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28E-filed on: 3/6/2009

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

In re McKESSON HBOC, INC.  
SECURITIES LITIGATION

Master File No. C-99-20743 RMW  
and Related Cases

\_\_\_\_\_  
This Document Relates To:  
  
ALL ACTIONS.

ORDER REGARDING FURTHER  
DISTRIBUTION OF THE NET  
SETTLEMENT FUNDS

**[Re Docket Nos. 1745, 1762]**

Lead Plaintiff New York State Common Retirement Fund ("Lead Plaintiff") entered into three settlements on behalf of the class. It first settled for \$960 million with McKesson HBOC, Inc. and HBO & Company with final court approval on February 24, 2006. It then settled with Arthur Andersen LLP for \$72.5 million, and the court granted its final approval to this settlement on April 13, 2007. Finally, Lead Plaintiff settled with Bear, Stearns & Co., Inc. for \$10 million, and the court gave its final approval to this settlement on January 11, 2008. With this final settlement, the court also authorized a partial distribution of the over \$1 billion in settlement funds to the members of the class. Lead Plaintiff now moves for distribution of the remainder of the settlement funds. It submits a number of determinations made by the claims administrator (Analytics, Inc.) for which the adversely affected claimants request court review.

ORDER REGARDING FURTHER DISTRIBUTION OF THE NET SETTLEMENT FUNDS  
Master File No. C-99-20743 RMW  
TSF

1 The court has also received briefing from two others seeking the court's review of aspects of  
2 the distribution. Bank of America, N.A., acting through U.S. Trust, Bank of America Private  
3 Wealth Management is the independent fiduciary for the McKesson Corporation Profit-Sharing Plan  
4 and objects to Analytics' rejection of a portion of the Plan's claim on the settlement fund. The Plan  
5 opposes the motion for distribution on this basis. The court has also received briefing from Larry  
6 Greco, a former employee of McKesson whose claim was rejected based on the definition of the  
7 settlement classes. Over the past year, the court has received a number of letters from former  
8 McKesson employees situated similarly to Mr. Greco.

9 The court has reviewed the papers and considered the arguments of counsel. For the  
10 following reasons, the court requests further information and will authorize appropriate distribution  
11 after receipt of that information.

#### 12 I. THE DEFINITION OF THE SETTLEMENT CLASSES

13 All three settlement classes carved out certain shareholders whose positions could have  
14 potentially scuttled the certification of a class. One such carve-out for was "officers" of the  
15 defendants has been the cause of controversy. All three settlements exclude from the class any  
16 "officer of McKesson or HBOC" and each defined an officer as "any person employed by HBOC or  
17 McKesson who held a position at or above the level of assistant vice president." The settlements  
18 also defined HBOC and McKesson to include their affiliates and subsidiaries.

19 In approving the settlement between the class and the McKesson entities, the court has  
20 already overruled objections from employees, including Mr. Greco, contending that the definition of  
21 "officer" was too broad. *See* Docket No. 1441, 3-4 (Feb. 24, 2006). The court reasoned that the  
22 exclusion of such employees was reasonable to ensure class certification. *Id.* at 4. The court also  
23 concluded that such employees could "file their own suits against the Settling Defendants." *Id.*

24 Nevertheless, a number of former "officers" of McKesson, HBOC and their subsidiaries  
25 opposed the initial distribution and now oppose further distribution of settlement funds based on  
26 their exclusion from the class. *See, e.g.,* Docket Nos. 1718; 1723; 1732; 1733; 1744; 1762. Fairly  
27 summarizing their objections, these former "officers" generally were mid-level employees allegedly  
28 given the title of "Vice-President" for appearances to those outside McKesson. They complain that

1 it is unfair to exclude them from the class of recovering shareholders given their lack of involvement  
2 in the conduct giving rise to the securities fraud claims and the three settlements, and they urge the  
3 court to include them in the class.

4 The disappointed "officers" and the parties have provided little in the way of authority to  
5 guide the court's inquiry, and it is difficult to ascertain the procedural posture of their grievances. At  
6 this point in time, the court cannot construe their filings as oppositions to the certification of the  
7 settlement classes. That objection was raised during the settlement with the McKesson entities, the  
8 court overruled it, and no appeal was taken by "officer" objectors to the judgment. Even if the court  
9 had agreed with the "officer" objectors at that time, the court could not have modified the proposed  
10 settlements; it could only have rejected them. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th  
11 Cir. 1998) ("Neither the district court nor this court have the ability to 'delete, modify or substitute  
12 certain provisions.' The settlement must stand or fall in its entirety."). But the court accepted the  
13 proposed settlements, including the definition of "officer," and the court is not free to revisit the  
14 issue.<sup>1</sup>

15 The court thus construes the filings by the "officers" as requests to be included in the class or  
16 objections to Analytics' denials of their claims. The requests must be denied. The various officers  
17 concede that they possessed, at a minimum, honorary titles of "vice president" of McKesson, HBOC,  
18 or one of their subsidiaries or affiliates. Analytics did not err in denying their claims, and the court  
19 cannot now include these individuals in the class.

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20  
21 <sup>1</sup> The only case cited in any of the papers, *Rossini v. Ogilvy & Mather, Inc.*, held that a district  
22 court erred in concluding that Rossini, a "vice-president" who had no policy-making authority, could  
23 not be an adequate representative for a class of female professionals and managers suing their  
24 employer for gender discrimination. 798 F.2d 590, 596 (2d Cir. 1986). The trial court also broadly  
25 excluded "officers" from the class because it believed (erroneously) that such officers were  
26 corporate agents responsible for the defendant's compliance with anti-discrimination laws. *Id.* The  
27 Second Circuit reversed, holding that the evidence established that the erroneous decision to deny  
28 class representative status to Rossini and to exclude her and other non-controlling officers from the  
class was prejudicial to the class.

*Rossini* differs significantly from the instant case. Here, we are involved with a claim by  
individuals who were not included within the class definition chosen by the parties and certified by  
the court but who, nevertheless, assert that they should be deemed part of the settlement class for the  
purposes of receiving a share of the benefits obtained for the class. *Rossini*, on the other hand,  
concerned the propriety of a court's action in not allowing a proposed class representative to serve in  
that capacity and in redefining the class. *Rossini* has no application to the issue presently before the  
court.

1 Various "officers" like Mr. Greco, Susan Weagley Jacobs, and Josephine Lamprey note that  
2 "officer" as defined by McKesson's bylaws and Delaware corporate law does not include employees  
3 like them. For example, Delaware law defines an "officer" as a specific subset of individuals  
4 including the corporation's CEO, CFO, COO, treasurer, controller, and like positions. Del. Corp.  
5 Code § 3114(b). The bylaws of the McKesson entities appear to reflect Delaware law and define  
6 "officers" as certain employees designated by the board of directors. These details would be highly  
7 probative of the meaning of "officer" in the definition of the class if the stipulations of settlement  
8 and the court's orders certifying the classes *lacked* a further definition of "officer." But they do not.  
9 Delaware law and the entities' bylaws notwithstanding, the parties agreed upon, and the court  
10 accepted, a broader, bright line definition of "officer." That definition may be many things, but it is  
11 not ambiguous. It clearly excludes anyone that "held a position at or above the level of assistant  
12 vice president." Because this definition of "officer" is not ambiguous, it would be inappropriate for  
13 the court to resort to these other sources to determine whether these claimants fall within the scope  
14 of the "officer" exclusion.

## 15 II. THE PLAN'S OPPOSITION

16 The McKesson Corporation Profit-Sharing Investment Plan's fiduciary (which the court  
17 refers to as "the Plan") also opposes the distribution because Analytics rejected a portion of the  
18 Plan's claim.

### 19 A. Background

20 McKesson formed the Plan to benefit its employees and incentivize them to give McKesson  
21 their best work. *See* Barrett Decl., Ex. B § 1.1 (hereinafter "1997 Plan").<sup>2</sup> The Plan acquired  
22 McKesson stock in a variety of ways. First, portions of the plan constitute an "employee stock  
23 ownership program" and were funded directly by McKesson. *Id.* §§ 4.1(a), 4.3, 4.8, 6.1. Second,

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24  
25 <sup>2</sup> The Plan submits two copies of the document setting up the McKesson Profit-Sharing  
26 Investment Plan, one from 1997 and a restated version from 2005. *See* Barrett Decl., Exs. A-B. The  
27 settlement period spans from 1997 to 1999. While the 2005 Plan is much easier to read, the court  
28 believes that the 1997 Plan should logically control the status of the Plan's claim on the settlement  
proceeds because it defined the status of the Plan during the period of time from which the Plan's  
claim originates. Thus, to the extent the documents differ, the court believes it would be more  
appropriate to rely on the 1997 Plan. That aside, the documents do not appear to differ in ways  
material to the Plan's claim on the settlement fund.

1 portions of the Plan acquired stock with contributions from employees who channeled a fraction of  
2 their pay into the Plan. *Id.* § 3. How the Plan acquired the stock on behalf of the participating  
3 employee determined whether the employee had a vested right to benefits under the Plan. *See id.* §  
4 7. It is not clear whether the portion of the claim denied by Analytics corresponded to shares that  
5 had vested or included shares that might vest to excluded individuals.

6 The Plan submitted a claim based on its ownership of 19,273,435 shares of McKesson stock.  
7 Analytics accepted the Plan's claim with respect to 18,789,184 shares. Barrett Decl., Ex. D.  
8 Analytics rejected the Plan's claim with respect to approximately 500,000 shares held by the Plan  
9 but attributed to 233 individuals identified as having held the position of officer or director of  
10 McKesson or HBOC." *Id.*

11 **B. Analysis**

12 As a preliminary matter, it is important to note what is not disputed. No one disputes that the  
13 Plan is an independent entity. 29 U.S.C. § 1132(d)(1). Nor is there a dispute as to who holds the  
14 shares giving rise to the rejected claims – the Plan's trustee does. 29 U.S.C. § 1103(a). Further,  
15 there is no dispute that the Plan holds those shares for the benefit of individuals who have been  
16 excluded as members of the class and whose claims would be rejected (and have been rejected) if  
17 the individuals held the stock. Thus, the question for the court is whether it was appropriate for  
18 Analytics to reject the Plan's claim to the extent the claim represented shares that the Plan holds for  
19 the benefit of excluded individuals.

20 The settlement classes include "*all* persons and entities" that purchased McKesson stock.  
21 The settlement class then makes seven specific carve-outs. The settlement class excludes: the  
22 defendants, the defendants' immediate families, entities in which any defendant had a controlling  
23 interest, officers and directors of Bear Stearns, partners of Arthur Andersen, "officers and directors  
24 of HBOC or McKesson," and "the legal representatives, heirs, successors, or assigns of any such  
25 excluded party."

26 Lead Plaintiff agrees that the Plan is properly included within the class. No one disputes that  
27 the Plan is entitled to a share of the settlement based on its ownership of over 18 million shares of  
28 McKesson stock. Nor could they. As discussed, the Plan is an "entity" that owned McKesson stock,

1 thus it is presumptively included. The Plan is not any of the seven classes of individuals or entities  
2 that were excluded from the definition of the settlement class.

3 Nonetheless, Lead Plaintiff argues that the Plan's claim should be denied, but only in part,  
4 based on the excluded status of some of the Plan's beneficiaries. Lead Plaintiff argues that the Plan  
5 "elevates form over substance" by distinguishing between the Plan and its beneficiaries. But this is  
6 the form imposed by the definition of the settlement class. The definition of the class excludes  
7 specified persons and entities; it does not make distinctions between discrete shares of McKesson  
8 stock based on the identity of who will eventually benefit from the portion of the recovery paid on  
9 behalf of that share of stock. The definition presumptively included all purchasers of McKesson  
10 stocks, and it then carved out seven classes of entities. The text of the definition does not permit the  
11 court to interrogate the class members to discern for whose benefit they hold their stock, and Lead  
12 Plaintiff cites no case that would permit the court to do so.

### 13 III. OBJECTIONS TO ANALYTICS' DETERMINATIONS

14 Analytics scrutinized over 100,000 claims. Various claimants have requested that the court  
15 review the rejection or determination of their claims. The documentation supporting their claims  
16 was provided in two declarations from Richard W. Simmons, the president of Analytics. The court  
17 refers to the two declarations as "Simmons I" and "Simmons II."

#### 18 A. Distribution Amounts

19 Four claimants complained that they received only a fraction of their recognized claim in the  
20 initial distribution from the settlement fund. *See* Simmons II, Ex. F-5. The disputes all arise from  
21 the claimants' confusion about how much of their loss they would recover. Analytics calculated  
22 each claimant's recognized loss to determine that claimant's correct *pro rata* share of the settlement,  
23 which was obviously less than the sum of all of the claimants' recognized losses. Analytics  
24 informed each claimant of their recognized loss and sent each a claimant a check for about 18% of  
25 that amount. The four claimants do not complain that their recognized loss calculation was  
26 incorrect; they complain only that the check they received did not equal their recognized loss.  
27 Analytics' determination of those four claims is affirmed.  
28

1 Another seven claimants contest the amount of their "recognized losses," and thus whether  
2 they have received the correct *pro rata* share of the settlement. *See* Simmons II, Ex. F-3. Their  
3 objections all arise from their confusion about how "recognized loss" was calculated, i.e., each  
4 claimant objected that their *actual* loss on the sale of certain McKesson or HBOC securities was not  
5 recognized. The court discerns no error, however, in the calculation of these claimants'  
6 *recognized* losses. Similarly, the court discerns no error in the sixteen other disputes over  
7 recognized loss calculations. *See* Simmons I, Ex. C-4.

8 **B. "Officers"**

9 As discussed above, the definition of "officer" as any position at or higher than the level of  
10 "assistant vice president" has caused some controversy. Analytics rejected 53 claims in the initial  
11 distribution and subsequently rejected six more on the basis that the claimants were excluded from  
12 the definition of the settlement classes based on their positions within the defendants. It appears that  
13 Analytics rejected these claims based on whether the claimants checked a box on their forms  
14 regarding "officer" status, but did not independently determine whether the claimant's position was  
15 "at or above the level of assistant vice president." This has generated problems where claimants  
16 checked the officer box, but then explained why their position was not "at or above the level of  
17 assistant vice president." For example, although the definition of "officer" in the settlements is not  
18 ambiguous, it nevertheless is unclear what titles reflect a status below that of "assistant vice  
19 president" in light of how divisions of McKesson and HBOC assigned responsibility.<sup>3</sup> Specifically,  
20 it is unclear whether a "regional vice president" or "area vice president" is a position "at or above the  
21 level of assistant vice president."

22 Accordingly, the court can sustain Analytics' denial of claims filed by individuals who were  
23 clearly "vice presidents" of the defendants or otherwise excluded based on their work for Bear  
24 Stearns or Arthur Andersen. *See* Simmons II, Ex. F-2; Simmons I, Ex. C-3. This includes the

25 \_\_\_\_\_  
26 <sup>3</sup> A former McKesson HBOC human resources manager named Vicki Brewster wrote to the  
27 court and explained that "there were multiple levels of Vice Presidents within the organization."  
28 She explained McKesson HBOC's hierarchy as Executive Vice President, Senior Vice President, and  
then as many as three layers of "Vice Presidents." She made no reference to a title corresponding to  
"assistant vice president." Similarly, Marty Tuominen explained that "you couldn't swing a dead cat  
without hitting a Vice President" at McKesson's headquarters.

1 disputes brought to the court's attention in letters filed by Denean Rivera (VP of Integration), Judith  
 2 Tambasco (VP of Product Management), Robert Fearing (VP Technical Services), Frederic Lindsay,  
 3 Carlton Carden (VP of Product Development), Suzanne Jeanson Travis, Joan M. Tachon, Richard  
 4 Thompson (VP of CRS, a company acquired by HBO & Co. before merging with McKesson), Larry  
 5 Greco (VP Pricing), Marty Tuominen, Susan Weagley Jacobs (Senior VP of Interqual), and  
 6 Josephine Lamprey (Senior VP of Interqual).

7 However, the court cannot currently sustain or overrule Analytics' denial of the following  
 8 claims and requests further information as to whether the claimant's position was, in fact, "at or  
 9 above the level of assistant vice president."

Claimant	Claim Number	Position
Kevin Scheckelhoff	295144	Regional Vice President of Consulting
Holly McInerney	6049180	Regional Vice President
Holly McInerney	7124019	Regional Vice President
Holly McInerney	7124020	Regional Vice President
Daniel Hanekamp	122922 <sup>4</sup>	Region VP of Distribution Operations
Joanne Konrath IRRA	293524	Area VP Payor Solutions Group
Kenneth Morrison	269936	Regional VP

18 An additional concern is expressed in Mr. Tuominen's letter that Analytics did not verify  
 19 whether claimants were or were not officers of the McKesson entities. His letter suggests that some  
 20 "vice presidents" falsely checked "no" on their claim forms and have been included in the settlement  
 21 class. Analytics did require the forms to be submitted under penalty of perjury and appears to have  
 22 at least verified some positions. If Mr. Tuominen or anyone else suspects that a claimant may have  
 23 claimed not to be an officer when they were, in fact, an assistant vice president or above, the court  
 24 will reconsider their claim on submission of any information suggesting they incorrectly failed to  
 25 check the officer box on their claim form.

26 **C. Duplicative Claims**

27 \_\_\_\_\_  
 28 <sup>4</sup> Daniel Hanekamp's other claim (112744) is labeled "PSIP," suggesting it has been duplicated  
 by the Plan's claim. Its rejection is therefore sustained.



1           Analytics denied various claims filed by former McKesson employees who participated in  
2 the Profit-Sharing Investment Plan because their claims duplicate the claim filed by the Plan. Five  
3 claimants requested review of their claims, *see* Simmons II, Ex. F-1 and Simmons I, Ex. C-1, and the  
4 court is satisfied that each claim is duplicative of the claim filed by the Plan.

5           The court has also received letters from employees who purchased stock through the  
6 Employee Stock Purchase Program. This program may be distinct from the Plan's employee stock  
7 ownership program. Accordingly, the court withholds ruling on the claims filed by Joseph R.  
8 Stabile and Robert S. Cauthen and requests clarification of whether their claims are duplicative of  
9 the Plan's claim.

10           Two additional claimants seek review of Analytics' determination that their claims are  
11 duplicative. The court cannot discern any problem with Analytics' determination regarding claim  
12 158373. Claim 7187028 is the claim filed by the ex-wife of a prior claimant, who argues that she,  
13 not her ex-husband, is entitled to the proceeds of the settlement. Regardless of who properly owns  
14 the right to the settlement recovery, it is clear that Analytics properly rejected the claim as  
15 duplicative.

16           **D.       Documentation of Purchased Securities**

17           Analytics rejected seven miscellaneous claims for which the claimants requested court  
18 review. Five of the claimants failed to supply documentation that they bought and held the relevant  
19 securities during the class period. *See* Simmons II, Ex. F-7. Generally, the claimants submitted  
20 some proof that they either bought or held the stock, but did not submit complete documentation.  
21 Although it seems possible some of the claimants could have perfected their submissions, they did  
22 not and Analytics properly rejected the claims.

23           Similarly, Analytics rejected two other claims for lack of documentation that the claimants  
24 purchased securities. *See* Simmons I, Ex. C-2. These claims involve stock options that appear to  
25 have been exercised before the class period at relatively low prices. While the claimants may have  
26 "lost money" during the class period, they did not purchase securities at a fraudulently heightened  
27 price. Their exercise of options prior to the class period excludes them from the definition of the  
28 class.

1 Another group of denials involves claimants who purchased their McKesson or HBOC  
2 securities prior to the class period and simply held their securities throughout. *See* Simmons I, Ex.  
3 C-5. Again, these claimants "lost money" when the stock price collapsed, but they never purchased  
4 any securities at fraudulently inflated prices. Similarly, Analytics rejected one disputed claim  
5 because the claimant did not purchase relevant securities during the class period. *See* Simmons II,  
6 Ex. F-4. The court affirms the denial of these claims.

7 The court received a letter from Harry J. Gibson which appears to contest various  
8 calculations, but the court was unable to determine how Mr. Gibson calculated his claim.  
9 Accordingly, the court affirms Analytics' determination.

10 **E. Miscellaneous Rejections**

11 Finally, Analytics rejected a claim as barred by the settlement in *In re McKesson HBOC, Inc.*  
12 *ERISA Litigation*. Although this appears to be a proper grounds for rejection, the claim was actually  
13 denied for duplicating another claim. Both grounds suffice, and the court affirms the denial.

14 **IV. ORDER**

15 For the foregoing reasons, the court requests that anyone wishing to submit additional  
16 information concerning a claim left open by this order or questioning a claimants' statement that he  
17 or she was not an officer do so within twenty days of service of this order on them. Service is  
18 deemed to be made on the date of mailing, not the date of receipt. Service on all objectors is to be  
19 made by Lead Plaintiff. Any objector submitting further information should send a copy to  
20 Analytics, Lead Plaintiff, and the court. Analytics is requested to respond to any further  
21 submissions with the additional information requested herein within fifteen days after the last date  
22 for the objectors to respond. Lead plaintiff is to submit a revised proposed Order for Second  
23 Distribution that conforms with this order and provides alternative wording for those claims left  
24 open.

25 DATED: 3/6/2009



26 RONALD M. WHYTE  
27 United States District Judge

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27 **Dated:** 3/6/2009 TSF  
28 **Chambers of Judge Whyte**