

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

GERALD GENTILE, in his capacity as
Administrator of the Estate of DIANE
GENTILE, Deceased,

Plaintiff,

v.

BIOGEN IDEC INC. and ELAN
PHARMACEUTICALS, INC.,

Defendants.

Docket No.

NOTICE OF REMOVAL

Defendant Elan Pharmaceuticals, Inc. (“Elan”), pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, hereby removes to the United States District Court for the District of Massachusetts the state action entitled, *Gerald Gentile v. Biogen Idec, Inc. and Elan Pharmaceuticals, Inc.*, Case No. MICV2011-3500, Middlesex Superior Court (the “State Court Action”). As grounds for removal, Elan states as follows:

JURISDICTION AND VENUE

1. This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332, and one which may be removed to this Court by Elan pursuant to the provisions of 28 U.S.C. § 1441(a) in that it is between citizens of different states and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.
2. Upon information and belief, and as alleged by Plaintiff in his Complaint, Plaintiff is a citizen domiciled in the state of New York.
3. Elan was, at the time of the filing of this action, and still is, incorporated under the laws of the state of Delaware, and has its principal place of business in California.

4. Defendant Biogen Idec, Inc. was, at the time of the filing of this action, and still is, incorporated under the laws of the state of Delaware, and has its principal place of business in Massachusetts.

5. Accordingly, Plaintiff and Defendants are citizens of different states and complete diversity exists.

6. As alleged by Plaintiff in his Complaint, Plaintiff seeks damages and other relief in excess of \$218,000, exclusive of interest and costs.

7. Venue is proper in this District pursuant to 28 U.S.C. 1441(a).

GROUND AND TIMELINESS OF REMOVAL

8. This action is removable to this United States District Court under 28 U.S.C. § 1441(a) and (b).

9. The State Court Action being removed to this Court originated by way of the Complaint, which Plaintiff filed on or about September 30, 2011.

10. On October 3, 2011 Elan learned that Plaintiff had filed a complaint in the Middlesex Superior Court. A copy of the Complaint is attached as Exhibit A to this notice in accordance with 28 U.S.C. §1446(a).

11. The Complaint is a wrongful death action. The Civil Action Cover Sheet submitted by Plaintiff includes a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages, and the total amount listed is over \$218,000.

12. The removal statute permits a non-resident defendant to remove a case to federal court prior to service on the resident defendant. *See* 28 U.S.C. § 1441(b); *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001) ("Where there is complete diversity of citizenship, . . . the inclusion of an unserved resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b).") (emphasis in original) (citing *Wensil v. E.I. DuPont De Nemours and Co.*, 792 F. Supp. 447, 449 (D.S.C. 1992)); *Allen v. Eli Lilly Co.*, No. 10-cv-141 (CAB), 2010 WL 3489366, at *2 (S.D. Cal. Sept. 2, 2010) (finding that the forum defendant rule was inapplicable if the removal was effected by an out-of-state defendant before any local defendant was served);

Carreon v. Alza Corp., No. C09-5623 RS, 2010 WL 539392, *1 (N.D. Cal. Feb. 9, 2010); *Timmons v. Linavac Corp.*, No. CV09-7947 R(SSx), 2010 WL 2402918, at *1 (C.D. Cal. Jan. 24, 2010); *Wallace v. Tindall*, No. 09-00775-CV-W-FJG, 2009 WL 4432030, *3 (W.D. Mo. Nov. 30, 2009) (“As held by the ‘majority’ of federal courts, this Court must apply the statute as written and determine that Defendants properly removed this action”); *Perez v. McNamee*, No. C06-5031CW, 2006 WL 3462791, *3 (N.D. Cal. Nov. 30, 2006) (Wilken, J.) (finding removal proper before in-state defendant served); *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp 2d 177, 180 (S.D.N.Y. 2003) (in construing § 1441(b), “courts have held, virtually uniformly, that where, as here, [complete] diversity does exist between the parties, an unserved resident defendant may be ignored in determining removability”); *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662, 666 (S.D.Miss. 2002) (“[T]he court finds no merit to plaintiffs' suggestion that the presence of an unserved resident defendant, who otherwise does not destroy diversity, precludes removal under § 1441(b).”) (emphasis in original); *Republic Western Ins. Co. v. Int'l Ins. Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991) (Ware, J.) (“[A] resident defendant who has not been served may be ignored in determining removability”) (quoting 14A C. Wright, A. Miller, E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3723 at 341 (2d ed. 1985)).

13. Pursuant to 28 U.S.C. § 1441(b), removal is available if “none of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b) (emphasis added).

14. Accordingly, removal of this case by non-resident Defendant Elan is timely under 28 U.S.C. § 1441(b) because the local Defendant, Biogen, has not been served with a summons and Complaint.

15. Joinder of Biogen in this Notice is not required as Biogen has not been served. *In re Neurontin Mktg. and Sales Practices Litig.*, 2006 WL 6552976, *1 (D. Mass. Oct. 16, 2006) (citing *In re Pharm. Indus. Average Wholesale Price Litig.*, 431 F. Supp. 2d 109, 113 (D. Mass. 2006)).

16. To date, Defendants have been served with no process, pleadings, or orders in connection with the State Court Action, and therefore, have no such documents to file with the Court pursuant to 28 U.S.C. § 1446(a). For the Court's convenience, attached as Exhibit A is a courtesy copy of the complaint filed by Plaintiff in the State Court Action, which has not yet been served on Elan.

17. Promptly after filing this Notice of Removal, Elan will serve a copy of it upon Plaintiff and file a copy with the clerk of the Middlesex Superior Court. Pursuant to Federal Rule of Civil Procedure 5(d), attached hereto as Exhibit B is a copy of the notice that will be served upon Plaintiff and filed with the State Court.

Respectfully submitted,
Defendant
ELAN PHARMACEUTICALS, INC.
By its attorneys,

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CERTIFICATE OF SERVICE

I, Michael D. Riseberg, attorney for Defendant Elan Pharmaceuticals, Inc., hereby certify that on this 4th day of October, 2011, I served the foregoing document on all parties by causing one true copy thereof to be delivered to the parties' Counsel-of-Record via First Class U.S. Mail, postage prepaid to:

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