IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GLORIA STRAYHORN and JERRY STRAYHORN,

Plaintiffs,

v. **Case 2:11-cv-020580-STA-cgc**

WYETH PHARMACEUTICALS, INC., et al.,

Defendants.

SARAH SPEED,

Plaintiff,

v. **Case 2:11-cv-02095-STA-cgc**

WYETH PHARMACEUTICALS, INC., et al.,

Defendants.

KATHLEEN SIMMONS,

Plaintiff,

v. **Case 2:11-cv-02083-STA-cgc**

WYETH PHARMACEUTICALS, INC., et al.,

Defendant.

ORVIELL RHODES, et al.

Plaintiffs,

v. **Case 2:11-cv-02134-STA-cgc**

WYETH PHARMACEUTICALS, INC., et al.,

Defendant.

IRVING EVANS and PHYLLIS EVANS,

Plaintiffs,

v. **Case 2:11-cv-02060-STA-cgc**

WYETH PHARMACEUTICALS, INC., et al.,

Defendant.

MICHAEL BROOKS and KAREN BROOKS,

Plaintiffs,

v. **Case 2:11-cv-02059-STA-cgc**

WYETH PHARMACEUTICALS, INC., et al.,

Defendant.

ALTONA BAIN and WILLIAM BAIN, et al.,

Plaintiffs,

v. **Case 2:11-cv-02145-STA-cgc**

WYETH PHARMACEUTICALS, INC., et al.,

Defendant.

ORDER GRANTING PLAINTIFFS' MOTIONS FOR LEAVE TO FILE AN AMENDED COMPLAINT

Before the Court are Plaintiffs' Motions for Leave to File an Amended Complaint ("Motions to Amend"), which were separately filed in each underlying case on September 23, 2011. The instant motions were referred to United States Magistrate Judge Charmiane G. Claxton for determination. For the reasons set forth herein, Plaintiffs' Motions to Amend are hereby GRANTED.

I. Introduction

Plaintiffs initiated these actions against Defendants for personal injuries allegedly suffered after ingestion of the prescription medication Reglan®, which is generically known as metroclopromide. Generic Defendants have filed Motions to Dismiss Plaintiffs' claims on preemption grounds in light of the Supreme Court's opinion in *PLIVA, Inc. v. Mensing*, 564 U.S. ___, 131 S.Ct. 2567 (June 23, 2011). Plaintiffs have responded that Generic Defendants have not made a showing that the claims in the Complaint are preempted.

Generic Defendants subsequently filed Replies in support of their Motions to Dismiss, which continued to assert that Plaintiffs claims were preempted by *Mensing*. In the Replies, Generic Defendants argue that the facts set forth in the Complaint set out only a claim for failure to warn, and while Plaintiffs include counts asserting design defect, manufacturing defect, and civil conspiracy, Plaintiffs only provide a "formulaic recitation of the elements of [the] cause of action and allege no facts to support those claims" in violation of *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Generic Defendants thus argue that Plaintiffs factual allegations, and therefore their entire case, sound in failure to warn,

which claims are preempted by *Mensing*.

After the filing of Generic Defendants' Replies, Plaintiffs separately brought the instant Motions to Amend on September 23, 2011. Plaintiffs argue that any challenges to the Complaint under *Twombly* and *Iqbal* were not properly raised as they were not included in the Motions to Dismiss. Plaintiffs further request that the Court permit them to amend the Complaint to cure any alleged defects or inadequacies, and Plaintiffs submitted a Proposed Amended Complaint as Exhibit 1 to the instant motions

Generic Defendants filed Responses to Plaintiffs' Motions to Amend, arguing that the motions are a transparent attempt to plead around the Supreme Court's decision in *Mensing*, to negate their already-filed and fully briefed motions to dismiss, and add new and never-before-alleged claims. Generic Defendants assert that Plaintiffs knew of the *Mensing* decision before responding to their Motions to Dismiss and could have sought leave to amend at that time. Instead, Generic Defendants claim that Plaintiffs elected to defend their Complaints as-is and, having done so, timed their Motions to Amend to unfairly burden and prejudice them after briefing on the Motions to Dismiss were complete.

II. Analysis

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend should be freely granted when justice so requires. Fed. R. Civ. P. 15(a)(2). Unless the opposing party can show prejudice, bad faith, or undue delay, a court should grant leave to file an amended pleading. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

1. Prejudice

With respect to prejudice to Generic Defendants, Plaintiffs argue that the case is in the initial stages, as the scheduling conference has only recently been held on September 29, 2011 and discovery has not yet begun. Plaintiffs assert that there are numerous other Reglan®/metroclopromide cases pending across the nation where many of the same issues are being refined. Specifically, Plaintiffs argue that leave to amend was granted on September 12, 2011 in *Petrina Brasley-Thrash v. Teva Pharmaceuticals USA, Inc.*, No. 10-00031-KD-N, in the United States District Court for the Southern District of Alabama, and they attached that court's decision as Exhibit 2 in support of their motions

Generic Defendants argue that the proposed Amended Complaint would create prejudice, as it goes beyond any issues raised in the Motions to Dismiss or Replies and raises multiple new legal theories and causes of action. Generic Defendants claim it will be forced to prepare new motions to dismiss and that the parties will all be required to undergo a second round of briefing on the issues.

Upon review, the Court concludes that, as this case is in its initial stages, and it would not create any significant prejudice to Generic Defendants to permit Plaintiffs leave to amend. Although Generic Defendants would undoubtedly face new claims from such amendments, which may affect the pending dispositive motions, this is not sufficient prejudice to disallow Plaintiffs from being freely granted leave to amend. *See Morse v. McWhorter*, 290 F.3d 795, 801 (6th Cir. 2002) ("We recognize [defendants] will be inconvenienced by another round of motion practice, but . . . such inconvenience does not rise to the level of prejudice that would warrant denial of leave to amend." In fact, district courts routinely address leave to amend following dispositive motions. *See, e.g.*, *Altra Flemons v. Wayne County Sheriff's Dept.*, No. 09-10606, 2011 WL 576659 (E.D.Mich. Feb.

9, 2011) (denying previously filed dispositive motion for mootness and without prejudice to the ability to re-file a dispositive motion after the amended complaint is filed).

2. Undue Delay

With respect to undue delay, Plaintiffs assert that they filed the Motions to Amend as soon as it became apparent that proposed amendments would be necessary, namely, when Defendants raised alleged inadequacies of Plaintiffs' Complaints in the Replies in Support of its Motions to Dismiss. Further, as far as the new claims post-*Mensing* are concerned, Plaintiffs argue that all parties nationwide in litigation involving generic pharmaceutical products are in the process of reacting to *Mensing*. Plaintiffs assert that the consequences of *Mensing* are a "matter of great disagreement," not just in Reglan®/metroclopromide lawsuits, but in all pharmaceutical product-liability lawsuits involving generic drug manufacturers. Given the recent developments in the law, Plaintiffs argue that they should have an opportunity to amend at this early stage in the case to preserve their rights in the interests of justice.

Defendants argue that Plaintiffs knew of the *Mensing* decision before the Motions to Dismiss were filed. Defendants claim that Plaintiffs had the opportunity to move to amend the Complaints even after the Motions to Dismiss was filed, but instead elected to defend the Complaints as-is. Defendants assert that leave should not be granted now that the Motions to Dismiss have been filed and fully briefed because it would create undue delay in the cases, including prolonging the resolution of the dispositive motions.

Upon review, the Court concludes that the Motions to Amend were not filed with undue delay, as Plaintiffs have averred that they have been attempting to react to the *Mensing* decision and have attempted to preserve their rights at an early stage in the proceedings. Further, even had this

Court found that Plaintiffs' unduly delayed their filing, as the *Mensing* decision predated their Responses to the Motions to Dismiss, the Sixth Circuit has held that "[d]elay alone, regardless of its length is not enough to bar [amendment] if the other party is not prejudiced." *Duggins*, 195 F.3d at 834.

3. Bad Faith

With respect to bad faith, Defendants did not explicitly assert that Plaintiffs have requested leave to amend in bad faith. Defendants generally allege that Plaintiffs' requests to amend are a transparent attempt to plead around the *Mensing* decision. Although this appears to be more of an argument that the proposed amendments are futile, such an issue has not been raised and will not be considered by the Court. Regardless, the Court finds that there is no evidence that Plaintiffs' acted in bad faith, as they have averred that they simply sought in the initial stages of the case to protect their rights post-*Mensing*.

III. Conclusion

For the reasons set forth herein, Plaintiffs' Motions for Leave to File an Amended Complaint are hereby GRANTED.

IT IS SO ORDERED this 21st day of November, 2011.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE