

WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: February 13, 2007
Decided: February 13, 2007

Kevin G. Abrams
Abrams & Laster LLP
1521 Concord Pike
Wilmington, DE 19803

Stuart M. Grant
Grant & Eisenhofer P.A.
1201 North Market Street
Wilmington, DE 19801

Edward P. Welch
Edward B. Micheletti
Skadden, Arps, Slate, Meagher & Flom LLP
One Rodney Square
Wilmington, DE 19899

Michael D. Goldman
Brian C. Ralston
Kirsten A. Lynch
Potter Anderson & Corroon
P.O. Box 951
Wilmington, DE 19899

Allen M. Terrell, Jr.
Richard P. Rollo
Richards, Layton & Finger, P.A.
P.O. Box 551
Wilmington, DE 19899

William M. Lafferty
Thomas W. Briggs, Jr.
John P. DiTomo
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
Wilmington, DE 19801

Rolin P. Bissell
Young Conaway Stargatt &
Taylor, LLP
1000 West Street, 17th Floor
Wilmington, DE 19899

Re: *Louisiana Municipal Police Employees'
Retirement Sys. v. Crawford, et al.*
Civil Action No. 2635-N
Express Scripts, Inc., et al. v. Crawford, et al.
Civil Action No. 2663-N

Dear Counsel:

Having reviewed the supplemental disclosure statement filed by Caremark on February 12, 2007, and having considered the written and oral arguments of counsel for all parties, the Court is not confident that all Caremark shareholders would be able to make an informed decision if they are required to vote on February 20, 2007. Accordingly, the Court will issue an order enjoining any shareholder vote concerning a merger between Caremark and any other party until at least March 9, 2007. I base this decision upon the materiality of Caremark's supplemental disclosures and the possibility, if not probability, that the current schedule will impede the ability of shareholders to fully consider the information available to them.

Defendant directors have a duty to "disclose fully and fairly all material information within the board's control" when they seek shareholder action.¹ At least two of Caremark's disclosures, made a mere eight days before shareholders are proposed to act, strike the Court as ones that "a reasonable shareholder would find relevant in deciding how to vote"² in that they would "significantly alter[] the 'total mix' of information made available."³ First, a reasonable shareholder may consider the revelation that Caremark has considered, on at least three separate occasions, potential transactions with Express Scripts to be highly relevant. This is particularly true in the face of Caremark's present protestations that antitrust difficulties loom so large as to prevent the board of directors from *even discussing* an offer with an admittedly higher dollar value. Second, a reasonable shareholder's view on a merger might be significantly altered by the discovery that, were *any* merger to be consummated, other plaintiffs presently engaged in derivative litigation against the defendant directors based on backdated option grants might lose standing to assert claims.⁴

Defendants argue that even if these disclosures are material, the distribution to shareholders of a new Form 8-K on February 12, 2007, is sufficient to comply with their duties and allows shareholders the opportunity to cast a fully-informed vote.

¹ *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001).

² *Klang v. Smith's Food and Drug Ctrs., Inc.*, 702 A.2d 150, 156 (Del. 1997).

³ *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994).

⁴ Defendants argue that an alternative merger with Express Scripts may result in the same loss of standing for other derivative plaintiffs. This may be the case, but the possibility of an alternate merger does not render the disclosure irrelevant. It merely suggests that such information should be included in *other* proxies.

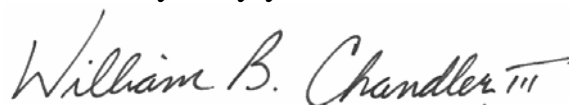
The Court cannot be so sanguine. Even if one assumes that all shareholders receive their supplemental disclosures on February 13, 2007, this leaves a mere three days for shareholders to digest and analyze the information if they are to return proxies by mail on Friday, February 16, 2007.⁵ Nor does Caremark's large institutional investor base provide the Court with much comfort: even institutional clients require time to receive, absorb, and decide upon new information.

Plaintiffs thus demonstrate the elements required for this Court to issue a temporary restraining order. The materiality of the delayed disclosures suggests a reasonable likelihood of success on the merits. Caremark shareholders face irreparable harm if they are forced to make their decision without adequate time to consider relevant information revealed by defendants almost upon the eve of a vote. Finally, in considering the balance of equities between plaintiffs and defendants, it is relevant to note that any wounds to defendants are entirely self-inflicted. As in *State of Wisconsin Investment Board v. Bartlett*,⁶ the information disclosed by defendants on February 12, 2007, was not new or unavailable at the time of the original proxy statement. If Caremark believed that a mere seventeen-day delay in the merger vote would, as defendants now suggest, materially affect Caremark's ability to operate and negotiate contracts, then these disclosures should have been made with greater haste.

Nothing in the supplemental disclosure affects the ability of the parties to complete their arguments according to the currently operative scheduling order, and the Court declines to modify the Order at this time. Oral argument on plaintiffs' motion for a temporary injunction will be held as presently contemplated on February 16, 2007, in Wilmington commencing at 10:00 a.m. and ending no later than 3:00 p.m. Parties will confer and provide a form of Order consistent with this Opinion.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name of the signatory.

William B. Chandler III

WBCIII:aar

⁵ Monday, February 19, 2007 is Presidents' Day, a federal holiday. The Court notes that the delivery and return of proxy statements may be adversely affected by the holiday weekend.

⁶ 2000 WL 193115, at *1 (Del. Ch. Feb. 9, 2000).