

In re Medco/ Express Scripts Merger Litigation

COURT: United States District Court, District of New Jersey
CASE NUMBER: CA No. 11-4211 (DMC)(MF)
JUDGE: U.S. District Judge Dennis M. Cavanaugh
CASE CONTACTS: Mark Lebovitch

This action was filed on July 22, 2011 on behalf of Plaintiff Louisiana Municipal Police Employees' Retirement System ("LAMPERS" or "Plaintiff"), seeking to enjoin the then-recently announced agreement by Defendant Express Scripts, Inc. ("Express Scripts") to purchase Defendant Medco Health Solutions, Inc. ("Medco" or the "Company") (the "Proposed Transaction"). Plaintiff alleged that the Medco board of directors ("Medco Board" or "Board") breached its fiduciary duty to shareholders because the per-share stock price they negotiated was inadequate relative to the extraordinary deal protection provisions the Board agreed to accept in the merger agreement. In particular, Plaintiff took issue with a virtually unprecedented breakup fee of nearly \$1 billion (the "Termination Fee").

Plaintiff submitted an application for expedited discovery on August 1, 2011. On August 8, 2011, Defendants moved to dismiss Plaintiff's complaint for lack of subject matter jurisdiction. At the same time, Defendants moved to stay this action in favor of a parallel Delaware action which, they argued, was more advanced than this action. On August 5, 2011, Plaintiff filed an Amended Complaint.

On August 17, 2011, the Court consolidated all of the New Jersey actions and appointed Interim Lead Counsel. The following day, Plaintiff here moved for class certification. Defendants then opposed the motion for class certification - notwithstanding the fact that the class certification issues were substantially identical to the class certification issues in Delaware - in a continued campaign to relocate the adjudication of this case to their favored forum. Defendants' also opposed expedited briefing with respect to class certification here.

By way of Opinion dated September 19, 2011, the Court denied Defendants' motion to dismiss and for a stay. The Court found that Plaintiff had pleaded sufficient facts to satisfy the \$75,000 jurisdictional threshold, and, thus subject matter jurisdiction existed. The Court further found that Defendants had failed to satisfy the criteria for a stay. On September 23, 2011, in an unending effort to delay this litigation and allow the Delaware actions a "head start" that Defendants could point to as reason why these claims should be adjudicated there, Defendants moved to certify the Court's order denying their motion dismiss for appeal pursuant to 28 U.S.C. § 1292(b), and for a stay pending appeal. Plaintiff opposed this motion, arguing that Defendants had failed to satisfy the requirements of § 1292(b).

On October 6, 2011, Aristotle Holdings, Inc., ("Aristotle") an affiliate of Express Scripts formed for purposes of the merger, filed a joint preliminary proxy statement ("Proxy") on behalf of Express Scripts and Medco with the Securities and Exchange Commission ("SEC"). The Proxy had blanks for a date sometime within 2011 for the shareholder vote to approve the Proposed Transaction. Similarly, in a statement filed with the SEC on October 20, 2011, Express Scripts stated that it expected a shareholder vote for both companies "to happen around the end of the year." This ambitious scheduling was a shock to Medco stockholders who were given the impression by the Company that the Proposed Transaction was not on track to close until well into 2012.

On October 25, 2011, the Court granted Defendants' motion to certify for appeal the denial of their motion to dismiss, but denied Defendants' motion for a stay pending appeal.

On October 28, 2011, Plaintiff filed an Order to Show Cause seeking a preliminary injunction to stop the scheduled shareholder vote and to enjoin enforcement of certain deal protection provisions in the merger agreement, including the

preclusive Termination Fee. Express Scripts opposed this application, predictably arguing that any injunction application should be heard in Delaware, not New Jersey.

On October 31, 2011, Express Scripts filed with the Third Circuit a petition for leave to appeal, a motion for a stay pending appeal, and a motion for expedited treatment of its appeal. Medco joined these applications. The Third Circuit directed that Plaintiff file opposition papers by Friday, November 4 and that Express Scripts file reply papers by Monday, November 7.

While those applications were being briefed, counsel for the parties negotiated a settlement in principle (the "Settlement"). Most notably, the Termination Fee was reduced by an unprecedented \$300 million. Further, the matching rights were reduced to only one opportunity, rather than unlimited opportunities, to match a competing bid. The Settlement also provided that Express Scripts and Medco would include additional disclosures in the final proxy statement and in order to allow the therapeutic benefits of the reduction in the deal protections and the fulsome disclosures to take effect, Express Scripts and Medco agreed to postpone a shareholder vote to approve the Proposed Transaction to no earlier than December 21, 2011.

The Settlement was approved by both Express Scripts and Medco's boards of directors on Tuesday, November 8, 2011. The Court preliminarily approved the Settlement on November 28, 2011. The parties subsequently provided the class with court-approved notice of the settlement. On April 2, 2012, we submitted final settlement approval papers. The Court subsequently held a final approval hearing on April 16, 2012 and issued an order approving the settlement in all respects.