

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

MICHAEL NOCELLA and THE
NOCELLA AGENCY,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY

Defendant.

Civil Action No. _____

NOTICE OF REMOVAL

[On Removal from Supreme Court of the State
of New York, County of Suffolk]

Document Electronically Filed

TO: THE CLERK AND THE HONORABLE JUDGES OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§1332, 1441 and 1446, defendant Allstate Insurance Company (“Allstate”), by and through its undersigned attorneys, Saiber LLC, hereby files this Notice of Removal of the above-captioned civil action commenced against it from the Supreme Court of the State of New York, County of Suffolk, to the United States District Court for the Eastern District of New York, together with all process, pleadings and orders, as required by 28 U.S.C. §1446(d), copies of which are annexed hereto and made a part hereof. This Notice of Removal respectfully states the following as the basis for removal to this Court:

I. The State Court Action

1. By a Summons and Verified Complaint for Declaratory Judgment and Equitable Relief (“Complaint”) dated March 9, 2018, and electronically filed via the New York State Courts Electronic Filing system (“NYSCEF”) on March 10, 2018, plaintiffs Michael Nocella and The Nocella Agency (collectively “Plaintiffs”) commenced a civil action against Allstate in the Supreme Court of the State of New York, Suffolk County (the “State Court Action”). A copy of

Plaintiffs' Summons and Complaint, along with a Request for Judicial Intervention ("RJI") and Commercial Division RJI Addendum, are attached as Exhibit A.

2. Plaintiffs' Complaint in the State Court Action contains eleven causes of action against Allstate, including seven declaratory judgment causes of action and claims for alleged negligence, breach of contract, violation of New York Insurance Law, and breach of the implied contract of good faith and fair dealing. All of Plaintiffs' claims arise out of Allstate's termination of an Exclusive Agency Agreement with Plaintiff Michael Nocella.

3. Plaintiffs have not effected formal service of the Summons and Complaint, in accordance with the New York Civil Practice Law and Rules ("CPLR"), upon Allstate. The undersigned counsel for Allstate obtained a copy of Plaintiffs' Summons and Complaint by accessing the NYSCEF system on March 14, 2018. Plaintiffs have not filed an Affidavit of Service of the Summons and Complaint upon Allstate.

4. Also on March 14, 2018, and via NYSCEF, Plaintiffs electronically filed an Order to Show Cause Request for a Temporary Restraining Order seeking temporary and preliminary injunctive relief enjoining Allstate from, *inter alia*, terminating its Exclusive Agency Agreement with Plaintiffs. A copy of Plaintiffs' Order to Show cause and supporting papers filed on March 14, 2018, along with a supporting Supplemental Affidavit and Supplemental Affirmation that Plaintiffs filed on March 15, 2018 (the "OTSC and TRO Application"), are attached as Exhibit B.

5. On March 14, 2018, Allstate filed an Affidavit in opposition to the OTSC and TRO Application that Allstate understood Plaintiffs intended to file in the State Court Action. At the time Allstate's affiant swore and subscribed to the Affidavit, neither Allstate nor its undersigned counsel had received a copy of Plaintiffs' OTSC and TRO Application. A copy of the Allstate Affidavit is attached as Exhibit C.

6. On March 15, 2018, Suffolk County Supreme Court Justice Jerry Garguilo entered the Order to Show Cause Request for a Temporary Restraining Order (the “TRO”) which, *inter alia*, contains certain mandatory injunctive relief and scheduled a hearing on Plaintiffs’ application for a preliminary injunction. A copy of the TRO is attached as Exhibit D.

7. On March 19, 2018 – following a pre-motion telephone conference that had been conducted by Justice Garguilo and the parties’ counsel on March 16 – Allstate filed a Motion to Modify the TRO pursuant to CPLR 6314. A copy of Allstate’s Motion to Modify the TRO and supporting papers is attached as Exhibit E.

8. On March 27, 2018, Plaintiffs filed papers in opposition to Allstate’s Motion to Modify the TRO. A copy of Plaintiffs’ opposition papers are attached as Exhibit F.¹

9. On March 28, Allstate filed a reply letter in response to Plaintiffs’ opposition to Allstate’s Motion to Modify the TRO. A copy of Allstate’s reply letter is attached as Exhibit G.

10. On March 29, 2018, Suffolk County Supreme Court Justice Jerry Garguilo entered an order granting Allstate’s Motion to Modify the TRO. A copy of the Order Modifying the Temporary Restraining Order is attached as Exhibit H.

11. By filing this Notice of Removal, Allstate does not waive any defects in or failure to effect service of process of the Complaint and/or the OTSC and TRO Application in this matter, and Allstate does not waive any defenses that may be available to it and reserves all such defenses. Nonetheless, Plaintiffs’ claims, as pleaded in the Complaint at the time of removal, “whether well or ill founded in fact, fixes the right of the defendant to remove.” St. Paul Mercury Indem. Co. v. Red Cab Co., 202 U.S. 283, 294 (1938).

¹ On March 28, 2018, Plaintiffs filed an “updated” Memorandum of Law and an “updated” Exhibit A (the Affidavit in Opposition of Michael Nocella). Accordingly, Exhibit F to this Notice of Removal includes only the “updated” versions of those documents.

II. Timeliness of Notice of Removal and Pleadings and Notice to the State Court

12. Allstate received a copy of the Summons and Complaint in the State Court Action, through its undersigned counsel, on March 14, 2018. Accordingly, this Notice of Removal is timely filed within thirty (30) days of the date Allstate first received a copy of the Summons and Complaint, pursuant to 28 U.S.C. §§1446(a), 1446(b)(1) and §1446(c) (based on diversity of citizenship jurisdiction), and pursuant to Fed. R. Civ. P. 6(a).²

13. Pursuant to 28 U.S.C. §1446(a), “a copy of all process, pleadings and orders served upon” Allstate in the State Court Action are required to be included with the Notice of Removal. Plaintiffs, however, have not effectuated formal service of the Summons, Verified Complaint or any other “process, pleadings and orders” upon Allstate in the State Court Action. Accordingly, copies of all of the “process, pleadings and orders” that were filed in the State Court Action are attached as Exhibits A to H.

14. Pursuant to 28 U.S.C. §§112(c), 1441(a), and 1446(a), this Notice of Removal is being filed in the United States District Court for the Eastern District of New York, because it is the “district and division embracing the place where such action is pending,” specifically, the County of Suffolk.

15. Pursuant to 28 U.S.C. §1446(d) a Notice of Filing of this Notice of Removal is being filed with the Clerk of the Supreme Court of the State of New York, County of Suffolk, and a copy served upon counsel for Plaintiffs, Anthony P. DellUniversita, Esq, and a copy delivered to the Honorable Jerry Garguilo, J.S.C., to whom the State Court Action is assigned. A

² Pursuant to the United States Supreme Court’s decision in Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526, U.S. 344 (1999), “if the complaint is filed in court prior to any service, the removal period runs from the service of the summons.” Id. at 354. This is because service of the summons is when the defendant becomes “subject to any court's authority.” Id. at 356. Here, Plaintiffs filed the Complaint prior to any service in the case. Because the Summons and Complaint have not yet been formally served upon Allstate, the 30 days for Allstate to remove has not yet begun to run. Nevertheless, Allstate’s removal of this action is within 30 days of its receipt of a copy of the Complaint, through its undersigned counsel.

copy of the Notice of Notice of Removal to be filed in the State Court Action (without exhibits) is attached as Exhibit I.

**III. Statement of Basis for Federal Court Jurisdiction:
Diversity Jurisdiction, 28 U.S.C. §1332 and Local Civil Rule 81.1**

16. This action is within the original jurisdiction of the United States District Court pursuant to 28 U.S.C. §1332, which provides, in pertinent part, that “[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between...citizens of different States.” 28 U.S.C. §1332(a)(1). This action satisfies both requirements.

17. For purposes of diversity jurisdiction, 28 U.S.C. §1332(c) provides that a corporation is a “citizen of every State...by which it has been incorporated and of the State...where it has its principal place of business.” Local Civil Rule 81.1 provides: “[i]f the Court’s jurisdiction is based upon diversity of citizenship...the notice of removal shall set forth (1) in the case of each individual named as a party, that party’s residence and domicile and any state or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. §1332;...(3) in the case of each party that is a corporation, its state or other jurisdiction of incorporation, principal place of business, and any state or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. §1332....”³

³ For the citizenship of a corporation for purposes of diversity jurisdiction, the United States Supreme Court has held that “‘principal place of business’ is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities....And, in practice it should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, i.e., the ‘nerve center’....” Hertz Corp. v. Friend, 559 U.S. 77, 92-93 (2010); see Hershfeld v. JM Woodworth Risk Retention Group, Inc., No. 16-cv-6369 (BMC), 2017 WL 1628886, at *3 (E.D.N.Y. May 1, 2017) (holding that defendant insurance company was a citizen of two states – the state of incorporation and the state of its “nerve center” – and citing Hertz Corp., 559 U.S. at 92-93.); see also Kramer v. Allstate Insurance Company, No. 11-cv-07079 (GAF)(FFM), 2011 WL 13221012, at *3 (C.D.Cal. Oct. 20, 2011) (“[I]n line with other courts...that have determined this very issue, the Court finds that Allstate’s principal place of business is Illinois,

A. Each Plaintiff is a Citizen of New York

18. The Complaint alleges that “Plaintiff, Michael Nocella, is “an individual residing in the State of New York, County of Suffolk, town of Sayville, with an address of 9 Gibbons Court, Sayville, New York 11782.” See Exhibit A [Complaint], ¶5. Upon information and belief, Plaintiff Michael Nocella was at the time the State Court Action was filed and is now a resident in, domiciled in, and a citizen of, New York.

19. The Complaint alleges that “Plaintiff, The Nocella Agency, is a corporation, duly licensed to do business in the State of New York, with a principal place of business located at 4250 Veterans Memorial Highway, Holbrook, New York 11741.” See Exhibit A [Complaint], ¶6. Upon information and belief, Plaintiff The Nocella Agency was at the time the State Court Action was filed and is now incorporated in New York with its principal place of business in New York, and a citizen of New York.

B. Allstate is a Citizen of Illinois

20. Plaintiffs’ Complaint further asserts that Allstate “is a corporation, incorporated under the laws of the State of Illinois, with a home office address of 2775 Sanders Road, A2E Northbrook, Illinois 60062.” See Exhibit A [Complaint], ¶7. Allstate was at the time the State Court Action was filed and is now incorporated under the laws of Illinois with its principal place of business in Illinois, and a citizen of Illinois, and not a citizen of New York.

21. Accordingly, there is complete diversity between Plaintiffs and Defendant in this action. Both Plaintiffs are citizens of New York and Allstate is a citizen of Illinois. Thus, Plaintiffs and Allstate are citizens of different States for purposes of the diversity of citizen requirement of 28 U.S.C. §1332(a)(1) and Local Civil Rule 81.1.

and therefore that for purposes of this court’s diversity jurisdiction, Allstate is a citizen solely of Illinois.”) (citation omitted).

IV. The Amount in Controversy Exceeds \$75,000, Exclusive of Interest and Costs

22. The requirement that “the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs,” 28 U.S.C. §1332(a), is satisfied here.

23. Plaintiffs’ Complaint does not specify the amount of damages Plaintiffs seek in this matter. “[T]he notice of removal may assert the amount in controversy if the initial pleading seeks a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded.” 28 U.S.C. §1446(c)(2)(A)(ii). New York practice does not require that a complaint include a demand for a specific amount of damages to which the pleader deems it is entitled. See CPLR §3017(a). “With respect to the jurisdictional amount element of diversity jurisdiction, the removing party must prove that it appears to ‘a reasonable probability’ that the claim is in excess of \$75,000.” Dischiavi v. St. Jude Medical, No. 17-cv-4955 (DLI)(RLM), 2017 WL 3700897, at *2 (E.D.N.Y. Aug. 24, 2017) (internal quotation and citations omitted).

24. Plaintiffs’ Complaint asserts, *inter alia*, a claim for declaratory judgment that the Termination Payment or TPP amount to which Plaintiffs may be entitled to receive from Allstate equals “\$771,491.40 or more”, and not the amount of \$98,325.60 that Plaintiffs allege Allstate has calculated to be the Termination Payment or TPP amount. See Exhibit A [Complaint], ¶¶53-54, ¶¶88-93. Plaintiffs also claim that they “stand[] to lose millions of dollars of commissions that renew and be [*sic*] paid residually for nearly twenty years”, and allege that “Allstate’s intention to no longer compensate [Plaintiff Michael] Nocella for his commission is a direct violation of” New York Insurance Law §3425. See Exhibit A [Complaint], ¶58 and ¶¶118-119. On Plaintiffs’ eleven (11) causes of action for declaratory and other legal and equitable relief, in addition to the foregoing monetary damages, Plaintiffs also claim entitlement to “recovery of plaintiffs’ attorney fees and costs” and “such additional and further relief, in law and equity, as

the Court may deem just and proper.” See Exhibit A [Complaint], Plaintiffs’ “Wherefore” clause ¶¶12-13. Here, the Complaint indicates that there is a reasonable probability that Plaintiffs’ claimed damages are in excess of \$75,000, thereby satisfying the amount in controversy requirement of 29 U.S.C. §1332(a).

V. Conclusion

25. Because this matter is between citizens of different States and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs, diversity jurisdiction exists under 28 U.S.C. §1332(a) and Local Civil Rule 81.1

WHEREFORE, defendant Allstate Insurance Company prays that this action proceed in its entirety in the United States District Court for the Eastern District of New York as an action properly removed thereto from the Supreme Court of the State of New York, County of Suffolk.

Respectfully submitted,

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