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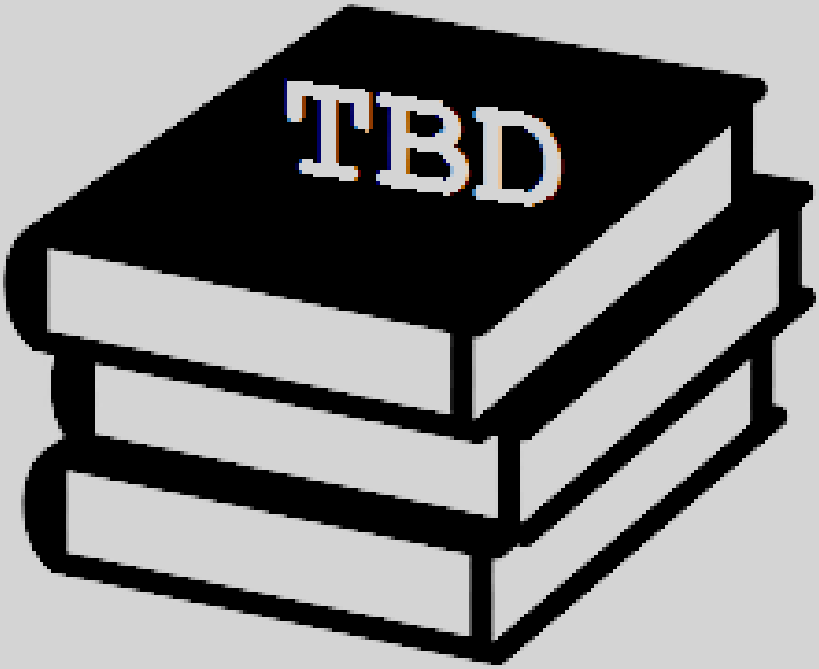

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(LAS CRUCES)

OLIVIA HERNANDEZ,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 2:15-CV-531
	§	
ALLSTATE INSURANCE COMPANY,	§	
	§	
Defendant.	§	

NOTICE OF REMOVAL

Defendant Allstate Insurance Company ("Allstate") files this Notice for Removal under 28 U.S.C. §§ 1332 and 1441, and in support thereof, respectfully shows the following:

I. INTRODUCTION

Defendant Allstate removes this state-law action brought by a former employee, Plaintiff Olivia Hernandez, based on diversity jurisdiction. Allstate and Hernandez are citizens of different states, and Hernandez seeks damages in excess of the $75,000 jurisdictional threshold. Allstate files this Notice of Removal within thirty days of the state court's order dismissing individual defendant Sherri Luikens, a New Mexico resident, as required by 28 U.S.C. § 1446(b)(3) and within one year after the commencement of the action as required by 29 U.S.C. § 1446(c). As explained below, this Court should assume subject matter jurisdiction over Hernandez's lawsuit.

II. FACTUAL BACKGROUND

1. On June 24, 2014, Plaintiff Olivia Hernandez filed a lawsuit against Allstate in the 3rd Judicial District Court, Dona Ana County, New Mexico. Hernandez's Original Complaint was styled *Olivia Hernandez v. Rio Grande Insurance-Allstate Alamogordo, L.L.C.*, D-307-CV-

2014-01419, Third Judicial District Court, Dona Ana County, New Mexico and involved claims of age and disability discrimination and retaliation against her former employer Allstate. Ex. 1, Pl.'s Org. Compl. at § 4. Hernandez never served her Original Complaint upon Allstate. Instead, on June 24, 2014, she filed a First Amended Complaint, styled *Olivia Hernandez v. Allstate Insurance Company, Mike Owens, Joel DeWall, and Sherri Luikens*, D-307-CV-2014-01419, Third Judicial District Court, Dona Ana County, New Mexico. In her Amended Complaint, Hernandez asserted nearly identical claims of age and disability discrimination and retaliation under New Mexico state law. *See* Ex. 2, Pl.'s 1st Am. Compl. at § 7. Hernandez's First Amended Complaint, however, also added potentially viable New Mexico state law claims for age and disability discrimination and retaliation against three individual defendants, Mike Owens, Joel DeWall, and Sherri Luikens.[1] *See id.*

2. Hernandez served a copy of her lawsuit along with a civil summons on Allstate on July 22, 2014. Ex. 3, Allstate State Court Summons. Allstate timely filed its Answer on August 21, 2014. Ex. 4, Allstate Answer. Allstate was not able to immediately remove Hernandez's lawsuit because the presence of the properly joined individual defendants, in particular New Mexico resident Sherri Luikens, who defeated complete diversity of citizenship.

3. Hernandez attempted service on individual defendants Mike Owens and Joel DeWall on October 6, 2014 and October 7, 2014, respectively. However, because Hernandez's attempts at service were insufficient, and Hernandez failed to properly and timely exhaust her administrative remedies, Owens and DeWall filed a Motion to Dismiss under New Mexico Rule of Civil Procedure 1-012(B)(1), (5), and (6). *See* Ex. 5, Owens & DeWall Motion to Dismiss. On April 20, 2015, after considering the parties' briefing and conducting a hearing with all

[1] Under the New Mexico Human Rights Act, individual supervisors and managers can be sued and retained as defendants provided the plaintiff exhausts her administrative remedies with respect to the individual defendants. *See Sonntag v. Shaw*, 22 P.3d 1188, 1193 (N.M. 2001).

counsel present, the court granted the Motion to Dismiss and dismissed individual defendants Mike Owens and Joel DeWall from the lawsuit. Ex. 10, Order Granting Owens & DeWall Motion to Dismiss.

4. Allstate next sought dismissal of individual defendant Sherri Luikens, who, although a New Mexico resident, remained unserved as of April 20, 2015. On May 22, 2015, after unsuccessfully requesting the voluntary dismissal of Luikens, Allstate filed its Motion to Dismiss Unserved Defendant Sherri Luikens, arguing that she should be dismissed due to Hernandez's failure to serve her within the statute of limitations or exercise due diligence in service in the months thereafter and due to Hernandez's apparent failure to properly and timely exhaust her administrative remedies as to Luikens under the New Mexico Human Rights Act. *See* Ex. 12, Luikens Motion to Dismiss. On June 19, 2015, after the completion of the parties' briefing, the court conducted a hearing with counsel present and granted Defendant's Motion to Dismiss Unserved Defendant Sherri Luikens. *See* Ex. 13, Order Granting Luikens Motion to Dismiss. Thus, as of June 19, 2015, the only defendant remaining in the underlying state court lawsuit is Allstate.

III. ARGUMENT & AUTHORITIES

Under 28 U.S.C. § 1441, a defendant may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." In the present case, this Court possesses diversity jurisdiction because "the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs and is between . . . citizens of different states." 28 U.S.C. § 1332. As explained in further detail below, removal is appropriate due to the satisfaction of both diversity jurisdiction requirements.

A. Allstate and Hernandez Are Citizens of Different States.

Section 1332(c)(1) states that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . ." 28 U.S.C. § 1332(c)(1). Under this definition, as Hernandez herself concedes in her First Amended Complaint, Allstate is a citizen of the State of Illinois where it is incorporated and maintains its principal place of business. *See* Ex. 25, Allstate Corporation 10K Excerpts; Ex. 2, Pl.'s 1st Am. Compl. at ¶ 2. Hernandez, on the other hand, is a citizen of the State of New Mexico. *See* Ex. 2, Pl.'s 1st Am. Compl. at ¶ 1. Allstate and Hernandez are therefore citizens of different states, thereby satisfying the first requirement for diversity jurisdiction.

B. Jurisdictional Amount in Controversy Satisfied

The second requirement for diversity jurisdiction—that the amount in controversy exceed $75,000—is also met in this case. *See* 28 U.S.C. § 1332(a). In removal cases based on diversity jurisdiction, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000. *See McPhail v. Deere & Co.*, 529 F.3d 947, 953 & 955 (10th Cir. 2008). A defendant can satisfy this burden through multiple of methods, including, but not limited to, offering evidence or presenting a calculation of damages based on the allegations made by the plaintiff in her complaint. *See id.* at 954 (quoting *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536, 540-43 (7th Cir. 2006)).

In the instant case, Hernandez's claims are brought, under the New Mexico Human Rights Act, which expressly permits a successful plaintiff to recover "actual damages and reasonable attorneys' fees." N.M. STAT. ANN. §28-1-3(D); *see Behrmann v. Phototron Corp.*, 795 P.2d 1015, 1020 (N.M. 1990) (acknowledging that actual damages include prospective damages as well). Although Hernandez's First Amended Complaint does not identify a specific

amount of damages sought, it does detail the multiple types of actual damages sought—lost wages and loss of wage earning capacity (past and future), mental anguish (past and future), and "other" damages. Ex. 2, Pl.'s 1st Am. Compl. at ¶ 16. Hernandez's First Amended Complaint also includes a request for punitive damages, presumptively in relation to her claim for retaliatory discharge. *Id.* at ¶ 17; *see Gandy v. Wal-Mart Stores, Inc.*, 872 P.2d 859, 861 (N.M. 1994) (recognizing separate tort for retaliatory discharge, which allows for the potential recovery of punitive damages). Hernandez further seeks recover of her attorney's fees incurred in prosecuting her lawsuit. *Id.* at ¶ 18. Thus, based on the breadth of damages sought, as well as the further evidence offered below, this Court possesses sufficient evidence to conclude that the amount-in-controversy requirement is met.

As noted, Hernandez requests an award of past and future lost wages as well as past and future earning capacity. Ex. 2, Pl.'s 1st Am. Compl. at ¶ 16. According to her First Amended Complaint, Hernandez was allegedly discriminatorily terminated from employment in October 2013. *Id.* at ¶ 12. It is now June 2015, some twenty months later. Presumptively, a trial will not be held for at least another nine months in light of discovery, potential dispositive motions, and the Court's scheduling. This means the period for which Hernandez can recover past lost wages is, in all likelihood, twenty-nine months (October 2013 to February 2016). As indicated by the evidence attached hereto, Hernandez was paid an approximate annualized gross salary of $83,262, or $6,938.50 per month, towards the end of her employment with Allstate. *See* Ex. 23, Birchfield Decl.; Ex. 24, Hernandez Compensation History. Although Hernandez's salary from a single year exceeds the $75,000 jurisdictional threshold, multiplying Hernandez's monthly amount of $6,938.50 by 29 months brings her past lost wages to $201,216.50, well beyond the $75,000 amount-in-controversy threshold. *Cf. Carillo v. MCS Indus., Inc.*, No. CIV 12-0573

JB/WPL, 2012 WL 5378300, *15 (D. N.M. Oct. 15, 2012) (considering simple calculation of past and future wages when determining if amount-in-controversy satisfied); *Sanders v. Leggett & Platt, Inc.*, No. 3:10-CV-00979-M, 2010 WL 3282978, *2 & n.20 (N.D. Tex. Aug. 17, 2010) (calculating back pay based on time between alleged discriminatory conduct and approximate date of judgment). As is evident, Hernandez's past lost wages alone are sufficient to satisfy the jurisdictional amount.

The addition of Hernandez's estimated future lost wages underscores the fact that the jurisdictional amount is easily established. Although the range of future lost wages can vary based on the particular facts of each case, front pay awards have ranged anywhere from two to four years. *See, e.g., Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1176-1180 (10th Cir. 2003) (affirming two-year award of front pay but remanding to district court for recalculation of the amount); *Smith v. FDC Corp.*, 787 P.2d 433, 440 (N.M. 1990) (finding no error in award of four years of front pay). Using the lower time period of two years and assuming Hernandez's pay rate would have remained the same, Hernandez's future lost wages could amount to as much as $166,524. Adding this future amount to her past lost wages brings the grand total of economic damages sought to $367,740,50. This alone far exceeds the more-than-$75,000 minimum threshold. This calculation also does not take into account the additional damages sought by Hernandez—emotional distress, punitive damages, and attorney's fees—which would undoubtedly raise the amount-in-controversy even higher. Thus, based on the damages sought by Hernandez in her First Amended Complaint and a simple calculation of her past and future lost wages, the amount-in-controversy requirement is more than satisfied.

C. Removal is Procedurally Proper.

Allstate has met all the procedural requirements for removal. Venue is proper in the District of New Mexico (Las Cruces) under 28 U.S.C. §1446(a), as it is the district and division in which the removed action is pending and where a substantial part of the events giving rise to the Hernandez's claims allegedly occurred.

Additionally, removal is timely, as Allstate has filed this Notice of Removal within thirty days of the underlying state court's Order dismissing unserved, New Mexico resident and forum-defendant Sheri Luikens and within one year after the commencement of the action on June 24, 2014. *See* 28 U.S.C.§ 1446(b)(3) *and* 29 U.S.C. § 1446(c); *see Lone Mountain Ranch, LLC v. Santa Fe Gold Corp.*, 988 F. Supp. 2d 1263, 1266 (D.N.M. 2013) ("a non-forum defendant cannot remove a case where there are unserved forum defendants"); *Couch v. Astec Indus., Inc.*, 71 F. Supp. 2d 1145, 1148 (D.N.M. 1999) ("the mere failure to serve a defendant who would defeat diversity jurisdiction does not permit a court to ignore that defendant in determining the propriety of removal").

Pursuant to 28 U.S.C. §1446(a), Allstate attaches to this Notice, and incorporates by reference herein, true and correct copies of Plaintiff's Original Complaint (Ex. 1), Plaintiff's First Amended Complaint (Ex. 2), Plaintiff's summons served upon Allstate (Ex. 3), Allstate's Answer (Ex. 4), Owens & DeWall Motion to Dismiss (Ex. 5), Notice of Completion of Briefing (Ex. 6), Request for Setting (Ex. 7), Plaintiff's Response to Owens & DeWall Motion to Dismiss (Ex. 8), Owens & DeWall Reply in Support of Motion to Dismiss (Ex. 9), Order Granting Owens & DeWall Motion to Dismiss (Ex. 10), Jury Scheduling Order (Ex. 11), Defendant's Motion to Dismiss Unserved Defendant Sherri Luikens (Ex. 12), Notice of Facilitator Sections (Ex. 13), Notice of Completion of Briefing (Ex. 14), Request for Setting (Ex. 15), McElroy Notice of

Non-Availability (Ex. 16), Valdez Notice of Non-Availability (Ex. 17), Plaintiff's Response to Luikens Motion to Dismiss (Ex. 18), Order Assigning Facilitation (Ex. 19), Notice of Setting (Ex. 20), Reply in Support of Luikens Motion to Dismiss (Ex. 21), Order Granting Luikens Motion to Dismiss (Ex. 22), which constitute all process, pleadings, and filings in the state court action. Also attached are the Declaration of Laura Birchfiled (Ex. 23), Hernandez's Compensation History (Ex. 24), and Allstate Corporation 10k Excerpts (Ex. 25). A true and correct copy of the State Court Docket Sheet (Ex. 26) is also attached. Pursuant to 28 U.S.C. §1446(d), promptly after filing this Notice, Allstate will serve Hernandez with written notice of the filing of this Notice for Removal. Allstate in addition will file a true and correct copy of this Notice with the District Clerk for Dona Ana County, New Mexico in compliance with 28 U.S.C. §1446(d) (Ex. 27).

IV. CONCLUSION & PRAYER

Having established both requirements for diversity jurisdiction, Defendant Allstate Insurance Company requests this action be removed from the 3rd Judicial District Court, Dona Ana County, New Mexico to the United States District Court for the District of New Mexico.

Respectfully submitted,

/s/ Clara B. Burns

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CERTIFICATE OF SERVICE

I hereby certify the foregoing document was served *via the Court's e-filing system and via certified mail, return receipt requested* on the following counsel of record:

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on the 23rd day of June, 2015.

/s/ Jose A. Howard-Gonzalez
Jose A. Howard-Gonzalez

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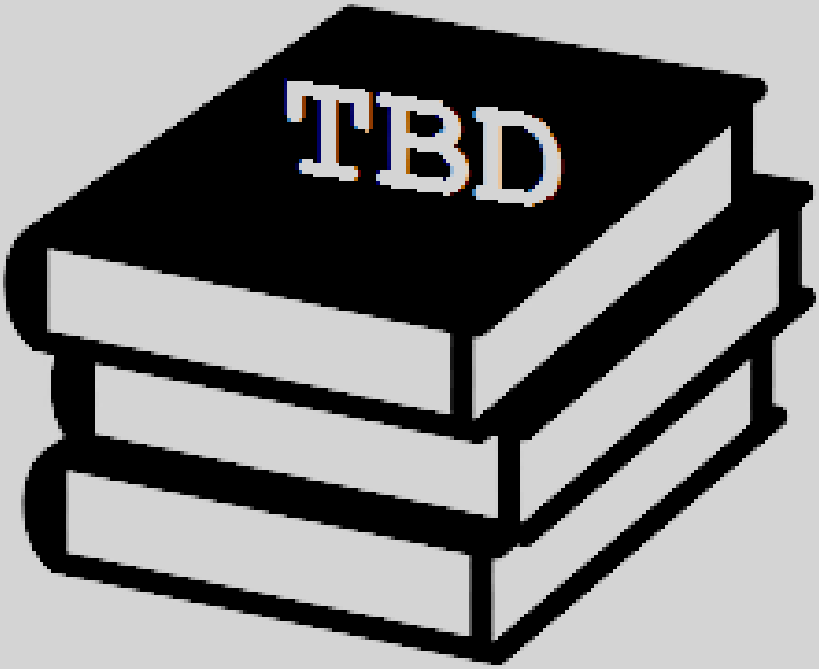

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