

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

In re ZYPREXA PRODUCT	:	
LIABILITY LITIGATION	:	MDL NO. 1596
	:	
JIM HOOD, ATTORNEY GENERAL	:	
OF THE STATE OF MISSISSIPPI, <i>ex rel</i>	:	
THE STATE OF MISSISSIPPI	:	No. 07-cv-00645-JBW-RLM
	:	
v.	:	
	:	
ELI LILLY & COMPANY, INC.	:	

**DEFENDANT ELI LILLY AND COMPANY’S RESPONSE TO
PLAINTIFF’S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

On April 17, 2007, plaintiff filed a Motion for Leave to File Amended Complaint and Memorandum in Support, attaching a proposed Amended Complaint. While defendant Eli Lilly and Company (“Lilly”) does not oppose plaintiff’s motion, Lilly files this Memorandum to clarify that, under clear and longstanding precedent, Lilly’s right to remove this action to federal court, and this Court’s jurisdiction over this case, are governed by plaintiff’s original complaint and not its proposed Amended Complaint.

A. Background

Plaintiff filed its original complaint on July 24, 2006 in state court in Mississippi. On August 24, 2006, Lilly removed this action to the United States District Court for the Northern District of Mississippi, and the action was transferred to this Court on February 7, 2007. Plaintiff now seeks to amend its complaint.

Plaintiff's proposed First Amended Complaint contemplates a number of changes in grammar and syntax, and adds an allegation that Lilly "falsely represented that Zyprexa is safer or more effective than less expensive, generic forms of first generation antipsychotics" to its fact section and common-law fraud count.¹ In addition, however, the proposed Amended Complaint would make the following changes:

- Deletion of section 5 of the original complaint, a background section about the federal origins of the Medicaid program;
- Deletion of all references to the term "non-medically accepted indications," replacing it with "non-medically necessary uses;"
- Deletion of the request for an injunction requiring "adequate warnings" on Zyprexa's label, and all paragraphs setting forth the purported factual predicate for this request.²

What these changes have in common is that they remove paragraphs that were the subject of jurisdictional arguments in Lilly's Notice of Removal and its original opposition to Plaintiff's Motion for Remand.³ *See, e.g.*, Lilly's Memorandum of Law in Opposition to Plaintiff's Motion to Remand, at:

- pp. 6 – 7, explaining the federal sources of the Medicaid program and the federal statutory and regulatory structure under which the program operates;
- pp. 5 – 9, explaining that the term "medically accepted uses," which must be construed and applied to determine the plaintiff's right to relief, is defined, and its application is

¹ Proposed Amended Complaint, at ¶¶ 7.1, 12.4.

² Plaintiff has deleted paragraph 16.4 of its original complaint, and has deleted related language from paragraphs 16.2, 16.5, and 17.4 of the original complaint. (In the proposed Amended Complaint, the analogous paragraphs are, respectively, 15.2, 15.4, and 16.4.)

³ Plaintiff has recently filed a renewed Motion to Remand before this Court. In opposition, Lilly will shortly file a Substituted Memorandum of Law, reflecting the law of the Second Circuit and other new case law and clarifying arguments made in the memoranda Lilly filed in the transferor court.

set forth, in the body of the federal Medicaid statute; accordingly, plaintiff's claims that Lilly promoted Zyprexa for non-medically accepted uses raise substantial federal questions requiring construction and application of federal law; and

- ii) pp. 12 – 14, related to plaintiff's request for an injunction requiring Lilly to include, in Zyprexa's labeling, warnings that the plaintiff deems adequate – Lilly argued that this request raises substantial federal questions under the FDCA and its implementing regulations, and in light of the FDA's Preemption Preamble.

These parallels between plaintiff's proposed amendments and Lilly's "federal question" arguments suggest that, in seeking to amend its complaint at this juncture, plaintiff is attempting to affect this Court's analysis of Plaintiff's Motion to Remand. Under well-settled principles established long ago by the United States Supreme Court, Lilly's right to remove this case to federal court, and this Court's analysis of its jurisdiction, hinge entirely on the complaint on file at the time of removal. *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939); *see also Vera v. Saks & Co*, 335 F.3d 109, 116 (2d Cir. 2003) (defendant's right to remove evaluated as of time removal notice is filed); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 399 F. Supp. 2d 340 (S.D.N.Y. 2005). The *MTBE* Court emphasized;

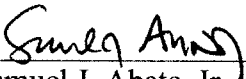
A court must . . . consider the complaint at the time of removal to determine if removal was appropriate in the first place. If the basis for federal subject matter jurisdiction later falls away, the modern rule is that a federal court has the power to hear claims that would not be independently removable even after the basis for removal jurisdiction is dropped from the proceedings. There is a judicial reluctance to make jurisdiction hinge on fortuities or *ex parte* tactical moves.

Id., at 345-46 (internal quotation marks and citations omitted).

Accordingly, plaintiff's proposed Amended Complaint is irrelevant to plaintiff's Motion to Remand, and this Court's jurisdictional analysis must be based on the original Complaint, which was the pleading on file at the time Lilly removed this action to federal court.

DATED: April 27, 2007

Respectfully submitted,



Samuel J. Abate, Jr., (SA 00915)
PEPPER HAMILTON LLP
Suite 2320
420 Lexington Avenue
New York, NY 10170-2399

Nina M. Gussack
Anthony C.H. Vale
Rachel B. Weil
PEPPER HAMILTON LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Attorneys for Defendant
Eli Lilly and Company

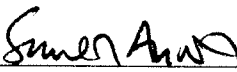
CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Fletcher V. Trammell, Esquire
Bailey Perrin Bailey LLP
440 Louisiana, Suite 2100
Houston, TX 77002

Joseph C. Langston
The Langston Law Firm, P.A.
P.O. Box 787
Booneville, MS 38829

W. Howard Gunn, Esq.
310 S. Hickory St.
P.O. Box 157
Aberdeen, MS 39730



Samuel J. Abate, Jr.