

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 IN RE MCKESSON CORPORATION
5 DERIVATIVE LITIGATION.

Case No. 17-cv-01850-CW

6 ORDER GRANTING IN PART AND
7 DENYING IN PART MOTION TO
8 STAY

(Dkt. No. 138)

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10 _____/

11 Before the Court is nominal Defendant McKesson Corporation's
12 Special Litigation Committee's (SLC) motion to stay this action
13 until July 18, 2019, while the SLC completes its investigation of
14 Plaintiffs' claims. Docket No. 138. Having heard the motion on
15 November 6, 2018, the Court GRANTS the motion in part and DENIES
16 it in part.

17 BACKGROUND

18 Plaintiffs Eli Inzlicht and Vladimir Gusinsky and
19 Intervening Plaintiffs Charlie Steinberg, Michael Berent and
20 Amalgamated Bank (collectively, Plaintiffs) are shareholders or
21 trustees for shareholders of McKesson. Plaintiffs bring this
22 derivative action against certain members of McKesson's Board of
23 Directors and senior officers,¹ alleging that they have maximized

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25 ¹ These directors or officers are named Defendants Andy D.
26 Bryant, Wayne A. Budd, John Hammergren, M. Christine Jacobs,
27 Marie L. Knowles, Edward A. Mueller, N. Anthony Coles, Alton F.
28 Irby III, David M. Lawrence, and Jane E. Shaw. Second Am.
Consolidated Compl. ¶¶ 18-29. While Plaintiffs initially named
Donald R. Knauss and Susan R. Salka as defendants, the claims
against them were dismissed, Docket No. 85, and they were not
renamed as defendants in Plaintiffs' operative amended complaint,
see Second Am. Consolidated Compl. at 84-87.

1 short-term profits over safety with respect to sales and
2 distribution of prescription opioids and failed to properly
3 implement a Controlled Substance Monitoring Program, as required
4 by a settlement with the United States Department of Justice and
5 Drug Enforcement Administration in 2008. The directors and
6 officers' subsequent actions resulted in a second settlement in
7 2017.

8 McKesson's Board of Directors appointed on March 10, 2017, a
9 Special Review Committee (SRC) consisting of three directors—
10 Coles, Knauss, and Salka—to investigate alleged McKesson
11 mismanagement and lack of accountability in relation to the
12 corporation's opioid distribution. Later, the SRC included in its
13 investigation Plaintiffs' claims and recommended that McKesson
14 not pursue this action.

15 After the Court denied Defendants' motions to dismiss,
16 McKesson's Board of Directors formed a SLC on July 25, 2018, to
17 investigate and evaluate whether and how Plaintiffs' claims
18 should be pursued.

19 LEGAL STANDARD

20 Delaware law is applicable here because it is undisputed
21 that McKesson is incorporated in Delaware. See In re Oracle Corp.
22 Derivative Litig., 808 A.2d 1206, 1212 (Del. Ch. 2002).

23 In Zapata Corporation v. Maldonado, the Delaware Supreme
24 Court concluded that a corporation's board of directors may form
25 a SLC to investigate a derivative action and determine whether
26 its continued prosecution is in "the best interests of the
27 corporation." 430 A.2d 779, 784-89 (Del. 1981). Following Zapata,
28 the Delaware Chancery Court has typically stayed derivative

1 litigation pending a SLC investigation. See, e.g., Katell v.
2 Morgan Stanley Grp., Inc., No. 12343, 1993 WL 390525, at *4 (Del.
3 Ch. Sept. 27, 1993). Accordingly, "the SLC need not meet any
4 special burden of proof before a stay of derivative proceedings
5 is warranted." St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler,
6 No. 1:06-CV-0068, 2006 WL 2849783, at *3 (S.D.N.Y. Oct. 4, 2006).

7 Nonetheless, the Delaware Chancery Court has recognized
8 exceptions to the general rule. In Carlton Investments v. TLC
9 Beatrice International Holdings, Inc., the Delaware Chancery
10 Court denied a motion to stay pending a SLC investigation,
11 concluding that the decision to stay an action is discretionary.
12 No. 13950, 1996 WL 33167168, at *8-*10 (Del. Ch. June 6, 1996).

13 DISCUSSION

14 The Court finds that the equities weigh in favor of denying
15 a stay. As the Delaware Chancery Court stated in Carlton, the
16 staying of an action "requires a balancing of the interests of
17 the plaintiff [with] the interests of the defendant, all with an
18 eye to the efficient and fair administration of the machinery of
19 justice." 1996 WL 3316768, at *9. This is true notwithstanding
20 Delaware case law interpreting Zapata as requiring a near-
21 automatic stay. In re MRV Commc'ns, Inc. Derivative Litig., No.
22 08-CV-03800, 2011 WL 6608642, at *3 (C.D. Cal. Dec. 22, 2011).

23 In particular, the Court finds that these considerations
24 weigh heavily against a stay: (1) McKesson's Board of Directors
25 did not initially appoint a disinterested SLC, but rather a SRC
26 comprised of Defendant directors; (2) the SRC investigated
27 Plaintiffs' claims before the SLC's formation; (3) the SLC was
28 not formed until approximately eighteen months after this action

1 was filed, as was the case in Carlton, 1996 WL 33167168, at *5,
2 *9; (4) although the Court ordered on September 18, 2018, that
3 "document-type discovery shall proceed pending the Court's ruling
4 on the motion to stay," Docket No. 149, the SLC did not readily
5 participate in discovery, giving itself a de facto stay of
6 approximately two months; (5) McKesson must participate in other
7 litigation, including National Prescription Opiate Litigation,
8 No. 1:17-MD-2804 (N.D. Ohio), and will therefore not have an
9 abeyance of litigation in any event; (6) Plaintiffs have survived
10 one prior motion to stay brought by McKesson and two motions to
11 dismiss filed by Defendants; (7) the Court has consolidated cases
12 and appointed lead counsel; and (8) the SLC has given the Court
13 no grounds on which to conclude that Plaintiffs' action
14 constitutes a strike suit. Nonetheless, the Court will grant a
15 temporary stay of deposition discovery to alleviate some of the
16 burden on the SLC. See Abbey v. Comput. & Commc'ns Tech. Corp.,
17 457 A.2d 368, 375 (Del. Ch. 1983).

18 CONCLUSION

19 For the reasons above, the Court GRANTS the motion to stay
20 as to deposition discovery and DENIES the motion in all other
21 respects. The Court STAYS deposition discovery until July 18,
22 2019. The Court does not require the SLC to conduct its
23 interviews in a particular way or to allow Plaintiffs to
24 participate in them.

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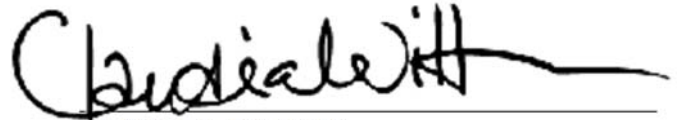
1 If particular aspects of discovery become oppressive, costly or
2 unreasonable, the SLC may raise its objections to the Court.

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4 IT IS SO ORDERED.

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6 Dated: November 13, 2018



CLAUDIA WILKEN
United States District Judge

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United States District Court
Northern District of California