

Case: Omnicare v. NCS Healthcare
Interview of Morton Pierce; White & Case LLP
Interviewed by: Ellisa Opstbaum-Habbart;
The Delaware Counsel Group, LLC
August 13, 2019, Wilmington, DE

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1 MS. OPSTBAUM-HABBART: Good morning, Mort. Thank you
2 so much for being here today.

3 MR. PIERCE: My pleasure.

4 MS. OPSTBAUM-HABBART: Really appreciate it. As you
5 know, the whole function of this exercise is to give some
6 light to people on what was really happening behind the scenes
7 that you don't ordinarily get the benefit of learning about
8 just by reading about the case. So, obviously, Omnicare is
9 quite interesting, and I'd love to start with, perhaps, you
10 letting me know at what point were you brought into the
11 matter? #00:01:06#

12 MR. PIERCE: It started in the fall - the events
13 that are outlined in the case are in 2002, spring and summer.
14 Omnicare got interested in this in the fall of 2001, and had
15 made some overtures to the NCS people and tried to get
16 information, tried to negotiate a confidentiality agreement.
17 And we were unsuccessful because they insisted on - I forget
18 whether it was a two- or three-year standstill. This is, in

1 some ways, ancient history now, so I apologize for not knowing
2 all the details.

3 MS. OPSTBAUM-HABBART: No, no. I understand; no
4 problem. #00:01:50#

5 MR. PIERCE: And we told them we wouldn't do that,
6 and we offered some alternatives-- shorter-term NDAs. We also
7 pointed out the fact that once we got information, it would be
8 very hard for us to do anything on a non-consensual basis. And
9 they insisted on their form, or they weren't going to deal
10 with us. So, we stopped talking to the company because we
11 weren't really getting anywhere, which is when we went to the
12 creditors' committee, again, in the fall of 2001.

13 MS. OPSTBAUM-HABBART: Why do you think they were so
14 resistant to any negotiation with you on an NDA? #00:02:32#

15 MR. PIERCE: I think they didn't want Omnicare to
16 acquire them. And subsequent events, I think, bore that out,
17 but they - you know, Omnicare had a certain reputation in the
18 industry. They were tough. They were aggressive in
19 negotiations. They - the business is also, is a very simple
20 business. It's a wholesale pharmacy business. The value was
21 all in the synergies, which meant that you know, synergies is
22 euphemistic for you were going to basically chop a lot of
23 people and consolidate their contracts into your system with
24 your people. And Omnicare was very successful in doing that,

1 and they had people that were very efficient in doing that.
2 And most target companies didn't like that prospect.

3 MS. OPSTBAUM-HABBART: And there had been some
4 history. #00:03:29#

5 MR. PIERCE: I don't know if there was history with
6 NCS-

7 MS. OPSTBAUM-HABBART: Directly, but-

8 MR. PIERCE: -- specifically-

9 MS. OPSTBAUM-HABBART: -- but the reputation you
10 talk about.

11 MR. PIERCE: Yes. I mean Omnicare was, by far, the
12 biggest player in an otherwise fragmented market. And that was
13 the Omnicare business plan. It was essentially a rollup. You
14 went around and rolled up a lot of, really, family businesses.
15 This was - this was the institutional pharmacy, which is
16 euphemistic for you sold drugs to nursing homes. And it was
17 generally a local business. You'd have the local nursing home,
18 and they'd go to another local pharmacy and get their product.
19 Omnicare institutionalized that business. They had
20 distribution centers. They had people that recommended certain
21 drugs. They got more efficient in their purchasing power. They
22 ended up being the largest of buyers of drugs in the country
23 from McKesson and Cardinal and those distributors. So, they
24 really brought a level of professionalism to the business. And

1 they got very large as a consequence. A lot of people sold to
2 them, not because they were forced to, because there were
3 private sales, but because Omnicare could pay what to these
4 local pharmacies looked like a huge amount of money, but to
5 Omnicare, given the synergies, were reasonable prices.

6 MS. OPSTBAUM-HABBART: Understood. So, all right, so
7 unsuccessful negotiating fair terms in your mind with them.
8 So, you go off to the creditors' committee. Can you tell us a
9 little bit about what your plan was with respect to your
10 negotiations with them? #00:05:14#

11 MR. PIERCE: [laughs] There was nothing secret or
12 underhanded about it. Omnicare wanted to acquire NCS. They had
13 a sense, you know, obviously, without doing any diligence,
14 without you know, access to private information, but, given
15 their experience, they had the sense that this could be a
16 lucrative transaction for them given the potential synergies
17 they thought they saw. So, they simply wanted to buy NCS, and
18 they wanted to talk to anybody who was willing to talk to them
19 to acquire the company. The company wasn't willing to talk to
20 them, so they found, at least initially, a willing participant
21 with the creditors' committee.

22 MS. OPSTBAUM-HABBART: And how did that work out?
23 #00:06:08#

1 MR. PIERCE: Well, the creditors - I think it worked
2 out well for the creditors. I think they negotiated with
3 Omnicare. They got a price from Omnicare. And then, the
4 company, with the creditors' involvement, turned to Genesis
5 and they, obviously, they knew what they had in their pocket.
6 So, there was much talk about the stalking horse, and I think
7 they used Omnicare as a stalking horse. They had the Omnicare
8 bid. They never bothered to go back to Omnicare. And they used
9 that - the bankruptcy bid -- as a basis for their
10 negotiations, I think, with Genesis.

11 MS. OPSTBAUM-HABBART: Well, with respect to that
12 bankruptcy bid, did When you call yourself that you,
13 perhaps, were the stalking horse, the terms of your offer -
14 what were the conditions? Do you recall if there was anything
15 significant? #00:07:10#

16 MR. PIERCE: No, not really. There was nothing
17 unusual in the discussions. It was, what do we need to do to
18 acquire this company? In the same way that any acquiror would
19 approach any target. Let's figure out how we can do this deal.
20 You know, obviously, the creditors wanted as much as they
21 could get or the company, I presume, since they never spoke to
22 us, wanted as much as they could get and, from the buyer's
23 perspective, we wanted to pay as little as we could in order
24 to acquire the company.

1 MS. OPSTBAUM-HABBART: Did Omnicare, any
2 representatives of Omnicare, have any prior dealings with any
3 of the individuals on the—

4 MR. PIERCE: NCS—

5 MS. OPSTBAUM-HABBART: -- creditors' committee?

6 #00:07:54#

7 MR. PIERCE: On the creditors' committee.

8 MS. OPSTBAUM-HABBART: Yeah.

9 MR. PIERCE: I don't know. There was some
10 familiarity with Judy Mencher, who was the lead on the
11 creditors' committee. But I don't know if there were prior
12 dealings or if the bankers knew people on the creditors'
13 committee. But we, you know, we had a few meetings with them,
14 and it was all amicable. It didn't go anywhere, but it was all
15 amicable.

16 MS. OPSTBAUM-HABBART: Well, why do you think after
17 all that meeting with the creditors' committee, they, again,
18 ignored your client and went right to Genesis? That's why I
19 asked was there any prior dealings that maybe led to some
20 history they wanted to avoid. #00:08:35#

21 MR. PIERCE: I don't think so. I mean, I think they
22 were playing it as creditors would. They got what they thought
23 they were going to get from Omnicare without sharing any
24 information. They then turned to Genesis. I think the reason

1 we knew something was going on was that Judy Mencher came back
2 to us late in July, and I think she did that because she was
3 playing the role that you would have thought that the board
4 would play. I don't think she liked the Genesis deal at the
5 point in time that she approached Joel. I don't think that
6 they were paying the creditors out completely. So, I think she
7 went back to Omnicare, at that point, and contacted them, and
8 said, gee, you really got to come in here and do something.

9 #00:09:21#

10 So, you know, the case - the facts would indicate
11 that Omnicare came in at the last minute, and Omnicare just
12 threw in this conditional bid. I mean, if someone had
13 approached Omnicare in, you know, March, April, May, or before
14 the signed an exclusivity agreement, and said, look, you know,
15 we think the equity has value. We can prove it to you. Sign
16 the standstill, a short-term standstill, not a multi-year
17 standstill, and get some information. I think Omnicare - not I
18 think -- I know Omnicare would have done that, but nobody
19 reached out to Omnicare.

20 MS. OPSTBAUM-HABBART: Well, do you think with the
21 encouragement of the creditors' committee that NCS might have
22 backed off on the term - the length of the confidentiality
23 agreement and standstill? #00:10:12#

1 MR. PIERCE: You know, I don't know what the
2 interaction was between the creditors' committee and NCS.
3 Look, it's very clear that NCS didn't want to sell Omnicare,
4 for whatever their reasons. And the case is, you know, is
5 replete with references to we want to do this to make sure
6 that we don't get a bid from Omnicare. I mean, but - strikes
7 me as an odd way for a board to go about an auction, but
8 that's - it's explicit, and it's explicit in their - it's
9 certainly, from the Genesis side, we want these things because
10 we want to make sure Omnicare doesn't bid and the company went
11 along with that.

12 MS. OPSTBAUM-HABBART: Well, the facts do, as it's
13 presented in the case, as you do read it and it sounds like
14 you come in at the last minute, very conditional, that a board
15 would be silly to take yours over a much more certain offer.
16 And why do you think it was referenced that way? I mean, why,
17 forget that, but what was going on that the presentation was
18 so anti- #00:11:30#

19 MR. PIERCE: Yeah, you know, we all pick our facts.

20 MS. OPSTBAUM-HABBART: -- Omnicare.

21 MR. PIERCE: We're lawyers. We know how to pick
22 facts and weave a story. Their litigators picked facts and
23 then weaved a certain story and the court-

1 MS. OPSTBAUM-HABBART: Bought their story.

2 #00:11:43#

3 MR. PIERCE: The court bought their story. Why they
4 would, you know, in the face of legal precedent, have acted
5 the way they acted. It's counterintuitive to me vis-à-vis the
6 minority shareholders. You know, that it - clearly, the board
7 and management did not want to be acquired by Omnicare. You
8 know, in this day and age - I don't think that would have
9 happened given the corporate governance environment today,
10 it's inconceivable to me that you would have replicated that
11 fact pattern. Back then, people were still pushing the edge of
12 the envelope to see what they could get away with, and boards
13 were a little more complicit with what the senior manager -
14 the senior management wanted to do. Again, I don't think that
15 would happen today.

16 MS. OPSTBAUM-HABBART: Well, as you said, the set of
17 facts that were noted in the cases, the story that was bought,
18 shall we say, or that everyone felt was credible, that went
19 into the case. Did you-- #00:13:02#

20 MR. PIERCE: And I wouldn't know, when we talk about
21 the facts, if you look at the Supreme Court decision, which I
22 actually reread in preparation for this, the decision rests on
23 the Unocal analysis, and they assume the facts, but in my
24 rereading, but there is a certain skepticism in the facts. And

1 the Supreme Court says, look, we're going to assume these
2 facts, but, you know, and among the facts we're going to
3 assume and the fact that they discharged their fiduciary duty,
4 we're going to assume that it was all okay, notwithstanding
5 the fact that, you know, they signed an exclusivity agreement.
6 They acceded to all the demands of Genesis. They abandoned
7 their stalking horse plan. You could look - to me, what the
8 Supreme Court seems to be saying is, you know, I'm not so sure
9 about these facts. And there may be a different way of looking
10 at these facts. And then, they go on to say and, by the way,
11 you know, given the fact that they were improving and that
12 they were no longer really on the verge of bankruptcy because
13 they were getting value for the equity and they were
14 convincing at least one buyer to pay for the equity that why
15 wouldn't you, at that point, have reached out? That's - and
16 that's really kind of an aside in the case because they're
17 focusing on the Unocal analysis. But I think there was some
18 skepticism, at least in the majority, as to - in looking at
19 those facts. Yes, you could look at it and say, well, gee, you
20 know, Omnicare was this big bad person, and they just wanted
21 to buy it in bankruptcy, and they made this bankruptcy bid and
22 then, oh gee, all of a sudden, six months later, they reappear
23 with a conditional offer. You know, a skeptic might look at
24 that and say, well gee, you know, what happened in the

1 interim? And why exactly didn't you attempt to contact them in
2 the interim? Why didn't you attempt to reengage them? And I
3 read a little of that into the decision.

4 MS. OPSTBAUM-HABBART: How about the fact that
5 Genesis truly - you know, basically gave NCS practically no
6 time to make a decision. Basically said, well, take it or
7 leave it or - I mean, there was a risk, wasn't there, if NCS
8 did not accept Genesis? They weren't sure about you? At that
9 time, when they were making the decision. #00:15:42#

10 MR. PIERCE: Putting the best light on it from their
11 perspective, the answer to that is, sure, yes, I get that.
12 But, I guess I would point out a couple things. One, I have
13 never seen an ultimatum, and I have been doing this for close
14 to 45 years, that someone really followed through on. Now, you
15 know, maybe they really were going to. Maybe they really were
16 not going to put themselves in a position where they were
17 going to have Omnicare come in. But, you know, I think there's
18 at least some obligation to test that notion. And that assumes
19 that there was no history here and Omnicare is just sort of
20 piling in at the last minute. #00:16:31#

21 To me, this is - again, if you look at the case law,
22 you know, Ace, Phelps Dodge, QVC, those opinions are replete
23 with references to the fact that you can't, in the sense,
24 create a situation where you force a decision and then say,

1 gee, I had no way out. And, in my mind, this case is on all
2 fours with that language in Ace where this was created by the
3 fact that this board, and their special committee, you know,
4 basically had the same advisors as the company, which to me
5 was curious. And after they were established in March, you
6 know, March, April, May, June, you know, I forget when they
7 signed the exclusivity, in June or in July, you would not
8 reach out to someone that everyone acknowledged had the
9 ability to pay the most money and at least give them another
10 shot. I mean, if for no other reason, if I were counsel on
11 that side, to create a better record, I would have reached out
12 to Omnicare.

13 MS. OPSTBAUM-HABBART: Okay, but Genesis had some
14 tough negotiators, right- #00:17:59#

15 MR. PIERCE: You know, that's the world that - you
16 know, that's the world of M&A. There are no cupcakes in this
17 business.

18 MS. OPSTBAUM-HABBART: No. Wouldn't you think it's
19 possible that, based on the Genesis presentation, and the
20 reputation of its counsel, that NCS might have thought,
21 reasonably might have believed, that the ultimatum was for
22 real? #00:18:27#

23 MR. PIERCE: And again, putting the best face on it,
24 let's assume that it was, but that ignores the fact that for

1 three or four or five months before they got that ultimatum,
2 they did nothing to reach out to Omnicare. The other thing
3 that that ignores in the kind of the real world of M&A, in my
4 view is, you know, the facts that weekend were somewhat
5 humorous, in a way, but we - Mencher contacts Joel, says, you
6 know, you got to put a bid in. So, we contact all of these
7 people, and nobody is responding. Now, it's unclear to me
8 timewise when exactly that exclusivity agreement ended, but it
9 was a Friday. It got extended that day, and I'm not sure
10 whether it got extended before we started reaching out to them
11 or afterwards.

12 MS. OPSTBAUM-HABBART: You never found that out.

13 #00:19:19#

14 MR. PIERCE: No. And the only way we got to them is
15 my brother had an office in the same building as the NCS
16 people. So it was a Friday afternoon, and we got his secretary
17 to come back in the office and we faxed the thing to her and
18 told her please don't read it and put it in an envelope, put
19 it under the door. That's the way we got the offer to them.

20 MS. OPSTBAUM-HABBART: That's something. #00:19:44#

21 MR. PIERCE: So, they had - they had that offer. And
22 it was like, it was you know, for \$2.50 or three bucks more
23 than what they were getting from Genesis. And, at that point,
24 so, okay, you get an ultimatum. You know, we got finish this

1 deal by Sunday night or you know, Monday morning when we've
2 got to announce. We've all done deals. This was not a
3 complicated transaction. And I understand the due diligence
4 condition, but as you negotiate out a merger agreement, you're
5 going to get diligence - I mean, you're going to - there are
6 going to be reps and warranties, there are going to be
7 schedules. It was not insurmountable. We have all done deals
8 over a weekend. And we have all done deals where we're
9 negotiating with two people simultaneously. And, you know, you
10 got one conference room going with one group, and another
11 conference room going with another group, and you see where
12 you end up at the time of the deadline. #00:20:30#

13 So, the fact that they didn't even engage in
14 anything like that, you know. And I know they go on and on
15 about conditionality of the due diligence condition, but
16 what's interesting to me also is there's language, and you
17 know, by the Chief Justice Veasey, in the Paramount decision
18 saying, look, you at least have an obligation to examine that
19 conditionality and determine whether it's really a problem or
20 not. You know, nobody came to us other than, you know, Judy
21 Mencher saying you got to take out the due diligence
22 condition. #00:21:09#

23 You know, Omnicare had a board. Omnicare had an
24 obligation to its shareholders and, you know, Joel Gemunder

1 did not control that board completely. And, you know, the
2 board didn't want to take that condition out. You know,
3 interestingly, the advisors told him to do that because he was
4 going to get his diligence anyway in the course of negotiating
5 a merger agreement, but the board wasn't comfortable with that
6 at that point in time. But they had the - NCS could have come
7 to us and said, you know what? Let's talk. Instead what they
8 did was they signed an extension of the confidentiality - the
9 exclusivity agreement -- and said, oh gee, you know we can't
10 talk. You know, I get it. I get what Genesis wanted, and I
11 suspect that the senior management - senior management knew
12 there was no job for them at Omnicare. I don't know if there
13 was any discussion of that with Genesis, but clearly they were
14 done if Omnicare bought them. But if you look at the cases,
15 and again, to me in analyzing this, obviously, you want your
16 client to win and, you know, you want to do the best for your
17 client. But I'm not - I have never really understood this
18 negative reaction to Omnicare. To me, it was just another in a
19 series of cases, you know, Phelps Dodge, Ace, QVC, MacMillan -
20 you know, go back to Anderson Clayton in the eighties. There
21 is a series of cases that just say, look, you know, there are
22 a couple of bidders, you can't - you just can't block one of
23 them out. You can't do that. And, to me, that's what this case
24 was all about.

1 MS. OPSTBAUM-HABBART: So, you were very surprised
2 with the Court of Chancery's rulings- #00:23:00#

3 MR. PIERCE: Yes, I was.

4 MS. OPSTBAUM-HABBART: Really?

5 MR. PIERCE: I mean, I thought we had a very strong
6 case based on the precedents. Now, again, people, as I have
7 said, you know, lawyers are good at picking their facts and
8 presenting their narrative. And, you know, they obviously
9 presented the narrative that we were last-minute bad guys. We
10 wanted to just, you know, we wanted to take it in bankruptcy
11 and screw the equity. And we came in at the last minute. And
12 we - with this highly conditional bid. And, just as an aside,
13 the conditionalities, it's also sort of humorous to me because
14 when you read the Genesis agreement, there was a working
15 capital condition, which you - you could pick up a thousand or
16 ten thousand or a hundred thousand merger agreements, you will
17 not see that in any other public company deal. So, you talk
18 about conditionality, nobody really focused on that. And,
19 certainly, the court didn't. And, you know, the NCS Genesis
20 people weren't going out of their way to point that out.

21 #00:24:13#

22 So, you know, they painted a certain narrative and,
23 you know, the Vice Chancellor accepted that narrative. Was I
24 surprised? Yes. You know, I didn't think we were doing

1 anything - we weren't creating new law, and I think the
2 Supreme Court decision is consistent with that. That this
3 isn't new law. This is, you know, this is a straightforward
4 Unocal/Unitrin analysis.

5 MS. OPSTBAUM-HABBART: So, I suppose you do believe
6 that, without a fiduciary out, a board can't lock itself up in
7 quite the manner it did? #00:24:57#

8 MR. PIERCE: Yes. And again, that is consistent with
9 a line of cases going back, at that point, 15 years. And it
10 was in the context of a shareholder vote. You've got to give
11 the shareholders an ability to vote. So, you know, there are
12 references in the case law too. You know, there might be a
13 situation in which the board can have a no-talk. Or, you know,
14 there might be a situation in which a board might negotiate
15 away certain of its rights. And, of course, all the cases say
16 this isn't it. And we're not, and you know, they had to be
17 fully shopped. And, you know, and otherwise they had, maybe it
18 was a distress situation, but fully shopped. But, in the
19 context of I don't have the ability to terminate and, you
20 know, the force the vote essentially doesn't have the ability
21 to terminate. But you have to give the shareholders the right
22 to vote. So, it cannot be a done deal. The shareholders --
23 this would have worked if the shareholders had the ability to
24 say, you know what? take a majority of the minority, and just

1 say you know, I'm not sure I want this deal because I think
2 I'll take my chances with another deal. I think that's all the
3 court was saying.

4 MS. OPSTBAUM-HABBART: Now, did you have a problem
5 with the directors who were also shareholders entering into
6 those voting agreements? I guess my question is, didn't they
7 have the right to exercise their powers as a shareholder?

8 #00:26:32#

9 MR. PIERCE: Sure—

10 MS. OPSTBAUM-HABBART: Separate and apart from their
11 role as a director?

12 MR. PIERCE: Absolutely. You know, you can take
13 Outcalt and Shaw and, then, you know, you can't force them to
14 sell to Omnicare. You have to focus, in this situation, on the
15 fact that, for whatever reason, they couldn't act by written
16 consent; it wasn't in their charter. And, for Delaware 203
17 purposes, they needed the board to exempt that voting
18 agreement from 203.

19 MS. OPSTBAUM-HABBART: Well, that was interesting
20 because the case says - or there's footnotes in the - to the
21 effect that says that 203 was - nobody recalled 203 being
22 addressed. #00:27:23#

23 MR. PIERCE: Well, they clearly - they needed - they
24 did not exempt themselves from 203. I don't know why they

1 didn't, but they didn't. Given the configuration of their
2 shareholders, I would have thought they would have, but they
3 didn't. They needed board approval. So, at that point, the -
4 you know, everyone wants to - yeah, I know the - certainly the
5 Vice Chancellor in the dissent wanted to separate the merger
6 agreement from the shareholders-

7 MS. OPSTBAUM-HABBART: Right.

8 MR. PIERCE: -- but at the point that the board is
9 agreeing to that merger agreement, it doesn't work without
10 that board also taking action to exempt those voting
11 agreements from 203. So, the board, at that point, is blessing
12 the entire package. It's not like they're saying, gee, we like
13 the merger agreement, and we've got nothing to do with that
14 voting agreement, and Outcalt and Shaw, as shareholders, they
15 can do whatever they want. Once the board has to act on those
16 voting agreements, it's the board's responsibility to take
17 care of the minority shareholders at that point.

18 MS. OPSTBAUM-HABBART: I agree, Mort. My question,
19 though, is the certificate of incorporation had opted out of
20 203. #00:28:36#

21 MR. PIERCE: You know, I don't recall that. But if
22 it had, I don't know why they needed to vote.

23 MS. OPSTBAUM-HABBART: Agreed.

24 MR. PIERCE: But they did.

1 MS. OPSTBAUM-HABBART: Which is a question I always
2 had., Why would you make the board a party to the voting
3 agreement as opposed to, like you said, keeping the voting
4 agreement separate and apart from the merger agreement.

5 #00:28:55#

6 MR. PIERCE: But I will say - I guess I would point
7 out that, even if they did, let's make the assumption that
8 they don't need any board action. They can do whatever they
9 want with their shares. The board still, at the point they're
10 agreeing to the merger agreement, it's not as though they're
11 oblivious to the voting agreement. So, they know, when they're
12 approving the merger agreement, that they are approving a done
13 deal, even if they had no involvement in the voting agreement.
14 So, I don't think the board's responsibilities, from the
15 fiduciary standpoint, change. I think it makes the case - I
16 thought it made our case even easier that the board had voted
17 on that voting agreement. But I am not sure that the analysis
18 would be different even if they hadn't.

19 MS. OPSTBAUM-HABBART: But I agree. It did make your
20 case better when they made the board a party to it-

21 MR. PIERCE: Not good enough-

22 MS. OPSTBAUM-HABBART: I never understood it-

23 MR. PIERCE: -- for the Vice Chancellor.

1 MS. OPSTBAUM-HABBART: -- No. And as soon as I saw
2 that you opted out of 203, I was like, I really don't
3 understand this at all what their thinking was. And,
4 apparently, you see logically why they might have included the
5 board because the board was not oblivious to the action, but
6 they really didn't have to. #00:30:16#

7 MR. PIERCE: Yeah. I have never spoken to anybody
8 about why they took that vote or didn't take that vote.

9 MS. OPSTBAUM-HABBART: It was very interesting
10 because then, when you dig in, in addition to opting out, then
11 the testimony says that there was no recollection of any
12 discussions of 203. So, you're like, well then, what were you
13 doing? Not sure I understood that, but I still don't.
14 #00:30:37#

15 MR. PIERCE: And again, what's interesting, we all
16 do deals in a constrained time period And, you know, you hope
17 that everyone is reading all the documents. But you make sure
18 you go through the documents in great detail. We prepare
19 detailed summaries. We go through all of the legal issues. We
20 go through why we're voting on what we're voting on. You know,
21 there is a reference in the decision to, you know, well... and
22 both the Vice Chancellor and Supreme Court addressed this,
23 well, you know, they only spent an hour discussing this, but
24 everyone—the Vice Chancellor says, you know, but it was

1 thoroughly explained to them. The Supreme Court is sort of
2 scratching their heads as to, geez, they only spent an hour on
3 this. You know, there was a certain rushed aspect, clearly, to
4 all of this. And it's, you know, did they fully understand
5 exactly what they were voting on and what the consequences
6 were? And I, you know, the depositions say that they did. And
7 so, again, if you take that at face value, but you know,
8 again, an hour to go through all the documents in a
9 transaction like this is, in my experience, is a short amount
10 of time.

11 MS. OPSTBAUM-HABBART: Understood. Now all those
12 months, as you noted between April through then, why - why
13 didn't your client pop up before that last minute? Any-
14 #00:31:59#

15 MR. PIERCE: Because they didn't know what was going
16 on. I mean they would have been very happy to engage in a
17 process-

18 MS. OPSTBAUM-HABBART: But they had no knowledge.

19 MR. PIERCE: Yeah. No one - the last contact they
20 had with the company was in the fall. And, you know, we made
21 it very clear - I think we made it clear we're not signing a
22 long-term standstill. We're just not going to do that. But you
23 know, otherwise, and I know Omnicare had a reputation for
24 being unreasonable and higher charges and all that sort of

1 stuff, but they were willing to sign a reasonable NDA. And
2 they did it all the time. They did it before then. They did it
3 after that. They did a lot of deals, and they signed a lot of
4 NDAs. None of them had a lengthy standstill. If someone had -
5 if anybody had approached them and said, look, there's value
6 here. There's a process here. There's, you know, sign - let's
7 negotiate something reasonable and get involved. Nobody did.
8 Now, again, if somebody had approached them in April, can I
9 sit here and guarantee you that they would have said, okay,
10 gee, we'll be part of the process? I don't know, but at least
11 they would have had the opportunity. My strong suspicion is
12 that they would have. They would have engaged in a process if
13 they were invited into the process.

14 MS. OPSTBAUM-HABBART: But before we get into some
15 of the legal issues that were entertained by the court, if I
16 may shift to just a personal reaction from you. Did you,
17 knowing - how did Omnicare appear to you when you first took
18 them on as a client as compared to their reputation? I mean,
19 did you have any notion of what you were dealing with when you
20 entered into that engagement? #00:33:55#

21 MR. PIERCE: When I started with Omnicare, the first
22 deal I did for them was in the early nineties, and they had a
23 market cap of a hundred and ten million dollars. We sold them
24 a couple years ago for, I think, close to fourteen billion

1 dollars. They made a lot of money for a lot of shareholders.
2 And they did it by being good at what they do and aggressive,
3 but not over the line aggressive, from my perspective. The
4 CEO, Joel Gemunder, was not everybody's cup of tea, but—

5 MS. OPSTBAUM-HABBART: But why not? Tell me.

6 #00:34:34#

7 MR. PIERCE: He was a - he was a tough guy. You
8 know, he was - Joel was - he had sort of grew up in a tough
9 neighborhood in the Bronx and went to City College, and then
10 did very well and went to Chicago to business school. And
11 yeah, he sort of worked his way up. And then, he worked for
12 Peter Grace, at Grace, and again, that was no shrinking violet
13 environment. The first board meeting I went to at Omnicare,
14 Peter Grace was still on the board. People weren't sure if he
15 came to board meetings with a gun.

16 MS. OPSTBAUM-HABBART: Oo! Okay, now that's
17 interesting. #00:35:15#

18 MR. PIERCE: It was an interesting environment. So,
19 but I don't think Joel was any different than any other
20 businessman trying to do the best for his company and his
21 shareholders. He was very successful, which I think led a lot
22 of people to be—

23 MS. OPSTBAUM-HABBART: Jealous.

1 MR. PIERCE: -- unhappy. He could sometimes be
2 gruff, which made people somewhat unhappy. But I've dealt with
3 a lot of businesspeople. They have a lot - you know, they have
4 different styles, personally, but, in my experience, most
5 successful businesspeople are you know, they're hard-charging,
6 and they're trying to do the best for their company and their
7 shareholders. And that means that they're not doing the best -
8 not trying to do the best for your shareholders; they're
9 trying to do the best for their shareholders.

10 MS. OPSTBAUM-HABBART: Of course. #00:36:07#

11 MR. PIERCE: And I think that was Joel.

12 MS. OPSTBAUM-HABBART: And so, so Joel might have
13 been difficult, but he was fair with his counsel, you felt. He
14 was always open and honest and listened to you.

15 MR. PIERCE: Yes. Absolutely. I mean, if he
16 respected you, he listened to you.

17 MS. OPSTBAUM-HABBART: Understood. He trusted you,
18 too.

19 MR. PIERCE: Yeah. And, you know, I put myself in
20 that category, but taking myself out of it for a minute, there
21 were a few people, you know. He had anti-trust counsel. He had
22 regulatory counsel. Joel tried to find people that he thought
23 were really good at what they did and experienced at what they
24 did and had good judgment and he relied on them completely. In

1 fact, Joel would not do anything without consulting counsel.
2 He was obsessed about that.

3 MS. OPSTBAUM-HABBART: Good for him. #00:37:05#

4 MR. PIERCE: Completely.

5 MS. OPSTBAUM-HABBART: Kept him out of trouble.

6 MR. PIERCE: Completely. And before the year of
7 governance and all that sort of stuff. He made sure that
8 counsel was at every board meeting. And he made sure that he
9 cleared everything with counsel. He was - he was meticulous
10 about that.

11 MS. OPSTBAUM-HABBART: He was ahead of his time, in
12 some ways.

13 MR. PIERCE: In some - in some ways.

14 MS. OPSTBAUM-HABBART: In some ways.

15 MR. PIERCE: In some ways.

16 MS. OPSTBAUM-HABBART: When you think about Enron,
17 you know, had their books of rules and regulations of
18 corporate governance. Won an award for it. And, then, look
19 what they did. And there is your hard-charging-

20 MR. PIERCE: No, he understood that he was in a
21 regulated industry. That the healthcare was a scrutinized
22 industry and, you know, selling drugs to nursing homes,
23 there's, you know, you don't want trip up, and he was very
24 conscious of that.

1 MS. OPSTBAUM-HABBART: So, tell me, shifting gears
2 just a bit. What did you think of the whole standing argument?
3 You're laughing, what did you- #00:38:05#

4 MR. PIERCE: I'm not a litigator. I'll let the
5 litigators talk about that-

6 MS. OPSTBAUM-HABBART: All right-

7 MR. PIERCE: -- but it just struck me as, again, you
8 know, I was going to use the word silly. I shouldn't use the
9 word silly when in talking about the judgment of a Vice
10 Chancellor. But, clearly, there were cases that established
11 standing for bidders. I don't know why they didn't follow
12 through on that. We obviously had - it just made things a
13 little more cumbersome. It's not like it really made a
14 difference in the case, because we worked through the
15 shareholders. And we were, essentially, writing the papers and
16 then doing the thinking, and they were - they were involved.
17 Again, I don't want to denigrate the plaintiffs' bar, but, you
18 know, they serve - they clearly serve a purpose. But, it's not
19 like that decision was going to do anything other than just
20 make it slightly more cumbersome. So, in retrospect, you know,
21 all of the Vice Chancellor's decisions kind of went against
22 us, so that doesn't surprise me, but it was not... . It was
23 unnecessary, I thought.

1 MS. OPSTBAUM-HABBART: But do you agree with his
2 concept of not being able to buy in to a lawsuit- #00:39:27#

3 MR. PIERCE: If he thought that that's what we were
4 doing, but I mean, I think the cases are distinguishable
5 between buying into a lawsuit or being a bidder and having a
6 legitimate interest in the board's decision-making process.
7 You know, it... and it also speaks to, you know, if you look
8 at the facts, again, we all pick our facts. You can look at -
9 you can look at Omnicare as both this predatory company in the
10 industry and the horrible people and all that sort of stuff.
11 You know, if they were really horrible people, they might have
12 been - gone out there and got a stake in the equity. They
13 might have taken a stake. They might have thought about ways
14 to pressure the NCS board. They didn't do any of that. It, you
15 know, that's not what they were about. They simply wanted to
16 do a deal.

17 MS. OPSTBAUM-HABBART: Your description of how
18 Omnicare is viewed, when you read the cases, without knowing
19 any of the background, is so on point. Is there anything, in
20 retrospect, you think you could have done differently to
21 convince the court that Omnicare was not the big, bad wolf?
22 #00:40:37#

23 MR. PIERCE: You know, I don't know, to be honest.
24 There's one thing that sticks out, and again, it came through

1 again, and I remember when it happened, and it came through
2 again in the decision, in the Vice Chancellor's decision. The
3 Vice Chancellor clearly was - was concerned, I think, about
4 Omnicare - and not about Unocal. And he asks - somebody asks
5 Joel, and it may have been in the deposition. It may have been
6 in court. I don't remember when. Well, can you buy the
7 combined company? And, Joel being Joel, never one to shirk
8 from a challenge, said, of course. You know, sure, you know,
9 we can do that. You know, we can do anything. If I could
10 change one fact, I might want to change that because clearly -
11 he shouldn't have said that. I think he should have said I
12 want to buy NCS, I don't want to - that's my focus now. But I
13 think that that just embodied Joel and I think that had he
14 answered that question differently, would it have made a
15 difference? I don't know. But I think it just, in my mind, it
16 probably cemented the view of the court that yeah, these guys
17 are just big, big bad guys and, you know, they think they can
18 do anything.

19 MS. OPSTBAUM-HABBART: He could. Yeah. He was
20 probably manipulated a bit to bang on his chest a little bit.
21 #00:42:10#

22 MR. PIERCE: Absolutely. Whoever asked that
23 question, I am sure that that was the - that was their dream
24 response-

1 MS. OPSTBAUM-HABBART: Exactly.

2 MR. PIERCE: And they got it.

3 MS. OPSTBAUM-HABBART: He should have checked with
4 his counsel before answering just as he checked with
5 everything else, right? #00:42:25#

6 MR. PIERCE: I don't know who the lawyers were when
7 that question got answered.

8 MS. OPSTBAUM-HABBART: Now tell me, how about the
9 whole transfer argument with respect to the certificate
10 provisions. Did you feel strongly about... ? #00:42:39#

11 MR. PIERCE: Strongly is a strong word. I thought we
12 had the better of the argument. It was not a solicitation in
13 connection with a 14(a) solicitation. It was-- and in fact, as
14 the Supreme Court points out, it's, again, another fact that
15 the - they're saying we're not ruling on this, but oh, by the
16 way, once they entered into that agreement, there was no need
17 for a solicitation. So, to me, it wasn't in connection with a
18 14(a) solicitation. It was also distinguishable because there
19 is an irrevocable proxy. When you solicit in the connection
20 with 14(a), with the proxy rules, you're getting revocable
21 proxies. Yeah, I thought that we had the better of the
22 argument. I thought that the other side had made a mistake in
23 signing those agreements.

1 MS. OPSTBAUM-HABBART: Because you felt it
2 constituted a transfer. #00:43:35#

3 MR. PIERCE: Yeah, we did. Look, sometimes you go
4 into cases, you got into a situation, and you just say, you
5 know, what the heck? Let's give it a shot, you know. This
6 could go either way. I'm not sure. But when the client asked
7 us, you know, what do you think about our case? I'm - my
8 reaction was, hey, you know, I think we got a winner on the
9 voting agreement. I think we got a winner on the fiduciary
10 duty issues.

11 MS. OPSTBAUM-HABBART: Yeah. See, when I looked at
12 that - reading the certificate, I thought, no, this is not a
13 transfer. It's interesting. That was my reaction. #00:44:14#

14 MR. PIERCE: And look, I understand it, and it's not
15 as though it's crazy to come to the conclusion-

16 MS. OPSTBAUM-HABBART: Agree.

17 MR. PIERCE: -- but I thought that if you look again
18 at the way 14(a) operates, if you look at the distinction
19 between revocable and irrevocable proxies, which is what 14(a)
20 solicits, if you look at the rights plan litigation and the
21 issues around that, the distinction between revocable and
22 irrevocable proxies... . I don't know, I just thought that we
23 had, you know, beneficial ownership distinction between

1 revocable and irrevocable. I just thought we had the better -
2 the better argument.

3 MS. OPSTBAUM-HABBART: I didn't think the Exchange
4 Act analysis - I didn't think the decisions went into that
5 kind of detail with respect to the 14(a). I really didn't.
6 Because some of the points you're making, I didn't take away,
7 and I've read it a number of times. #00:45:16#

8 MR. PIERCE: It's pretty clear at that point that
9 we're getting slammed by the Vice Chancellor. We lost the
10 standing argument. We lost that one. You could - you could
11 sort of see where this was trending at that point.

12 MS. OPSTBAUM-HABBART: So, okay, knowing that how
13 things were trending, how did you sit down with Joel and say,
14 we're going to keep going because I still think I'm right,
15 and... #00:45:35#

16 MR. PIERCE: We, yeah. You know, we thought we were
17 right and, you know, kind of in for a penny, in for a pound
18 kind of thing. You know, it's we were - we were there, and we
19 weren't going to abandon it unless we absolutely had to.

20 MS. OPSTBAUM-HABBART: And so, in your mind, there
21 was never a point where you said this is just not working for
22 us. Maybe we should call it a day? #00:46:03#

23 MR. PIERCE: Again, I'm the corporate lawyer, not
24 the litigator. And I think the litigators probably, after the

1 Vice Chancellor's decision, might have said, you know what,
2 this looks a little bit uphill. I'm sitting there as a
3 corporate lawyer just reading cases and that, definitely with
4 the inner workings of the judiciary or, you know, that side of
5 the law. It's just, to me, it was still, you know, we were
6 involved with Maxwell and that decision, you know, and going
7 back to Anderson Clayton, Ace, Phelps Dodge, QVC. These are
8 the stuff, you know, we lived with. We watched the law
9 develop. We were involved in some of those deals. It just
10 struck me as on all fours with all of those cases. So, to me,
11 it was like, gee, yeah, let's go - let's go appeal it because,
12 you know, I'm sure - I'm sure the Supreme Court is going to
13 see the wisdom of our view.

14 MS. OPSTBAUM-HABBART: Well, they did.

15 MR. PIERCE: Well three of them.

16 MS. OPSTBAUM-HABBART: But I would imagine Joel
17 trusted your judgment to continue the fight. #00:47:17#

18 MR. PIERCE: Yeah, it was mine and the senior
19 litigators at our firm and at Potter Anderson, but, you know,
20 he had great respect for all the senior - the senior lawyers
21 he was getting advice from. And, you know, I don't think
22 anybody said, gee, let's just stop. And there may have been
23 differing views on- obviously, it's kind of like, you know,
24 you're in a seven-game World Series, and you lose the first

1 three games, you know, it gets a little more uphill to come
2 out on top. But, you know, everyone said that it - my
3 recollection is everyone says it's certainly worth continuing
4 at this point. You know, just another hearing, you know,
5 prepare another set of briefs for the Supreme Court.

6 MS. OPSTBAUM-HABBART: But do you remember the Toys
7 R Us, how they - the board negotiated over a weekend-

8 MR. PIERCE: Yep.

9 MS. OPSTBAUM-HABBART: -- to make their decision.
10 And I have to say that I am personal friends with one of the
11 board members, so I share that, but I also know that, boy, she
12 worked real hard that-you know, these people they were on top
13 of things and they had a very short period of time to make a
14 decision and looked like they came out okay on that one.

15 #00:48:33#

16 MR. PIERCE: Well, and, you know, if you read the
17 Toys' decision and you, and again, I'm somewhat familiar - we
18 represented the banks in that-

19 MS. OPSTBAUM-HABBART: Oh, great. Great. #00:48:42#

20 MR. PIERCE: You know, they were very careful-

21 MS. OPSTBAUM-HABBART: Yes.

22 MR. PIERCE: -- and they were very careful about
23 process. But, as I said before, you can do deals over a
24 weekend. It's not great for your health or your sleep, but,

1 you know, we've done - I've done multi-billion-dollar deals
2 over a weekend. I don't recommend it as a regular occurrence,
3 but-

4 MS. OPSTBAUM-HABBART: It can be done. #00:49:05#

5 MR. PIERCE: Oh, absolutely.

6 MS. OPSTBAUM-HABBART: And it was done.

7 MR. PIERCE: And especially if you've already got a
8 fairly well-negotiated document. The process would have been
9 to take it to the other bidder and say, here, you know-

10 MS. OPSTBAUM-HABBART: Beat this.

11 MR. PIERCE: Yeah. I'm not going to relitigate a lot
12 of these provisions here.

13 MS. OPSTBAUM-HABBART: Take it and beat it.

14 #00:49:30#

15 MR. PIERCE: And that's essentially what we did. We
16 took a - once we got a look at the contract, we said, okay,
17 great, you know, we'll sign it.

18 MS. OPSTBAUM-HABBART: Did you like that working
19 capital provision?

20 MR. PIERCE: I mean, it's great for the buyer. Not
21 too good for the seller, but, you know, fine, you know. So,
22 it's not like at the end of the day we said, oh, my gosh! This
23 is going to require, you know, weeks and weeks of negotiation.
24 And from the due diligence aspect, you know, again, a great

1 deal is made of conditionality, we would have gotten the
2 information we wanted anyway in negotiating the reps and
3 warranties. And what was important to Omnicare was simply to
4 know, you know, what were the lease arrangements? What were
5 going to be the costs of terminating leases? So, you get a
6 contract rep, and you get a list of leases, and it's easy
7 enough to see that. And you want to know how many employees
8 they have.

9 MS. OPSTBAUM-HABBART: Didn't the - and the board
10 just didn't understand that you were going to get the
11 information you needed without putting that due diligence
12 condition, and then, that would have really put you in a
13 different position. #00:50:40#

14 MR. PIERCE: You know, it's easy for me, as a person
15 that's done a number of transactions, M&A deals, you know, I
16 do this for a living, to say, we're going to get that
17 information to you anyway. Don't worry about it. It's a very
18 different thing for a businessperson sitting on a board that -
19 they're fiduciaries. They take their fiduciary responsibility
20 very seriously also. They wanted to make sure that they
21 weren't stepping into something that - an unknown. Now, they
22 wouldn't have, but, you know, I understand their position. And
23 I have gone through this with other boards in other situations
24 also. And, you know, in virtually every deal that you pick and

1 every bid letter, there's, you know, you phrase the diligence
2 differently, you know, confirmatory diligence or limited
3 diligence, or everyone tries to minimize it. You're going to
4 get the same amount of diligence.

5 MS. OPSTBAUM-HABBART: Correct. #00:51:40#

6 MR. PIERCE: You're going to, in negotiating the
7 contract, it's just-

8 MS. OPSTBAUM-HABBART: Exactly.

9 MR. PIERCE: -- you're going to get it. So, you
10 know, and I think sellers understand that too, you know. I
11 don't see a lot of beating the drum about how, you know, you
12 got a diligence condition there, and so we're not going to
13 deal with you.

14 MS. OPSTBAUM-HABBART: Yeah, you have to sign the
15 agreement with schedules that say this is the only thing out
16 there that's a problem.

17 MR. PIERCE: Exactly. Exactly.

18 MS. OPSTBAUM-HABBART: Okay? So, you almost wonder
19 why parties waste a lot of time with that. #00:52:10#

20 MR. PIERCE: You know, the older I get, the more I
21 ponder why we spend so much time on so much that's irrelevant,
22 but—we do, and that's... Now, look, as lawyers, we get paid to
23 worry and paid to-

24 MS. OPSTBAUM-HABBART: That's our job.

1 MR. PIERCE: -- to really sort of dig down and make
2 sure we're not exposing anybody to any real risk. But, at the
3 end of the day, you know, all these - it's all roads lead to
4 Rome. You end up in the same place. You know, you sign an
5 agreement. It's got schedules. You've done your diligence. It
6 all comes out at the same place.

7 MS. OPSTBAUM-HABBART: So, obviously, you were very
8 happy when the Supreme Court decision came out. Did it strike
9 you as odd that there was no written opinion? That the written
10 opinion followed months later, so you really didn't understand
11 the grounds on which their decision was made? #00:53:02#

12 MR. PIERCE: I'm not a litigator. I didn't know if
13 that was usual or unusual, but they had to act quickly
14 because, you know, this was a dynamic, moving situation. I
15 don't think anybody would have - nobody would have hung around
16 for another six months to wait for a decision. You want to get
17 the deal done. So, it didn't strike me as unusual, but you
18 know, the litigators might have a different viewpoint on that.

19 MS. OPSTBAUM-HABBART: And when the decision did
20 come out, what did you think of the dissent? Obviously, it was
21 accepting all the facts as, you know, you may have focused on
22 different facts, but what was your reaction? #00:53:44#

23 MR. PIERCE: I mean, obviously, I thought the
24 dissent was wrong, but I found it curious that, you know, the

1 chief judge, who had written Paramount, didn't see the
2 parallels to the QVC situation. And the, you know, if you take
3 - if you assume a certain set of facts - like Omnicare was
4 never really there and Omnicare came in after the decisions
5 were made to sign the exclusivity and the bird in hand as
6 opposed to just the last - the fly-by-night last-minute guy.
7 I'm not saying that I don't understand his reasoning, but it's
8 still difficult to square with the decision he wrote in QVC,
9 which is very clear you cannot block another bidder. It's very
10 clear that you've got to be able to - if you think something
11 is conditional, you know, the QVC bid you thought was too
12 conditional, there was an obligation to investigate that. You
13 know, they go out of their way - the dissents go out of their
14 way -- to talk about how this was last minute and the
15 precipitous nature of the company, and if they didn't do this,
16 they might have gone back into bankruptcy. Well, it's pretty
17 clear, at that point, this company wasn't going bankrupt.
18 There wasn't that urgency. So, I - look, I've got great
19 respect for the Delaware judiciary. I just thought they were
20 wrong.

21 MS. OPSTBAUM-HABBART: Well- #00:55:24#

22 MR. PIERCE: And not consistent with the precedent.
23 The other thing they did was they made a point, and forgive me
24 if I go on about this.

1 MS. OPSTBAUM-HABBART: No, no. Please, go ahead.

2 MR. PIERCE: They made a point of this is new law.
3 And, to me, I mean, I always found that curious, and boy, we
4 hope this is sui generis, and this will never happen again.
5 Well, I suppose that getting a control person and locking it
6 up doesn't come up every day. But it, to me, it wasn't new
7 law. It was, you know, it was very consistent with all the
8 cases that had gone - that had preceded it, which is you can't
9 be preclusive and coercive. And this was just in those lines
10 of cases, and I think that that's all the majority was saying.
11 You can't prewire a vote.

12 MS. OPSTBAUM-HABBART: And you think - I felt as if
13 the dissent was saying, look, these were egregious
14 circumstances because of the facts as they saw them. And you
15 had to leave room for a board to be able to act in this
16 manner. #00:56:27#

17 MR. PIERCE: Well, although, again, the case law is
18 pretty clear that you can't - you can't create the situation
19 that creates that exigency.

20 MS. OPSTBAUM-HABBART: Well, that's true.

21 MR. PIERCE: And, to me, again, you pick your facts,
22 but they created the situation. They could have come and
23 spoken. They could have reached out to Omnicare; they didn't.
24 Then, all of a sudden, it's Omnicare's bid is at the last

1 minute. Omnicare might not have bid at all at - on that day
2 had Judy Mencher not reached out to them. So, you know, it's
3 you could all paint it as last minute, but if someone had
4 reached out to them in June, they would have allowed the bid
5 in in June.

6 MS. OPSTBAUM-HABBART: Do you think Judy reached out
7 with the support of the rest of the board? Or do you believe
8 this was an action she did independently from the board?

9 #00:57:19#

10 MR. PIERCE: I have a sense she did it on her own.

11 MS. OPSTBAUM-HABBART: Wow!

12 MR. PIERCE: I mean, again, I don't-

13 MS. OPSTBAUM-HABBART: I know, I know. I know, we're
14 guessing.

15 MR. PIERCE: Yes.

16 MS. OPSTBAUM-HABBART: But that - what does that
17 tell you? #00:57:31#

18 MR. PIERCE: She did what, to me, and I've been
19 involved in a couple of bankruptcy sales. She did what every
20 creditors' committee does and every creditor does. They care
21 about a hundred cents on the dollar plus interest. I suspect
22 she didn't see that coming from Genesis. And what she did
23 actually prodded Genesis into doing that. But, at the time,
24 and I'm not sure what her motivation was. Was her motivation

1 to really get Omnicare involved? Or was her motivation to see
2 if she could jack up Genesis? Or maybe a little of both. It
3 was kind of a win-win for her.

4 MS. OPSTBAUM-HABBART: Or maybe she wanted to create
5 a record that the board was giving an opportunity. #00:58:21#

6 MR. PIERCE: Yeah, I don't think she was - be too
7 concerned about the record. I think she was worried about-

8 MS. OPSTBAUM-HABBART: The money.

9 MR. PIERCE: -- yeah, the money. I think some of the
10 actions of the board after the fact, you know, started to pay
11 lip service to, you know, fiduciary duties and Unocal and that
12 sort of stuff. But, at that point in time, I don't think the
13 creditors - they had any concerns about that.

14 MS. OPSTBAUM-HABBART: What did you think of
15 Genesis' negotiation of the fee at the end? #00:58:53#

16 MR. PIERCE: The termination fee?

17 MS. OPSTBAUM-HABBART: Yeah.

18 MR. PIERCE: You know, we wanted to get rid of them,
19 and they realized that they weren't going to top us. They were
20 going to be gone. They were - you know, we were willing to pay
21 them so that we didn't have to wait till the term-the drop-
22 dead date in the merger agreement-

23 MS. OPSTBAUM-HABBART: Right.

1 MR. PIERCE: They were - there was some sensitivity
2 on their part. They were - they were concerned about the size.
3 I think they didn't want anybody to come back and say, wait a
4 minute, that was money that could have gone to shareholders,
5 and maybe that was a little bit excessive. So, there was some
6 consideration of that. But, otherwise, you know, at that
7 point, I think they were just trying to get as much as they
8 could to cover their expenses.

9 MS. OPSTBAUM-HABBART: And you felt it was a cost of
10 doing business. #00:59:43#

11 MR. PIERCE: Yes. I mean, again, these deals were
12 incredibly accretive to Omnicare. And so, it was - it was not
13 that - again, you'd rather not spend the money than spend the
14 money, but, in order to get the deal done, sure.

15 MS. OPSTBAUM-HABBART: Well, I think, so the
16 quandary really comes at the point of do you, when you think
17 you're in an exigent situation, have to, still, stop and give
18 a potential bidder an opportunity? And I suppose that's where
19 I saw the disagreement with them, and I agree with you that
20 pay attention to maybe some different facts than others and
21 the outcome is a bit different. #01:00:30#

22 MR. PIERCE: And I think the case law, even again,
23 if you read Phelps Dodge and Ace, which were really, you know,
24 very much on my mind when we went into this because those were

1 1999 cases. They said, look, there might be situations in
2 which you say cut off a fiduciary out. And again, there's some
3 - there's confusion about that. They're saying you can do a -
4 you can cut out the fiduciary out, but you still need to let
5 the shareholders vote. So, you can't be wired. So, you can
6 give people, depending on the circumstances, if you have a
7 completely shopped deal, you have a company that might be in
8 dire circumstances; you know, you can conjure up situations in
9 which, okay, I've got to give them more than not. But, still,
10 so I can avoid talk... . I hate to say the no-talk, which was in
11 Phelps Dodge. Maybe you can give that. Again, in this day and
12 age, it's never going to come up again. No one - no one would
13 ever do that. I don't think. But, back then, I think, I don't
14 think the Delaware judiciary were going to say there's
15 something you absolutely - you know, there are no hard and
16 fast rules. I'm not sure that Omnicare is a hard and fast rule
17 either, other than you have got to give people, ultimately,
18 the shareholders, the right to vote. So, I don't have to talk
19 to you, but that means - that doesn't preclude you from
20 saying, okay, but I am here, and I am making a bid and
21 shareholders be aware that I am here. And now, you know, vote.
22 You know, take the bird in hand, or you know, maybe take, you
23 know, run a risk with me. #01:02:19#

1 But again, I think those were extreme - if you read
2 the cases -- extreme circumstances. And, even if you say that
3 NCS as in that extreme circumstance, the one thing they didn't
4 do is they didn't shop the company. They didn't really - had
5 they gone to Omnicare - if the facts were that they had gone
6 to Omnicare in April or May before they signed the exclusivity
7 agreement, and Omnicare said, you know, I just don't care. I
8 don't care what you guys are saying. You know, I'm never
9 paying anything for the equity. Go away. Don't bother me. I'm
10 going to pick up your bones in bankruptcy. If that was the -
11 if those were the facts, then I could see a situation where
12 they could say, okay, we don't have to talk to them. But,
13 still, give the shareholders the ability to really vote. And,
14 in this case, a minority the board should be protecting. But
15 that wasn't the case. And, which is again why I thought we
16 were just very consistent with the previous case law.

17 MS. OPSTBAUM-HABBART: Is there anything else that
18 you can remember from the case that you thought was
19 significant? That surprised you? Or that- #01:03:45#

20 MR. PIERCE: The whole thing was surprising to me,
21 frankly. I mean, it was... But, you know, other than the fact
22 that we kept losing these decisions, no. I mean, Genesis'
23 approach didn't surprise me. You know, they obviously wanted -
24 they were doing what was best for them. You know. The - I

1 guess at the end of the day, what surprised me a little bit
2 was just the NCS board. You basically, Genesis was telling
3 you, I want these lockups because I don't want Omnicare to
4 bid. At that point, you might have thought, well, gee, maybe I
5 can get more out of Omnicare if I go talk to them. It's
6 somewhat inexplicable to me that they didn't do that. So, you
7 know, if there was a surprise in this, that would be the
8 surprise. But they didn't, and we ended up where we ended up.

9 MS. OPSTBAUM-HABBART: And I imagine that, since
10 then, you always see a fiduciary duty out in your agreements?

11 #01:04:59#

12 MR. PIERCE: Yes. And in the rare cases where you
13 have a, you know, a majority owner, I mean we structured it so
14 that it's not a fait accompli. And there are ways around this.
15 It's, you know, if somebody has a majority, you know you can
16 get a voting agreement for 35-percent, sometimes we have done
17 that. But the other aspect of that is nobody wants to be
18 locked up completely. So, even when we get voting agreements
19 that stop short of a majority, they all unravel if the board
20 exercises their fiduciary out or the board changes its
21 recommendation, because that majority buyer wants as much
22 money as he can get. You know, it's sort of common sense—

23 MS. OPSTBAUM-HABBART: Of course, of course.

24 #01:05:53#

1 MR. PIERCE: So, I... when, you know, in the
2 dissent, I mean Judge Veasey talks about hopefully this is -
3 this will never happen again, sui generis. I think it won't
4 happen again just because the market has moved away. I mean no
5 one - no one is going to ignore a better bidder. I just don't
6 think that will happen today.

7 MS. OPSTBAUM-HABBART: And I suppose that's the
8 whole thing as to whether or not the fiduciary outs really
9 work is how you define what a better bid is and how much
10 latitude is given to the board to make that determination as
11 to whether or not it's really as valuable as you'd like to
12 think. #01:06:29#

13 MR. PIERCE: Well, you negotiate, you know, what's a
14 superior proposal. But-

15 MS. OPSTBAUM-HABBART: Right.

16 MR. PIERCE: -- again, these things have a way of
17 becoming market standards. So, things that you negotiated ad
18 nauseam ten years ago, today, it's like, you know, you play
19 around at the edges, but everybody more or less understands
20 what a superior proposal is. Sometimes, somebody will have a
21 new bright idea and, you know, we have to negotiate that. But
22 it's now pretty standard and, you know, and there's, if you
23 have a superior proposal, you have matching rights, you know,
24 you argue about whether it's three days, four days, two days,

1 18 hours. But, you know, you essentially get to the same place
2 because I can't imagine somebody saying, you know what, I
3 really don't want the highest bid. I don't want more money.

4 MS. OPSTBAUM-HABBART: I'll take less money.
5 #01:07:16#

6 MR. PIERCE: Yeah. I just - it's not going to happen
7 today. People - I just don't see people doing that. And if
8 someone decided that they want to do that, they'd have their
9 shareholders and the whole corporate governance world to
10 answer to. It's just not going to happen.

11 MS. OPSTBAUM-HABBART: If the option to act by
12 written consent was available, do you believe that might have
13 changed the outcome? Or do you believe that's form over
14 substance? #01:07:46#

15 MR. PIERCE: Well, in some sense, it is form over
16 substance, but that's the way lawyers live. You know, some
17 charters have certain provisions, some others have others.
18 There are staggered boards and there's, you know, shareholders
19 can call meetings in some situations, in other situations,
20 they can't. People, you know, and the governance community
21 has their views on some of these provisions, but they're there
22 and you live with the provisions in your charter. That's your
23 contract with your shareholders. So, if they could have acted
24 by written consent, that would have, potentially, changed the

1 issue. What's interesting to me always about the written
2 consent issue is it doesn't become effective if you're a
3 public company until you issue an information statement. I
4 think it's a 20-day lapse. Now, to my knowledge, this case
5 hasn't arisen, but, you know, theoretically, you could act by
6 written consent, and somebody could come along before that
7 consent is effective and say, gee, I'll pay you five times
8 more. I'm not sure exactly what people would do in that
9 situation. I know, obviously, the acquiror would want to
10 insist on the validity of the written consent.

11 MS. OPSTBAUM-HABBART: It's an interesting... .

12 MR. PIERCE: I don't know what a court would do with
13 that. #01:09:10#

14 But taking that wrinkle out of it for a moment. If
15 you could act by written consent, you'd act by written
16 consent, if that's what's in your charter, sure. That's your
17 contract with your shareholders.

18 MS. OPSTBAUM-HABBART: Did you think that the
19 director shareholders that gave the proxy and entered into the
20 voting agreement - did you think their interests were aligned
21 with the minority shareholders? I mean everybody wanted to get
22 money and come out a winner? #01:09:39#

23 MR. PIERCE: Everybody always likes money. Outcalt
24 had a consulting agreement...and you know, the Vice Chancellor

1 minimizes that, or one of the opinions minimizes that. But
2 again, that's money. They say, well, it's not - it wasn't
3 enough relative to his net worth or whatever he was getting in
4 the deal to make a difference. But it's something he got that
5 other shareholders didn't get. And-

6 MS. OPSTBAUM-HABBART: But it wasn't significant.

7 #01:10:10#

8 MR. PIERCE: It's not significant, but, you know, if
9 you sort of put it in the context of an all holders' best
10 price world, and I understand that's a tender offer, and he'd
11 then have to consider whether that's really consideration for
12 his shares or is that consideration for other things. But he
13 got more than other shareholders. #01:10:32#

14 With respect to Shaw, it's very clear he was not
15 going to be an employee of Omnicare. Although I think that
16 Joel, at some point after the fact, may have said, you know,
17 we'll consider continuing employment. But he wasn't going to
18 be CEO of a public company anymore, that was for sure. There
19 was, obviously, no written agreements with Genesis, but
20 Genesis had some senior leadership vacancies. So, it's-

21 MS. OPSTBAUM-HABBART: Sure ... it's a
22 consideration.

23 MR. PIERCE: -- I'm sure that that was - he's human,
24 and that probably entered into his thinking. I don't know if

1 there were any conversations on that point or not. So, there
2 was a possibility of employment there. There was no
3 possibility of employment for him at Omnicare. Did that factor
4 in-

5 MS. OPSTBAUM-HABBART: That wasn't really focused on
6 very much. #01:11:31#

7 MR. PIERCE: No. Look, there was - you can dislike
8 someone and I get it, you know. Not everybody likes me. Not
9 everybody likes, you know-- I don't like everybody. And not
10 everybody likes Joel Gemunder. But to take that dislike and to
11 translate that into a negative impact on the financial
12 situation, I don't get that. So, there - I mean you really got
13 to dislike someone to say, hey, I'm going to spite myself. I'm
14 going to take less money because I really don't like you.
15 Maybe that happened, but it just struck me that there had to
16 be more going on.

17 MS. OPSTBAUM-HABBART: Yeah, but at that time, they
18 didn't really know there was going to be that much more money
19 coming from you. #01:12:17#

20 MR. PIERCE: Oh, but they didn't ask. It's, to get a
21 normal bidder, a normal seller would have at least explored
22 the possibility because you'd want more money. I mean,
23 everyone generally wants more rather than less. The fact that

1 they didn't. The fact they went out of their way. It seemed to
2 me not to -- it's just it always struck me as curious.

3 MS. OPSTBAUM-HABBART: Maybe as opposed to dislike,
4 maybe it was more a trust issue based on nothing more than
5 reputation. #01:12:52#

6 MR. PIERCE: Yeah...no. And they make a lot about
7 that. But I - well, I didn't do every deal Omnicare did, and
8 they did a lot of deals. But we did a number of deals for
9 them, and they never reneged. I - they just - I never saw them
10 say, you know what? We're going to do this deal and then, at
11 the last minute, oh, gee, we're not unless we have a price
12 reduction or unless you give something else. It just - in part
13 because their business model depended on acquisitions. It all
14 slowed down, actually, when they got so big that the smaller
15 acquisitions didn't have much of an impact on their per share-

16 MS. OPSTBAUM-HABBART: Value. #01:13:39#

17 MR. PIERCE: -- accretion. So, they would have - it
18 would have been basically shooting themselves in the foot to
19 renege. I mean, their whole business model was we've got to do
20 acquisitions. Did people think that they drove a hard bargain?
21 Yeah, maybe. But no one said, oh, my god, they're going to -
22 they're going to do a bait and switch on you, and they're not
23 going to close, or they're going to drastically reduce the
24 price. And that's just not the way they operated.

1 MS. OPSTBAUM-HABBART: Anything else you'd like to
2 add before we end?

3 MR. PIERCE: I think we've covered it.

4 MS. OPSTBAUM-HABBART: Well, thank you. It's been a
5 very interesting conversation with you, Mort.

6 MR. PIERCE: Well, thank you.

7

8 #01:14:21#

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