**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **MYLAN PHARMACEUTICALS, INC.,** | : | |
| **Plaintiff,** | : | |
| | : | |
| **v.** | : | **Civ. No. 12-3824** |
| | : | |
| **WARNER CHILCOTT PUBLIC LIMITED COMPANY, et al.,** | : | |
| **Defendants.** | : | |
| | : | |

**O R D E R**

Plaintiffs allege that Defendants violated the Sherman Act and various state laws by engaging in "product hopping." Defendants ask me to dismiss. (Doc. Nos. 82, 83, 101, 102, 135, 138, 172, 174.) For the reasons that follow, I will deny Defendants' Motions without prejudice.

**BACKGROUND**

The focus of this litigation is the prescription drug "Doryx"—the branded version of delayed-release doxycycline hyclate, an oral antibiotic widely prescribed for severe acne. Defendant Mayne Pharma first received FDA approval to market Doryx in 1985. (Doc. No. 1 ¶ 41.) In 1997, Mayne granted Defendant Warner Chilcott an exclusive license to market and sell Doryx in the United States. (Doc. No. 1 ¶ 41.)

Plaintiffs allege that until 2005, Defendants benefitted from high prices, enjoying patent protection from competition. In about 2005, however, Defendants first faced the possibility of generic competition with Doryx. (Doc. No. 1 ¶ 52.) As alleged, to avoid competition, Defendants "switched the market" from Doryx tablets to Doryx capsules, even though this product change provided little or no benefit to patients. (Doc. No. 1 ¶¶ 3, 52-56.) The sole

purpose of the change was to prevent pharmacists (acting under state law) from automatically substituting generic tablets for Doryx capsule prescriptions.

Mylan Pharmaceuticals, which produces generic versions of Doryx, initiated this action, arguing that Defendants' strategy of "market-switching" or "product-hopping" is anticompetitive. Joined by direct and indirect purchaser plaintiffs, Mylan alleges that Mayne and Warner Chilcott engaged in an agreement in restraint of trade in violation of § 1 of the Sherman Act. Plaintiffs also allege § 2 monopolization and attempted monopolization, and violation of various state laws.

**LEGAL STANDARDS**

"[T]o satisfy Rule 8, a complaint must contain factual allegations that, taken as a whole, render the plaintiff's entitlement to relief plausible." W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556). In deciding a motion to dismiss, I must conduct a two-part analysis. Fowler v. PMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). First, I must accept factual allegations, and disregard legal conclusions or mere recitations of the elements. Id. I must then determine whether the facts alleged make out a 'plausible' claim. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Twombly did not create a more rigorous pleading standard for antitrust cases. "Iqbal made clear that Rule 8's pleading standard applies with the same level of rigor in all civil actions." W. Penn Allegheny Health Sys., 627 F.3d at 98 (internal citations omitted).

**DISCUSSION**

The gravamen of Defendants' many dismissal motions is the same: their product changes

were intended to improve Doryx and did nothing to block generic firms from competing with Defendants. Rather, Defendants argue, their product hopping merely precluded generic firms from taking advantage of automatic substitution laws. Nothing Defendants have done precludes generic firms from making and advertising their own versions of doxycycline hyclate to compete with Doryx. In Defendants' view, Plaintiffs' allegation that generic firms cannot advertise their products to compete successfully with Doryx may reveal a problem with the generics' business models or demonstrate the regulatory regimes' inability to control generics' costs through forced "free-riding"—but it does not make out an antitrust injury.

Defendants' contentions, if correct, appear compelling. I agree that Plaintiffs' theory here is "novel" at best. Nevertheless, Defendants' arguments require me to consider "facts" that are well outside the Complaints in this matter. I am not prepared to consider these facts at the Rule 12 stage. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings.")

Defendants' other arguments for dismissal are no more persuasive. The Noerr-Pennington doctrine does not bar Plaintiffs' claims as alleged. Again, this question should be addressed when I have the benefit of a record. See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, at 499 (1988) ("The scope of [Noerr-Pennington] protection depends . . . on the source, context, and nature of the anticompetitive restraint at issue."). So, too, with respect to Defendants' argument that Mayne and Warner Chilcott are a single entity incapable of conspiring under Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). See Townshend v. Rockwell Int'l Corp., C99-0400SBA, 2000 WL 433505, at *6 (N.D. Cal. Mar. 28, 2000) ("Because the question of capability to enter a conspiracy is a question of fact" dismissal

under 12(b)(6) is inappropriate). Finally, I do not agree that the Plaintiffs' (remaining) state claims either include insufficient facts or are preempted by federal law.

In sum, Defendants' Motions are premature. Plaintiffs' allegations are sufficient to survive Defendants' Rule 12 Motions. Although I am skeptical that the "product hopping" alleged here constitutes anticompetitive conduct under the Sherman Act, I cannot definitively address that question without going beyond the pleadings. Accordingly, I will deny Defendants' Motions to Dismiss without prejudice. They may renew these arguments at summary judgment.

**AND NOW**, this 11th day of June, 2013, it is hereby **ORDERED** that Defendants' Motions to Dismiss (Doc. Nos. 82, 83, 101, 102, 135, 138, 172, 174) are **DENIED without prejudice**.

**AND IT IS SO ORDERED.**

*/s/ Paul S. Diamond*

Paul S. Diamond, J.