

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE NCS HEALTHCARE, INC. : Consolidated
SHAREHOLDERS LITIGATION : C.A. No. 19786
: :

**ANSWER OF THE NCS DEFENDANTS
TO THE CONSOLIDATED AMENDED COMPLAINT**

Defendant NCS Healthcare, Inc. ("NCS"), Boake A. Sells, and Richard L. Osborne (collectively, the "NCS Defendants"), by its attorneys, Skadden, Arps, Slate, Meagher & Flom LLP, respond as follows to the allegations of the Consolidated Amended Complaint:

1. Denied, except admitted that Genesis Health Ventures, Inc. ("Genesis"), Geneva Sub, Inc. ("Geneva Sub") and NCS entered into a merger agreement on or about July 28, 2002, and that NCS publicly announced that agreement on July 29, 2002. The NCS Defendants respectfully refer the Court to the Agreement and Plan of Merger (the "Merger Agreement") and the press release referenced by Plaintiffs for the true and correct terms therein.
2. Denied.
3. Denied, and the NCS Defendants respectfully refer the Court to the Merger Agreement for the true and correct terms therein.
4. Denied.
5. Denied, except admitted that Jon H. Outcalt and Kevin B. Shaw entered into

agreements with Genesis (the "Voting Agreements"), and that Messrs. Outcalt and Shaw own 3,476,086 and 1,141,134 shares, respectively, of Class B stock with 10 votes per share. The NCS Defendants respectfully refer the Court to the Voting Agreements for the true and correct terms therein.

6. Denied.

7. The NCS Defendants respectfully refer the Court to the Merger Agreement for the true and correct terms therein, and deny the allegations to the extent they are inconsistent therewith.

8. Denied, except admitted that the Merger Agreement requires 51% of the votes of the outstanding NCS shares, with the Class A and B shares voting as a single class. The NCS Defendants also admit that Messrs. Outcalt and Shaw collectively control more than 65% of the voting power of NCS shares entitled to vote on the merger.

9. Denied.

10. The NCS Defendants respectfully refer the Court to the Merger Agreement for the true and correct terms therein, and deny the allegations to the extent they are inconsistent therewith.

11. Denied.

12. Denied.

13. Denied.

14. The NCS Defendants lack information sufficient to admit or deny the allegations contained in paragraph 14.

15. Admitted.

16. The NCS Defendants admit the allegations in the first sentence of paragraph

16. The NCS Defendants deny the allegations in the second sentence of paragraph 16, except admit that Outcalt as a NCS director owes fiduciary duties to the NCS shareholders. The NCS Defendants deny the allegations in the third sentence of paragraph 16, except admit that Outcalt receives an annual salary of \$200,000 plus other benefits and receives a monthly consulting fee of \$17,000 for services in connection with the NCS restructuring program. The NCS Defendants deny the allegations in the fourth sentence of paragraph 16 to the extent they are inconsistent with the disclosures on this issue in the Schedule 14D-9 filed by NCS on or about August 20, 2002. The NCS Defendants deny the allegations in the fifth sentence of paragraph 16. The NCS Defendants deny the allegations in the sixth sentence of paragraph 16 to the extent they are inconsistent with the Schedule 14D-9 filed by NCS on or about August 20, 2002.

17. The NCS Defendants admit the allegations in the first sentence of paragraph 17, except deny that Shaw is the Secretary of NCS. The NCS Defendants deny the allegations in the second sentence of paragraph 17, except admit that Outcalt as a NCS director owes fiduciary duties to the NCS shareholders. The NCS Defendants admit the remainder of the allegations in paragraph 17, except deny that his salary for fiscal 2002 increased to \$196,000.

18. The NCS Defendants admit the allegations in the first sentence of paragraph 18. The NCS Defendants deny the allegations in the second sentence of paragraph 18, to the extent Plaintiffs are alleging that Sells has received a director's fee of \$35,000 per year and monthly consulting fee of \$10,000 per year since 1993. The NCS Defendants admit the allegations in the third sentence of paragraph 18.

19. The NCS Defendants admit the allegations in the first sentence of paragraph

19. The NCS Defendants deny the allegations in the second sentence of paragraph 19, to the extent Plaintiffs are alleging that Osborne has received a director's fee of \$35,000 per year since 1986. The NCS Defendants admit the allegations in the third sentence of paragraph 19.

20. Denied, except admitted that Messrs. Osborne and Sells comprise the NCS Independent Committee, and have recommended that the NCS Board approve the Merger Agreement.

21. The NCS Defendants admit the allegations in the first and second sentences of paragraph 21. The NCS Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence of paragraph 21, except admit that Genesis emerged from bankruptcy proceedings on or about October 2, 2001. The NCS Defendants admit the allegations in the fourth, fifth, sixth and seventh sentences of paragraph 21.

22. Admitted.

23. Admitted.

24. Denied, and the NCS Defendants decline to respond to those allegations in paragraph 24 consisting of legal conclusions to which no response is required.

25. Denied, and the NCS Defendants decline to respond to those allegations in paragraph 25 consisting of legal conclusions to which no response is required.

26. Denied, and the NCS Defendants decline to respond to those allegations in paragraph 26 consisting of legal conclusions to which no response is required.

27. Denied, and the NCS Defendants decline to respond to those allegations in paragraph 27 consisting of legal conclusions to which no response is required.

28. Admitted.

29. The allegations in the first and second sentences of paragraph 29 are admitted. The NCS Defendants deny the allegations in the third sentence of paragraph 29, except admit that Mr. Gemunder sent a letter to NCS on July 20, 2001. The NCS Defendants respectfully refer the Court to that letter for the true and correct terms therein.

30. Denied, except admitted that a letter dated August 9, 2001 was sent from NCS's counsel to Omnicare. The NCS Defendants respectfully refer the Court to that letter for the true and correct terms therein.

31. Denied, except admitted that on August 29, 2001, Omnicare made an indication of interest for \$270 million to purchase NCS's assets pursuant to Section 363 of the United States Bankruptcy Code.

32. Denied, except admitted that in late September 2001, Omnicare and NCS entered into a confidentiality agreement.

33. Denied, except admitted that Omnicare met in November 2001 with the Ad Hoc Committee and its financial and legal advisors to discuss Omnicare's interest in NCS, that Omnicare and the Ad Hoc Committee attempted to negotiate a transaction over the ensuing months, and that those negotiations were unsuccessful.

34. Denied, except admitted that Omnicare prepared a draft asset purchase agreement contemplating a sale of NCS to Omnicare under the bankruptcy laws. The NCS Defendants respectfully refer the Court to the draft asset purchase agreement for the true and correct terms therein.

35. Denied, except admitted that in March 2002, the Director Defendants created an Independent Committee consisting of Messrs. Sells and Osborne for the express purpose

of reviewing, evaluating and negotiating possible strategic transactions.

36. Denied, except admitted that the Independent Committee was advised by certain legal and financial advisors that NCS management had employed prior to the creation of the Independent Committee.

37. Denied, except admitted that on or about April 10, 2002, NCS received a copy of Omnicare's bankruptcy proposal referenced by Plaintiffs in paragraph 34.

38. Denied, except admitted that the Independent Committee held a meeting on May 14, 2002 and met with its financial advisors at that time.

39. Denied, except admitted that on or about June 26, 2002, NCS entered into a retention and indemnification agreement with certain officers and directors of NCS, and caused a trust for that purpose to be funded by NCS with \$975,000.

40. Denied.

41. Denied.

42. Admitted that on July 3, 2002, NCS and Genesis entered into an Exclusivity Agreement. The NCS Defendants respectfully refer the Court to the Exclusivity Agreement for the true and correct terms therein, and deny the remainder of the allegations in paragraph 42.

43. Admitted that on July 26, 2002, Mr. Gemunder sent a letter to Mr. Outcalt. The NCS Defendants respectfully refer the Court to that letter for its true and correct terms, and deny the allegations in the first and second sentences of paragraph 43 to the extent they are inconsistent therewith. The NCS Defendants deny the remainder of the allegations in paragraph 43.

44. Admitted that on July 29, 2002, Mr. Gemunder sent a letter to Mr. Outcalt

("July 29 Letter"). The NCS Defendants respectfully refer the Court to the July 29 Letter for its true and correct terms, and deny the allegations in the first and second sentences of paragraph 44 to the extent they are inconsistent therewith.

45. The NCS Defendants respectfully refer the Court to the July 29 Letter for its true and correct terms, and deny the remainder of the allegations in paragraph 45 to the extent they are inconsistent therewith.

46. The NCS Defendants respectfully refer the Court to the July 29 letter for its true and correct terms, and deny the allegations in the first and second sentences of paragraph 46 to the extent they are inconsistent therewith. The NCS Defendants deny the allegations in the third sentence of paragraph 46, except admit that the July 29 Letter enclosed a draft merger agreement, and respectfully refer the Court to that document for its true and correct terms.

47. The NCS Defendants respectfully refer the Court to the July 29 letter for its true and correct terms, and deny the allegations in the first and second sentences of paragraph 47 to the extent they are inconsistent therewith.

48. The NCS Defendants respectfully refer the Court to the July 29 letter for its true and correct terms, and deny the allegations in the first and second sentences of paragraph 48 to the extent they are inconsistent therewith.

49. Denied.

50. The NCS Defendants admit the allegations in the first and second sentences of paragraph 50. The NCS Defendants deny the remaining allegations in paragraph 50.

51. The NCS Defendants respectfully refer the Court to the Merger Agreement and the Voting Agreements for the terms contained therein, and deny the allegations of

paragraph 51 to the extent they are inconsistent therewith.

52. Denied.

53. Denied.

54. Denied, and the NCS Defendants respectfully refer the Court to NCS's Form S-4 filed by Genesis on or about August 29, 2002 for its true and correct terms.

55. The NCS Defendants respectfully refer the Court to Omnicare's August 1, 2002 Press Release for its true and correct terms, and deny the allegations of paragraph 55 to the extent they are inconsistent therewith.

56. Admitted.

57. Admitted that on August 8, 2002, Mr. Gemunder sent a letter to the Director Defendants, and respectfully refer the Court to that letter for its true and correct terms, and deny the allegations contained in paragraph 57 to the extent they are inconsistent therewith.

58. Admitted that on or about August 20, 2002, NCS filed with the SEC a Schedule 14D-9 in response to the Omnicare tender offer. The NCS Defendants respectfully refer the Court to NCS's Schedule 14D-9 for its true and correct terms, and deny the allegations contained in paragraph 58 to the extent they are inconsistent therewith.

59. The allegations in the first sentence of paragraph 59 are denied, and the remaining allegations contained in the second and third sentences of paragraph 59 are denied to the extent they are inconsistent with the Schedule 14D-9 filed by NCS on or about August 20, 2002.

60. Denied.

61. Denied, except admitted that Messrs. Outcalt and Shaw collectively possess sufficient voting strength to ensure approval of the Merger Agreement.

62. Denied, except admitted that Messrs. Outcalt and Shaw have granted an irrevocable proxy to vote all of their shares in favor of the Merger Agreement.

63. Denied, and the NCS Defendants respectfully refer the Court to the Merger Agreement for its true and correct terms.

64. Denied, and the NCS Defendants respectfully refer the Court to the Merger Agreement for its true and correct terms.

65. Denied.

66. The NCS Defendants admit the allegations contained in the first sentence of paragraph 66, and deny the remaining allegations.

67. Denied.

68. The NCS Defendants deny the allegations contained in the first sentence of paragraph 68. The NCS Defendants respectfully refer the Court to NCS's amended Schedule 14D-9 filed on or about September 12, 2002 for the true and correct terms therein, and deny the remainder of the allegations in paragraph 68 that are inconsistent therewith.

69. Denied, except admitted that on or about September 13, 2002, a meeting was held between Omnicare and NCS to discuss Omnicare's proposal to acquire NCS.

70. In response to paragraph 70, the NCS Defendants hereby incorporate paragraphs 1 through 69 of this Answer, as if set forth fully therein.

71. Paragraph 71 states legal conclusions as to which no response is required.

72. Paragraph 72 states legal conclusions as to which no response is required.

73. Denied, and the NCS Defendants respectfully refer the Court to NCS's Certificate of Incorporation for its true and correct terms.

74. Denied.

75. Denied, and the NCS Defendants respectfully refer the Court to NCS's Certificate of Incorporation for its true and correct terms.

76. Denied.

77. Denied.

78. In response to paragraph 78, the NCS Defendants hereby incorporate paragraphs 1 through 77 of this answer, as if set forth fully herein.

79. Paragraph 79 states legal conclusions as to which no response is required.

80. Denied.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. In response to paragraph 85, the NCS Defendants hereby incorporate paragraphs 1 through 84 of this answer, as if set forth fully herein.

86. Paragraph 86 states legal conclusions as to which no response is required.

87. Denied.

88. Denied.

89. Denied.

90. Denied.

91. Denied.

92. Denied.

93. Denied.

94. Denied.

95. Denied.

96. Denied.

97. Denied.

98. In response to paragraph 98, the NCS Defendants hereby incorporate paragraphs 1 through 97 of this answer, as if set forth fully herein.

99. Paragraph 99 states legal conclusions as to which no response is required.

100. Denied.

101. Denied.

102. Denied.

103. Denied.

104. In response to paragraph 104, the NCS Defendants hereby incorporate paragraphs 1 through 103 of this answer, as if set forth fully herein.

105. Paragraph 105 states legal conclusions as to which no response is required.

106. Paragraph 106 states legal conclusions as to which no response is required.

107. Paragraph 107 states legal conclusions as to which no response is required.

108. Denied.

109. Denied.

110. Denied.

111. Denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part because plaintiffs lack standing.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part because plaintiffs have failed to state claims upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by Article VIII of NCS's Certificate of Incorporation, adopted pursuant to 8 Del. C. § 102(b)(7).

WHEREFORE, the Defendants respectfully request that this Court enter an Order and Judgment:

- (i) dismissing the Complaint;
- (ii) awarding NCS the reasonable costs of suit, including reasonable attorneys' fees; and
- (iii) granting such other relief as the Court deems just and proper.

Respectfully submitted,



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DATED: October 4, 2002

CERTIFICATE OF SERVICE

I, Katherine J. Neikirk, hereby certify that I caused to be served two copies of the foregoing Answer of the NCS Defendants to the Consolidated Amended Complaint on October 4, 2002, by hand, upon the following counsel of record:

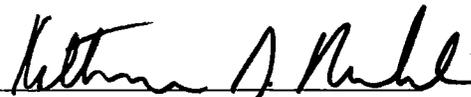
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