas and deny Genesis' Commission Motions.

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