

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

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Date Decided: November 30, 2017

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RE: *In re Insys Therapeutics Inc. Derivative Litigation*
Civil Action No. 12696-VCMR

Dear Counsel:

This letter opinion addresses Defendants’ Motion to Stay. For the reasons stated herein, Defendants’ Motion to Stay is granted.

I. BACKGROUND

Nominal Defendant Insys Therapeutics, Inc. (“Insys”) produces SUBSYS, “an instant-release sublingual fentanyl spray.”¹ The Federal Food and Drug Administration approved SUBSYS in January 2012 “[f]or the management of breakthrough pain in cancer patients 18 years of age or older who are already

¹ Compl. ¶ 52.

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receiving and who are tolerant to around-the-clock opioid therapy for their underlying persistent cancer pain.”²

On December 12, 2013, Insys received “a subpoena from the Department of Health and Human Services Office of Inspector General (“HHS”) in connection with the government’s investigation of the sales and marketing of SUBSYS.”³ On February 2, 2016, Insys stockholders filed a federal securities class action lawsuit against Defendants Insys, John N. Kapoor, and Michael L. Babich, and non-party in the instant case Darryl Baker, alleging that Insys “made misrepresentations concerning its business practices and compliance with law.”⁴

Following the HHS subpoena and federal class action lawsuit, state authorities in Arizona, Massachusetts, Illinois, and New Jersey launched investigations of Insys.⁵ Additionally, medical professionals associated with Insys have faced criminal investigations, indictments, and convictions.⁶ “U.S. Attorney’s Offices of Michigan, Rhode Island, Florida, Connecticut, New Hampshire and Alabama are

² *Id.* ¶ 57.

³ *Id.* ¶ 12.

⁴ Defs.’ Opening Br. 11.

⁵ Compl. ¶¶ 17-21.

⁶ *Id.* ¶¶ 17, 20, 87.

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investigating physicians with ties to Insys.”⁷ On November 8, 2016, Plaintiffs filed this suit.

On December 6, 2016, six senior Insys executives, including Babich, were indicted in federal court on charges of racketeering conspiracy, mail fraud conspiracy, wire fraud conspiracy, and conspiracy to violate the federal anti-kickback statute.⁸ A trial is scheduled for October 2018.⁹ Plaintiffs filed an amended complaint on January 26, 2017 to include information about the indictments. On April 28, 2017, Plaintiffs filed their Consolidated Verified Derivative Complaint (the “Complaint”).

On November 6, 2017, Plaintiffs alerted the Court to the fact that Kapoor had also been arrested.¹⁰ On October 26, 2017, the United States Attorney’s Office of the District of Massachusetts announced that Kapoor had been arrested and charged in a superseding indictment that includes additional allegations against the former Insys executives initially charged in December 2016.¹¹

⁷ *Id.* ¶ 21.

⁸ *Id.* ¶ 225.

⁹ Oral Arg. Tr. 33-34.

¹⁰ Letter from Pls. to Ct. (Nov. 6, 2017).

¹¹ *Id.* at Ex. A, B.

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Plaintiffs have brought derivative breach of fiduciary duty claims against Insys’s board of directors (the “Individual Defendants”), against Kapoor and Babich as former Insys officers, and against Kapoor as the controlling stockholder of Insys.¹² Plaintiffs allege that the Individual Defendants, Babich, and Kapoor “knowingly over[saw] the implementation of an illegal sales and marketing program, and thereby caus[ed] Insys to violate positive law;”¹³ “consciously and repeatedly fail[ed] to actively monitor or oversee the compliance program;”¹⁴ and “consciously disregard[ed] their duty to investigate red flags and to remedy any misconduct uncovered.”¹⁵ Plaintiffs further allege that Kapoor violated his fiduciary duties as controlling stockholder “by causing Insys to implement and execute an illegal sales and marketing plan.”¹⁶

Defendants move to dismiss this action or, in the alternative, to stay this action pending the resolution of the federal securities action and criminal investigation.

¹² Compl. ¶¶ 280-94.

¹³ *Id.* ¶¶ 282(a), 287(a).

¹⁴ *Id.* ¶¶ 282(b), 287(b).

¹⁵ *Id.* ¶¶ 282(c), 287(c).

¹⁶ *Id.* ¶ 293.

The Court heard oral argument on the Motion to Dismiss or Stay on September 19, 2017.

II. ANALYSIS

“The Court’s right to grant a stay is within the exclusive discretion of the Court. The discretion to issue a stay is ‘inherent in every court and flows from its control over the disposition of cases on its docket.’”¹⁷ When deciding a motion to stay, this Court “recognizes the inherently discretionary nature of a decision on a stay motion and the importance of striking a sensible balance of the relevant competing interests.”¹⁸

A. The Motion to Stay is Granted Because Simultaneous Prosecution of This Derivative Action and the Federal Securities Action Would Be Unduly Complicated, Inefficient, and Unnecessary

Among the relevant competing interests this Court must balance are “‘practical considerations’ [that] make it unduly complicated, inefficient, and unnecessary for [the action before it] to proceed ahead or apace of a related litigation

¹⁷ *In re TGM Enters., L.L.C.*, 2008 WL 4261035, at *1 (Del. Ch. Sept. 12, 2008) (quoting *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683 (Del.1964)).

¹⁸ *Brudno v. Wise*, 2003 WL 1874750, at *1 (Del. Ch. Apr. 1, 2003).

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pending elsewhere.”¹⁹ Defendants raise two main practical considerations, which they argue outweigh any prejudice to Plaintiffs.

First, Defendants argue that Insys will be prejudiced in the securities action and government investigation by a simultaneous derivative action that significantly overlaps with both.²⁰ Defendants rely on *Brenner v. Albrecht*, in which this Court found that the derivative action risked prejudicing the Company’s defense in a simultaneous securities class action.²¹ The *Brenner* Court explained:

Like any co-defendant [the company] could pursue a litigation strategy of either cross-claiming that its directors and officers are the primary wrongdoers who should indemnify it, as is asserted in this derivative action, or collaborating with its directors and officers and denying that any wrongdoing occurred as [the company] is doing in the [s]ecurities [c]lass [a]ction. Either litigation strategy would appear to be reasonable, but it is not practical for two actors . . . to pursue divergent strategies in two simultaneous actions on behalf of the same entity.

¹⁹ *Brenner v. Albrecht*, 2012 WL 252286, at *4 (Del. Ch. Sept. 25, 2012) (alterations in original) (quoting *Brudno*, 2003 WL 1874750, at *4).

²⁰ Defs.’ Opening Br. 15. This Court recently articulated a new test for whether a civil action should be stayed pending a criminal investigation. *A. Schulman, Inc. v. Citadel Plastic Holdings, LLC*, 2017 WL 5035497, (Del. Ch. Nov. 2, 2017). Defendants address their arguments under *Brenner* to both the federal securities action and the government investigation, but I address the government investigation under the new, more specific test in Section II.B.

²¹ *Brenner*, 2012 WL 252286, at *4.

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. . . Prosecution of [the] derivative action would involve taking actions designed to refute the merits of the [c]ompany's defense of the [s]ecurities [c]lass [a]ction, and vice versa. The [i]ndividual [d]efendants are likely witnesses in both cases, but [plaintiff] must attempt to undermine their credibility while the [c]ompany presumably will attempt to rely on their veracity. The potential for such conflicts . . . creates a significant risk that prosecution of [plaintiff's] case will prejudice [the company]. For example, party admissions and adverse judicial rulings in this action might estop the [c]ompany from advancing contrary assertions on its own behalf in the [s]ecurities [c]lass [a]ction. . . . In contrast, staying this action for the immediate future would minimize these risks of prejudice to [the company's] defense of the [s]ecurities [c]lass [a]ction.²²

These concerns apply in the present case. Allowing this derivative suit to go forward simultaneously with the federal securities action likely would prejudice Insys by requiring both parties acting on behalf of Insys to adopt conflicting strategies in their respective lawsuits. This constitutes a significant risk to Insys—a risk to which the Court is particularly sensitive because a derivative suit is meant to further the best interests of *the company*.²³

²² *Brenner*, 2012 WL 252286, at *6.

²³ *King v. Verifone Hldgs., Inc.*, 994 A.2d 354, 362 (Del. Ch. 2010) *rev'd*, 12 A.3d 1140 (Del. 2011) (“[T]he derivative suit is one of several tools that stockholders may use to further the corporation’s best interests.”).

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Second, Defendants argue that the damages sought by Plaintiffs “result primarily from the pending securities action and government investigations”²⁴ and, therefore, will not be discernible until the action and investigation conclude. Plaintiffs disagree that the derivative action is primarily an indemnification action for other ongoing actions.²⁵ Plaintiffs point out that Insys previously settled one class action and several governmental investigations, incurring “many millions of dollars in damages as a result.”²⁶ The same was true in *Brenner*. There, this Court noted that “at least some portion of [the plaintiff’s] derivative claims is ripe for adjudication now. Nevertheless, if [the plaintiff] ultimately succeeds on the merits, the full extent of damages will not be known until the Securities Class Action is resolved.”²⁷ This reasoning applies here as well. While some claims against Insys currently are ripe, the full extent of damages due to Insys cannot be known until the resolution of the federal securities case and government investigation. To move

²⁴ Defs.’ Opening Br. 16.

²⁵ Pls.’ Opp’n Br. 64-65.

²⁶ *Id.* at 65.

²⁷ *Brenner*, 2012 WL 252286, at *6 (quoting *Brudno*, 2003 WL 1874750, at *4).

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forward with this case, which is at the very least a partial indemnification suit, would be “unduly complicated, inefficient, and unnecessary.”²⁸

These concerns of Defendants, however, must be balanced against the alleged prejudice to Plaintiffs. Plaintiffs raise three main concerns about prejudice: (1) there will be a delay in recovery for claims that are currently ripe; (2) Insys faces “a substantial risk of harm due to the continuing nature of the Board’s misconduct;”²⁹ and (3) the passage of time will negatively affect evidence.³⁰ The first concern was addressed above. Additionally, any delay in recovery of monetary damages can be redressed by prejudgment interest.³¹ As to the second concern, the Board size and composition have changed significantly since the filing of the Complaint, and both the CEO and CFO have been replaced.³² Finally, Plaintiffs’ argument about the third concern rests solely on the fact that Defendant Stanley passed away in July 2017,

²⁸ *Id.* at *4 (quoting *Brudno*, 2003 WL 1874750, at *4).

²⁹ Pls.’ Opp’n Br. 66, 62.

³⁰ *Id.* at 64.

³¹ *Brenner*, 2012 WL 252286, at *7.

³² *See* Letter from Pls. to Ct. 4 (Nov. 6, 2017); *Id.* at Exs. A, B; Defs.’ Suggestion of Death Upon R. (Aug. 9, 2017).

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and “[l]ike Stanley, four of the six remaining Defendants are age 70 or older.”³³ Defendant Stanley passed away due to cancer.³⁴ There is nothing in particular about serving on the Insys board, or Defendant Stanley’s death, that makes any of the Individual Defendants any more likely to pass away than the general population.

This Court has recognized, however, that loss of evidence due to the passage of time is a serious concern for the proper adjudication of justice.³⁵ Plaintiffs point to *In re Duke Energy Corporation Derivative Litigation* to argue that this Court should order that “all written discovery provided by the defendants in the federal securities action shall be provided in a timely way to the plaintiffs [in the derivative suit]”³⁶ to assuage concerns about the passage of time. At oral argument, Defendants had no objection to this production.³⁷ I grant the same in this case. “Because the two

³³ Pls.’ Opp’n Br. 64.

³⁴ Oral Arg. Tr. 31.

³⁵ *In re Duke Energy Corp. Deriv. Litig.*, CA No. 7705-CS, tr. 6 (Del. Ch. Dec. 11, 2013).

³⁶ *Id.*

³⁷ Oral Arg. Tr. 77-78.

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actions are somewhat related, the [s]ecurities [c]lass [a]ction plaintiffs ‘have strong incentive to develop evidence that will be useful to the plaintiffs in [both actions].’³⁸

Ultimately, balancing the concerns of Plaintiffs and Defendants dictates the same outcome as *Brenner*: “On balance, . . . neither of [the] burdens outweighs the practical considerations in favor of granting a stay.”³⁹

B. This Action Will Be Stayed Because Named Individual Defendants Have Been Indicted in a Federal Criminal Action Related to the Same Underlying Facts as This Derivative Suit

This Court recently articulated the test for “analyzing whether to stay a civil case in light of a pending criminal investigation,” which is the same as the test used by the federal courts.⁴⁰ “The federal courts have identified a series of factors to guide the exercise of judgment. Two overarching considerations are (i) ‘the status of the criminal case, including whether the defendants have been indicted’ and (ii) ‘the extent to which the issues in the criminal and civil cases overlap.’”⁴¹ This Court then balances five additional factors:

³⁸ *Brenner*, 2012 WL 252286, at *7 (quoting *Brudno*, 2003 WL 1874750, at *4).

³⁹ *Id.*

⁴⁰ *A. Schulman, Inc. v. Citadel Plastic Holdings, LLC*, 2017 WL 5035497, at *1 (Del. Ch. Nov. 2, 2017).

⁴¹ *Id.* at *2 (quoting *In re Herley Indus. Inc.*, 2007 WL 1120246, at *1 (E.D. Pa. 2007)).

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(1) the interest of the plaintiff in proceeding expeditiously with his case and any potential prejudice it may suffer from any delay; (2) the burden upon the defendants from going forward with any aspects of the proceedings, in particular any prejudice to their rights; (3) the convenience of the court and the efficient management of judicial resources; (4) the interests of any non-parties; and (5) the interest of the public in the pending civil and criminal litigation.⁴²

In this case, both “overarching considerations” favor granting a stay in light of the ongoing criminal investigation. First, Babich and five other former executives of Insys were indicted and are facing trial in 2018; Kapoor was indicted in October 2017; and the investigation is still ongoing.⁴³ Second, Plaintiffs admit in the Complaint that “[t]he Federal Indictment significantly tracks the particularized allegations alleged herein.”⁴⁴ The five secondary factors are largely addressed by the above discussion of *Brenner* and do not outweigh the two overarching considerations in this case.

⁴² *Id.* (quoting *In re Herley*, 2007 WL 1120246, at *1).

⁴³ Compl. ¶ 225; Letter from Pls. to Ct., Exs. A, B (Nov. 6, 2017).

⁴⁴ Compl. ¶ 225.

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III. CONCLUSION

For the reasons stated herein, Defendants' Motion to Stay is GRANTED. Defendants must provide all written discovery from the federal securities class actions to Plaintiffs in a timely manner. Also, Defendants must alert Plaintiffs and the Court if another derivative suit is filed and moves forward. Finally, the Parties must provide the Court with quarterly reports on the status of the ongoing litigations and investigations starting January 15, 2018. Plaintiffs may move at any time to have the stay lifted upon a showing of good cause.

IT IS SO ORDERED.

Sincerely,

/s/Tamika Montgomery-Reeves

Vice Chancellor