Case: Omnicare v. NCS Healthcare
Interview of Theodore N. Mirvis; Wachtell Lipton Rosen & Katz
Interviewed by: Elissa Habbart, Delaware Counsel Group
October 22, 2018, Wilmington, DE

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MS. HABBART: Hi Ted, thank you so much for being here.

MR. MIRVIS: It's my pleasure.

MS. HABBART: Tell us, at what point did you come into the transaction? Meaning, was the transaction already negotiated by the time you were brought in?

MR. MIRVIS: Oh, yeah. Yeah, I think my first substantive involvement in the matter was briefing and arguing the standing motion, which ended up not exactly being pivotal, but it was a very interesting issue. It turned on the fact that Omnicare, at least until relatively late in the process, was not a stockholder of NCS. And even though Delaware, for reasons that are shrouded in the mists of time, has allowed bidders to bring fiduciary duty claims against targets, which is, I suppose necessary but hard to comprehend.

MS. HABBART: Yeah, I don't make the sense of that either. #00:01:06#

MR. MIRVIS: Yeah, okay. Didn't – we thought we had a shot of getting Omnicare knocked out of the case completely,

but it never really worked completely. Plus, there was always the stockholder plaintiffs anyway, so I don't think the case would have litigated differently if we had won or lost the question.

MS. HABBART: Let me ask you. What was your first reaction when you saw the complaint and decided to think about your strategy for how you would approach it? #00:01:37#

MR. MIRVIS: When I first heard about the matter, it was -- the facts were fully baked. I remember thinking, well, this is a pretty tough case. This is about as locked up as a deal can ever be. I was puzzled by the fact that there was going to be an annual meeting at all. I didn't understand why there was going to be an annual meeting with a preordained result, but then I learned that, apparently Outcalt and Shaw, they didn't have the power to act by written consent and, therefore, there had to be a meeting. Or maybe it was some SEC rule that required there be a meeting.

MS. HABBART: Must have been an SEC rule, because I checked the certificate because I thought the same thing: they must have eliminated the power to act by written consent, but they didn't—

MR. MIRVIS: Well, that's interesting.

MS. HABBART: -- in the certificate. So, it had to have been some other regulatory body. #00:02:29#

MR. MIRVIS: Okay. And you know, it was a case from our point of view, from Genesis' point of view, in which NCS was a failing company. It was insolvent. It was in bankruptcy. They were looking at a future in which the equity was going to get nothing, and the bondholders, the debtholders, weren't even going to get – they were going to be made to sacrifice as well. So, our client viewed themselves as having sort of rescued this company and provided at least some payment to the equity holders, every penny of which was a windfall compared to where they had been. So, in return for that, we had an unusually, you know, locked-up, lock, stock, and barrel deal, which precluded any competition – any further competition, and made the vote, kind of a silliness.

MS. HABBART: A foregone conclusion. But the truth is, there had been a lot of history and a lot of history with Omnicare and Genesis, which would support the fact that Genesis would say, I need some tough terms, I am not going to be a stalking horse. #00:03:53#

MR. MIRVIS: Right, I do remember learning afterward, and not in real time, that a lot of this was driven by the prior experience between Genesis and Omnicare in bidding for another company. And that's often – things like that I think are often lost sight of when you go back and look at these facts. I mean CEOs and boards of directors are real,

live human beings. And if they have had experiences where they think they got the short end of the stick, driven by somebody else previously, they are going to try very hard not to be made a fool of again. And, I think, no doubt that drove a lot of the deal terms in this situation.

MS. HABBART: I don't disagree that that should have been the case. And because they didn't seem to play ethically -- Omnicare – when you go back and look at their behavior. But, whether it was ethically or not, and that's up for debate, is that the fact that the best they were going to offer was something that sailed out of bankruptcy court and you know, your client was saving the company in many ways. #00:05:04#

MR. MIRVIS: Right. And the price we wanted to extract for that was maximum deal certainty. And you know this was, Omnicare was – this case was decided at a time where – 2003 -- I suspect that the last statement from the Delaware Supreme Court prior to that was probably either – either or both -- of *Time Warner* and *QVC* and that was informing a lot of the way people on the buy side, and on the defending defensive measure side of these cases were viewing the world. You know, there had never been a case – I think *Omnicare* was actually the first case that made it clear that defensive measures in a sale were going to be viewed with enhanced scrutiny under

Unocal. And that they were going to be separated out. You could make – we made an argument that, under *Time Warner,* that that was inconsistent with *Time Warner*. *Time Warner* sort of glommed everything together. When *Time Warner* held that a stock-for-stock merger was a pure business decision, it sort of gave the back of the hand to the dry up fees and whatever the other defensive measures were here. In this case, the defensive measures sort of got pulled out, partly because they were structurally different; they were in a separate agreement. But they were pulled out and put under a separate microscope. And that, from a litigator's point of view, that made it harder to defend.

MS. HABBART: I'll bet. And that ties in with a question that I have always had is why they needed to have the company a party to the voting agreements in the first instance, but we'll need some of the strategic persons involved with the negotiations to find out what their thinking was behind that. #00:07:04#

MR. MIRVIS: I know ... sometimes the litigators don't see the sausage getting made.

MS. HABBART: No, you really don't. You're stuck with whatever is handed to you, right? But so, your opinion was – or, your initial reaction was, we're doing a good thing. We're representing a company that's going in there and doing a

good thing and making a reasonable offer with terms that make sense in the context. And what's the problem? #00:07:29#

MR. MIRVIS: But we had – you had an independent board, clearly fully-informed and acting deliberately. No conflicting interests. More than that, you had Outcalt and Shaw with, not just the majority of the voting power under a dual-class structure, which wasn't really focused on that much in the case, that their voting power came not from their economics, but they were the largest, single economic owners of the company. And they had no reason to sell for anything but the best price they could get.

MS. HABBART: No.

MR. MIRVIS: And they took our deal, and they didn't – they took our deal, they took our – accepted our exclusivity demands, and they didn't think it was necessary to risk that in order to see what Omnicare might or might not be willing to do, particularly in the way that Omnicare had first come to them with, I don't remember what it was called in the opinion – was it called low-ball or no-ball, or something, but—

MS. HABBART: It was probably selling the asset out of the bankruptcy court— #00:08:25#

MR. MIRVIS: Yeah, they were doing an asset sale where the debt wasn't even going to get fully paid, and equity would have gotten zip. So, to that degree, we would have

thought, you know, we were on the side of the angels insofar as we were being attacked by stockholders with concerns.

MS. HABBART: Were you surprised? #00:08:41#

MR. MIRVIS: Surprised that there as a challenge? No. I mean there was always a challenge. But Omnicare, which was – to some degree, a Johnny come lately with a higher price. What our position was, okay, what was done wrong here? Where was the violation? We didn't see one. You know, unless – and the way we tried to frame the issue was, unless Delaware is going to say that the highest price has to always win, even if nothing that preceded it can be really shown to have been a breach of duty, then we didn't see how we could be stopped. And that's why the decision, from the Supreme Court – the decision in the Court of Chancery was sort of mainline, Delaware, intense scrutiny, heavy record, but intense scrutiny of everything that the board did. There was a full discovery record of everything that happened. There were no mysteries, no surprises. And I thought a really remarkable decision from the Court of Chancery. I wasn't surprised that they appealed, because, you know, why not? I mean they had one thing going for them on the appeal.

MS. HABBART: What did you think that was? #00:09:59#

MR. MIRVIS: A higher price on the table.

MS. HABBART: Yeah, but that came after the fact.

MR. MIRVIS: Understood, but you know, the cynical people have often said that there's really only two rules in Delaware in takeover cases. Rule number one, you never get an injunction if you don't have a higher price. And number two, you always get an injunction if you have a higher price. Of course, the exception that proves the rule is *Time Warner,* arguably. But we didn't – we thought that was besides lawless, you know, kind of a terrible policy idea. But we turned out to be wrong. I mean I was, as we have chatted before, I mean my principle involvement was in the charter issue, which—

MS. HABBART: We should – we'll get to that in a minute. #00:10:51#

MR. MIRVIS: Which has been buried under a lot of time and that's probably where it should stay. But on the fiduciary issue, in a stock-for-stock deal, to lose on the ground that the defensive measures violated *Unocal;* that was news to us. And I must say, the first time I read this opinion, and I read it again because I thought maybe I was misremembering it, the statement in the majority opinion that "the latitude a board will have in either maintaining or using defensive devices adopted to protect a merger, will vary according to the degree of benefit or detriment to the stockholders' interest that is presented by the value or terms

of the subsequent competing transaction." When I read that for the first time, I went back and read it again, and I didn't understand it.

MS. HABBART: Because why is a board being judged by something that comes after the fact? #00:11:58#

MR. MIRVIS: Yeah, and so, basically... I mean, I understood the idea, which is this case is often cited for, the directors' duties are unremitting. That's all fine. But the directors of NCS and, you know, we weren't being charitable. We made them make a decision and they made it. And they were held to have breached their fiduciary duties, not because of anything – if the clock had stopped—

MS. HABBART: They would have been fine.

MR. MIRVIS: -- at that point in time, there'd be no claim at all. The claim, they became, that what they did turned out to be a breach of fiduciary duty not because of anything they had done, did, knew, or could possibly have foreseen, but because Omnicare later decided to throw more money on the table? That was news to us. And the shocking thing about this – well, shocking is a big word – surprising thing about this opinion is this is the first opinion I know of, and maybe to this day, that sort of says Delaware is saying there are certain things that are just not in the directors' toolbox. You just can't do it. You just can't sign

a merger agreement without a fiduciary out, in which the vote is preordained by voting agreements.

MS. HABBART: Under any circumstances. #00:13:18#

MR. MIRVIS: Full stop. And of course, that was the point of the dissents. And you know, back in 2003, dissents in corporate law cases were—

MS. HABBART: Rare.

MR. MIRVIS: -- really almost unheard of.

MS. HABBART: That was making a big statement; you had two justices dissent—

MR. MIRVIS: Two – and one by the Chief. It was a big deal. It didn't help us at all, but it was nice to read.

MS. HABBART: No. Did it trouble you at all that you didn't get a written decision from the court until four months after the order? #00:13:48#

MR. MIRVIS: Well, did it trouble us?

MS. HABBART: Well, the die was cast, but were you surprised—

MR. MIRVIS: But we knew we lost, and we had a – I forgot, exactly what was in the order at the time. We had some idea why we had lost. I mean we knew we had lost because the deal was completely locked up. But I couldn't, for the life of me, figure out how they were going to state that in a

doctrinally coherent way. And what were they going to find? I mean they weren't going to reverse – and they did not reverse—

MS. HABBART: They accepted, in fact, all the findings— #00:14:22#

MR. MIRVIS: Correct ... correct.

MS. HABBART: -- the Court of Chancery.

MR. MIRVIS: Right. And yet found that it was a new idea. It was just a new idea. Right, wrong, or indifferent, it was clearly new to say there are certain things directors can't do, even if they act with pure heart on a fully-informed basis without any conflict in a transaction designed to get the greatest value for the equity. You just can't do certain things. Okay?

MS. HABBART: All right, I look at that and say, that really is something that would preclude some people from wanting to be first at the table, because, no matter what they do and no matter how well they negotiate, somebody after the fact coan come in, and the board is responsible to have to talk to them. #00:15:12#

MR. MIRVIS: Well, you raise an interesting question. I don't know whether people think of it from the interloper's point of view. How comfortable would you be if you were in Omnicare's shoes in the next case, saying, well, I

can just wait? I don't have to participate – because they had every opportunity to participate—

MS. HABBART: Yeah, they sure did.

MR. MIRVIS: -- I can just sit back, be cute, make all kind of demands about due diligence and things like that that make my offer unattractive. Smoke out what's the – what bid am I going to get from my competitor. Let them lock it up any which way they want, and then I will just put a higher bid on the table and win. I don't think people thought that way, necessarily, afterward. And don't forget, there was, as you know, a firestorm of statements, including statements from members of the court, that this was going to be a highly confined case. And then, there were a couple of CLE programs; people used words like "life of a fruit fly."

MS. HABBART: But that was the dissent. Did the majority – and I can't recall them ever saying that it was based on the confines of the facts and issues -- therefore, why wouldn't you take the position of Omnicare next time around? I think I might roll that die. #00:16:22#

MR. MIRVIS: Okay, I hear you. Oh, that's the beauty of the common law, right? One case at a time.

MS. HABBART: That's exactly right. And it just seems as if, when we were looking at the review of the defensive measures, the history of both NCS and Genesis with

Omnicare, we would have thought would have helped carry the day? #00:16:44#

MR. MIRVIS: Yeah.

MS. HABBART: But can we shift for one moment and go back to that charter issue? Because it's interesting, our former Vice Chancellor, he thought, frankly, that that was the most intellectually challenging issue. He enjoyed that issue. #00:17:00#

MR. MIRVIS: It was a fascinating issue. And I don't have it in front of mind, but it involved what I love the most, which is careful reading of charter language and trying to figure out how they apply in situations that probably you don't have any real basis to say, or anybody had thought of at the time, the thing happened. But the notion that by signing the voting agreement, Outcalt and Shaw should have gone from high vote to low vote never made any sense to me. But there was traction to the other side. It wasn't like they had nothing to say. It wasn't a silly argument; it was a, you know, a swing for the fences argument. It got—

MS. HABBART: Remember the "in connection with proxy"? I remember my first reaction was, I don't follow that— #00:17:48#

MR. MIRVIS: But you know, you wonder sometimes why people raise certain arguments in cases. Was one of the

purposes of Omnicare in raising that argument to sort of put greater pressure on the fiduciary point? I mean, were they saying look, if you're not going to rule for us on the fiduciary point, you can still get the stockholders a better deal by just making a narrow decision based on this charter provision. Who knows?

MS. HABBART: No, but you're right about that.

MR. MIRVIS: Could be. That could be.

MS. HABBART: I'd love to go back and ask the Vice Chancellor how that influenced him, if it did. And I will – give a simpler option, thank you. Now, that's interesting. And it was – and frankly, a lot of that discussion, as well, where they talked about transfer. You can read agreements all the time that don't properly define transfer for purposes of the agreements at issue and limited partnership agreements and LLC agreements, they really fail to— #00:18:55#

MR. MIRVIS: Yeah, words are messy things, but we don't have a lot of alternatives—

MS. HABBART: Words are very messy ... yes, that's correct. Anything else you want to say about the charter issue? How about the standing issue? You had said [inaudible] -- #00:19:08#

MR. MIRVIS: The standing issue was an interesting one. I enjoyed that a lot also, even though it – nobody ever

really thought it was going to change the course of the litigation. But, you know, we had argued -- I say "we," I mean my firm had argued, I think it was in *Revlon*, perhaps, for the first time, or right around the time of *Revlon*, which would have been '85 -- '84, '85 -- that bidders shouldn't be allowed to raise fiduciary issues. That – and we had a kind of a very tight, doctrinal kind of argument. You know, fiduciary duty issues should only be raised by people who were on the same page as the cestui que trusts, or whatever they – the English words or something – the people were the beneficiaries of the fiduciary duty. While the bidder is the exact opposite; the bidder is the buyer. The buyer has a direct conflict with the seller. Why should the bidder be able to litigate fiduciary issues that are designed to benefit the selling stockholders? It didn't make a lot of sense to us. We never won that issue. And the way Delaware sort of – and not just Delaware, but other states have done the same thing, have sort of [alighted] the issues is to say, well, the bidder at least has to have the fig leaf of owning shares in the company.

MS. HABBART: At the time. #00:20:34#

MR. MIRVIS: At the time of the conduct complained of.

MS. HABBART: Right.

MR. MIRVIS: Now, with the contemporaneous ownership rule, of course, comes out of the derivative law context. Now, once you talk about derivative law context, you have to ask the question, well, is the plaintiff an adequate representative? Well, how in the world is a bidder an adequate representative for the selling stockholders? Well, but – I think it was really almost like a rule of necessity. Hard to imagine all the cases that ran from '84 until, well, until today, frankly. Suppose Delaware would have gone the other way? Suppose Delaware would have said, you know what? Bidders don't have standing to assert fiduciary claims against targets and their directors. Well, we would live in – that would be a true alternative universe. There would still be the stockholder plaintiffs, but the stockholder plaintiffs, more so then than now, didn't have the resources to litigate these kind of cases. These were knockout, drag-out cases. The good thing about them, of course, is they were pre-email. None of these cases could be litigated today. Impossible.

MS. HABBART: Why do you say that? #00:21:57#

MR. MIRVIS: Oh, because the sheer burden -- crunch of – there aren't enough human beings or contract lawyers on this planet to review the emails that would have had to have been collected and reviewed to litigate cases like *Revlon*, *Unocal*, *Newmont*, *Time Warner*, *QVC*, on anything like the

expedited timeframes, which were required to be litigated for those cases to be decided. I do not know what would happen if there was a preliminary injunction practice in a hostile takeover case in which somebody needed to have a preliminary injunction hearing and what was the timing in those cases? Between 20 and 60 days?

MS. HABBART: Correct.

MR. MIRVIS: You couldn't do it. You simply couldn't do it. And I don't care how many lawyers you threw at it. I don't care how much money you spent on vendors. You could not possibly gather, review, produce, that number of emails. And even if you said, okay, all rules are off, I just have to try this case, just produce everything. Produce their inboxes.

MS. HABBART: You can't do that. #00:23:10#

MR. MIRVIS: Well, first, you can't do that. But not only that, you can't review it. It's just not possible on either side of the case. So, email has done – the best thing email has done is it waited long enough to come along until we had a firm grounding of Delaware takeover doctrine. Otherwise, we never would have – and I firmly – I truly, truly believe that.

MS. HABBART: Well, do you have a position today about emails?

MR. MIRVIS: Oh, sure.

MS. HABBART: What is your position? #00:23:36#

MR. MIRVIS: It's seven words to save America: Delaware should adopt a statute: an email is not a document. I don't have a co-sponsor for that legislation yet, but I'd be happy to have one.

MS. HABBART: Well, we'll take it under consideration at the council. See if we can get it, because I agree with you and I think people don't put the level of care in emails that they would in ... a paper document. #00:24:03#

MR. MIRVIS: And they never will; they never will. Because email is – the reason that they're not documents is they're really spoken words caught on a page.

MS. HABBART: But how about a text message?

MR. MIRVIS: Worse. Worse. And no matter – you look, we, ourselves, right? Everyone thinks they're funny on emails. They think they're hilarious in text. To say nothing of ephemeral messages like Snapchat, and now there's—

MS. HABBART: WhatsApp—

MR. MIRVIS: WhatsApp and also direct Tweets – are a new subject of discovery. So, this is a never-ending miasma, if that's a word.

MS. HABBART: Well, and I suppose those, others would say that those unmeasured responses are showing you what the real intent was. But then again, agreements always say

you're doing it based on the terms written herein and nothing else. #00:25:06#

MR. MIRVIS: I would agree that candid emails often reveal truth, but they reveal truth only about the speaker and their influence in an overall construction of the narrative is -- the prejudicial effect of their influence outweighs their usefulness. If you have an email that supports a certain narrative, it could be from a third-level person talking to somebody else who is not a decision-maker, but that can stink up a case and affect a court's view of a board-level decision that's very hard to get rid of. So, I don't know what the real answer is other than my statute, which ain't going anywhere.

MS. HABBART: Email is not a document. That's email plus everything else. #00:25:56#

MR. MIRVIS: Well, then, I'll define the word—

MS. HABBART: Text, yeah. We'll have to get it really broad. But I understand that challenge. And, going back to the dissent, when you knew that two justices, including the Chief Justice, dissented, that really sent a mixed message to the public. And like you said, would you have been Omnicare and after the fact try the same set of circumstances again. How did that temper your advice to clients, if at all, after this decisions? #00:26:35#

MR. MIRVIS: Well, that's a very good question because, you know, the word got out right away, once we had these opinions, and then you had comments and CLE programs of people saying, "*Omnicare* will have the life of a fruit fly. It will never happen again." I get calls from either my corporate partners or other people saying, "well, we want to do this transaction, and we want to do A, B, and C; and it was exactly like *Omnicare*." And I say, "well, that's *Omnicare*. You can't do that." They say, "what do you mean you can't do that?" That decision—

MS. HABBART: Look at the dissent.

MR. MIRVIS: Yeah, that decision is not right. I said, "well, it may not be right, but if you're going to have to litigate in the first instance in the Delaware Court of Chancery, what's the Delaware Court of Chancery supposed to say? That the majority opinion is not the law of Delaware?"

MS. HABBART: It can't.

MR. MIRVIS: And you look for ways around it. People look for things like acting by written consent. And there was a bench ruling that said, "yeah, that's different." That's pretty hard to understand, particularly if there was a contract obligating the person to act by written consent shortly afterward—

MS. HABBART: It's form over substance. #00:27:40#

MR. MIRVIS: -- hard to understand. But at the end of the day, the one change is, everybody now – I don't think I've seen a merger agreement since *Omnicare* that doesn't have a fiduciary out, not just for the right to change a recommendation, but you can't couple it with a force the vote under 251. I don't know that that's a bad thing. I think that, what it's actually done is, I think, it's put a lot of the pressure on the post-signing period. People have gotten more aggressive than they might otherwise have gotten in doing one-off transactions, that is with a soft market canvass or maybe even no market canvass. If they have a fiduciary out, coupled with either a go-shop period or some period of time in which it's free for other bidders to emerge. And I fully understand the contrary argument, which was any deal that's subject to a stockholder vote that's not locked up is a fiduciary out, whether it's in the agreement or not. Because all someone has to do is come along and make a higher bid and you're just not going to get the vote.

MS. HABBART: Exactly. #00:28:52#

MR. MIRVIS: But, look, the world didn't fall apart because of *Omnicare*. The deal market certainly didn't dry up. You know, will we know how many deals didn't get done because of *Omnicare*? No, we'll never know. If you asked me to guess, do I think it's a lot? No, I think it's probably none. But

what was rattling about the opinion and, still rereading it today, is rattling about the opinion is sort of the point that Chief Justice Steele, subsequently Chief Justice Steele, hammered home in his concurring dissent, which was, you have announced here a prescriptive rule. There is something you simply can't do no matter what the circumstance. No matter what the context. And that was very un-Delawarean. And that's what made this opinion surprising, to some degree unnerving, and you just sort of wondered, when you get an opinion like this that -- it's obviously very hard to predict how a court is going to view the set of facts. But this court viewed the set of facts the same way the Court of Chancery viewed the set of facts; it adopted the findings of the Court of Chancery—

MS. HABBART: Which was very – yes, you're right. #00:30:05#

MR. MIRVIS: And yet, announced a rule that certain things you just can't do. Well, that was startling, and it made people wonder for a while of what else are we going to find we just can't do? And, but, you know, in the great common law tradition, things sort of got righted, and the sky didn't fall, the world didn't end, and corporate lawyers just structured around a lot of this and litigators found clever ways to win cases no matter what.

MS. HABBART: So, let me ask you something. There was a point in time where, notwithstanding the no-shop clause, that Genesis permitted NCS to speak with Omnicare. Do you have any sense of why that was done? Or again, that was before your time? #00:31:02#

MR. MIRVIS: It was before my time, but I would suspect, and you can confirm this with the transactional lawyers. I may be completely wrong. I suspect the reason is probably a fear that if they – you know, even when you have a right, you also know that asserting it might not look great in the litigation. And sometimes you might feel like – and I don't know that that's the case here, but there are other situations I have been involved in that are like this where people say, "well, why should we let this happen? We have the right not to let it happen." And you say, "well, yes, you have the right not to let it happen. We think you're right and you have a perfectly legitimate basis not to let it happen, but think about how it's going to play in a courtroom. And, if you let the person talk, and they got nothing to say, that's a whole lot better as a record than not letting them talk." I don't know that's what happened here, but there are many situations in which people – that's how situations play out. One example is don't ask, don't waive, which people put into agreements all the time, frankly, no matter how many times the

courts say they don't like them or maybe they're even, per se, no good, people are going to put them in. And then, the question comes, okay, once you sign the merger agreement, even if it the don't ask, don't waive, don't fall by their own terms, shouldn't you release those people from the don't ask, don't waive? It's a very similar kind of dynamic. Clients will say, "well, why do I have to do that? Can you tell me it's definitely illegal?" No, it's not definitely illegal, not just definitely illegal. But it's -- people don't like them. There are a lot of judges don't like them. You're going to get – you're going to at least get a disclosure claim about them. Why don't you disclose this? Things like that. And you say, "well, we'll deal with that if it happens." Okay. You know, there's still a lot of judgements you have to make even after the case – even after facts look like they're fully baked; they're not often out of the oven yet.

MS. HABBART: Yeah, and I still – I find that most troubling is the idea that yes, okay, even if you say you always have to have a fiduciary out, everything was being analyzed by activity that took place after the merger agreement was entered into, and I just don't know how you – it's just not a good way to do business. #00:33:36#

MR. MIRVIS: You could chalk it up to hard cases make hard law. That's what I think happened here. It's very

tough for a court – when the court knows that by signing an order, stockholders will get more money, that's a huge amount of pressure. A huge amount of pressure. I'm not so cynical as to say a higher bid will always flush away everything that came before it. But, if I was a judge, and someone saying look, the stockholder is going to get 50-percent or 30-percent or 20-percent more value if you sign this order striking down these defenses. Not an easy call.

MS. HABBART: No, not an easy call at all, but what do they say? A deal should be a deal. One would think—

MR. MIRVIS: No argument here.

MS. HABBART: So, speaking of the deal, you were supposed to get six-million breakup fee, your client. You got 25. Kudos to you, but do you have any idea what the dynamics were there? #00:34:35#

MR. MIRVIS: I have a glimmer of a memory on that. The glimmer of a memory on that is Omnicare very much didn't want to have any further litigation. And I don't remember exactly what the hook was, but there was some – we had a prospect of asserting some kind of a claim if this wasn't resolved quickly. And they wanted it resolved quickly. And I can't put the pieces together in my head, but speed had a lot to do with it.

MS. HABBART: And they were willing to pay the 25.

MR. MIRVIS: Yes.

MS. HABBART: And query whether the 25 really is enough compensation for time, aggravation, legal fees—

MR. MIRVIS: Oh, it's probably not—

MS. HABBART: -- all that—

MR. MIRVIS: -- oh, it was certainly not.

MS. HABBART: It seems like a drop in the bucket—

MR. MIRVIS: Yeah, also, the reason – one of the reasons people have – get fees like this is when they have gone out into the marketplace and done a transaction that they don't close, they have exposed their business strategy to the world. And that's – you can't reasonably determine the cost of that, but it ain't nothing. It's something. And that's one of the reasons people insist on high breakup fees. Because once we tell the world this is the direction in which we plan to go, and we're thwarted from doing it, you run the risk of being positioned as a damaged company, and that's part of the reason for that level of compensation.

MS. HABBART: Thank you so much, Ted. This was a great help, and I will follow up with your transaction partner.

MR. MIRVIS: Great ... always great to be in Wilmington. Thank you.

MS. HABBART: You're welcome.

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