

withholding their consent pending such due diligence. *See* Memorandum of Defendants Genesis Health Ventures, Inc. and Geneva Sub, Inc. in Opposition to Plaintiff's Motion to Quash Subpoenas and in Support of Their Motions for Commissions ("Genesis Mem.") at ¶¶ 2, 11.

2. Specifically, Genesis contends that

one of the reasons NCS entered into the Merger Agreement with Genesis, instead of recommending due diligence and negotiations with Omnicare, was a concern about Omnicare's *ability* and intention to consummate its proposal. More specifically, Omnicare's "due diligence" condition may have been necessitated by concerns or demands of its lender and may have been a disguised financing condition, allowing Omnicare to refuse to proceed on due diligence grounds if it were unable to obtain the consent of its lenders.

Genesis Mem. ¶ 2 (footnote omitted).

3. Genesis apparently believes that it knows more than the defendant NCS directors themselves about their reasons for choosing the inferior Genesis offer over the superior Omnicare offer. While purporting to cite to the NCS Schedule 14D-9 for the speculation quoted in the preceding paragraph, Genesis in fact bases its statements on nothing but its own conjecture. Nowhere in NCS's Schedule 14D-9 is there any reference to a concern that the requested brief due diligence might somehow be "a disguised financing condition" or that Omnicare lacked the ability to consummate its proposal.

4. Genesis acknowledges that "it is technically true that the offer contained in the July 26 letter was not expressly conditioned on financing" (Genesis Mem. ¶ 14), but speculates that concern over the potential existence of a financing contingency *might* have motivated the defendant NCS directors in their rejection of Omnicare's superior offer, notwithstanding the defendant NCS directors' failure to record any such concern either in the minutes of their meetings or in their Schedule 14D-9.

5. Moreover, as Genesis concedes (Genesis Mem. ¶ 15), the relevant issues are what the NCS directors actually knew and the steps they took to inform themselves.

Nonetheless, Genesis asserts that

it would be fundamentally unfair and undermine the integrity of the factfinding process to permit Omnicare to claim that the NCS Board was wrong to have concerns about Omnicare's ability or intention to consummate its proposal, while at the same time permit Omnicare to conceal information which might show that on July 26 Omnicare lacked the financing to consummate a merger with NCS, the consents needed to proceed with such a merger, or both.

Genesis Mem. ¶ 15.

6. Whatever theoretical merit this attenuated claim of relevance might have, it is purely hypothetical. Not only has NCS made no claim that its directors acted out of a fear of any inability by Omnicare to consummate its proposal, but there is no evidence – and Genesis points to none – that Omnicare in fact lacked financing or necessary consents.

7. In short, Genesis' after-the-fact creation of a concern that the defendant NCS directors themselves never expressed, and which is unsupported by the existing record, is an inadequate basis for burdening non-parties with discovery demands that are duplicative of discovery already provided by Omnicare.

8. Nor is there any basis for Genesis' unsupported speculation that the non-party financial institutions may somehow have documentation that Omnicare does not but that is nonetheless probative of Omnicare's reasons for negotiating with NCS and the Ad Hoc Committee as it did. Moreover, the reason for Omnicare's negotiating strategies are irrelevant – what is at issue in this litigation is the conduct and state of mind of NCS and its directors.

9. 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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CERTIFICATE OF SERVICE

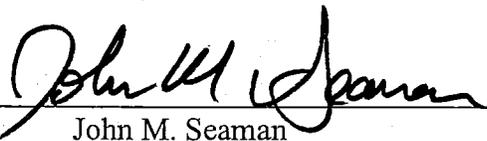
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