

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: GUIDANT CORP. IMPLANTABLE
DEFIBRILLATORS PRODUCTS
LIABILITY LITIGATION

MDL No. 05-1708 (DWF/AJB)

This Document Relates to All Actions

ORDER

Plaintiffs UFCW Local 1776 and Participating Employers Health and Welfare Fund and the City of Bethlehem (collectively, the “named TPP Plaintiffs”) request permission pursuant to Local Rule 7.1(g) to file a Motion to Reconsider the Court’s April 16, 2007 Order. That Order, in part, dismissed with prejudice Counts XVIII-XXI and XXIV-XXVI of the Master Complaint.

Pursuant to Local Rule 7.1(g), a request for leave to file a motion for reconsideration will only be granted upon a showing of “compelling circumstances.” A motion to reconsider should not be employed to relitigate old issues but to “afford an opportunity for relief in extraordinary circumstances.” *Dale & Selby Superette & Deli v. United States Dept. of Agric.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993).

The named TPP Plaintiffs seek to file a motion to reconsider for two reasons. First, they assert that the Court erred in dismissing the above-mentioned claims with prejudice because dismissal for lack of jurisdiction is not an adjudication of the merits. They therefore request that those claims be dismissed without prejudice. The Court agrees. A district court is generally barred from dismissing a case with prejudice if it concludes subject matter jurisdiction is absent. *County of Mille Lacs v. Benjamin*, 361

F.3d 460, 464 (8th Cir. 2004). Accordingly, the named TPP Plaintiffs have presented compelling circumstances. Instead of requiring them to file a motion to reconsider, the Court will amend its April 16, 2007 Order to dismiss the counts at issue without prejudice.

Second, the named TPP Plaintiffs assert that the Court erred in not granting them leave to cure the deficiencies in the Master Complaint. They assert that they can cure all the pleading deficiencies outlined in the April 16, 2007 Order. The Court disagrees. Although leave to amend “shall be freely given when justice so requires,” *see* Fed. R. Civ. P. 15(a), a plaintiff does not have an absolute or automatic right to amend. *See Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913 (8th Cir. 2002). Futility is a valid basis for denying leave to amend. *See Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1065 (8th Cir. 2005).

The Court dismissed the seven claims at issue for three reasons: (1) the named TPP Plaintiffs failed to allege sufficient facts to establish that they suffered a direct injury; (2) there is no causal relationship between the alleged injury and Guidant’s alleged misconduct; and (3) the claims are not ripe because each claim depends on whether Guidant committed some wrong against the named TPP Plaintiffs’ participants. (April 16, 2007 Order at 15-18.) At this time, any amendments would be futile because the underlying claims are not ripe. Moreover, even if they were ripe, the Court has trouble seeing how the named TPP Plaintiffs could correct all of the deficiencies, given that a court is “free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” *Wiles*

v. Capitol Indem. Corp., 280 F.3d 868, 870 (8th Cir. 2002). Given this, the Court denies the named TPP Plaintiffs' request insofar as it seeks leave to amend the Master Complaint.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Plaintiffs UFCW Local 1776 and Participating Employers Health and Welfare Fund and the City of Bethlehem's Request for Leave to File a Motion to Reconsider (Doc. No. 1647) is **GRANTED IN PART** and **DENIED IN PART**.

Dated: May 9, 2007

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court