

[DO NOT PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 23-13423

Non-Argument Calendar

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MAUREEN HERBST,

Plaintiff-Appellant,

*versus*

AMERICAN ORTHODONTICS CORPORATION,  
WILL BENTSON,  
an individual,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Florida

D.C. Docket No. 0:23-cv-61262-DMM

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Before WILSON, BRASHER, and ABUDU, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Maureen Herbst appeals the district court's orders denying remand to the State court and granting the dismissal of her complaint against Defendants-Appellees American Orthodontics Corporation and Will Bentson. Herbst is a saleswoman for American Orthodontics. She alleges that she was subjected to retaliatory action, including bullying, harassment, and discrimination when she raised concerns about losing a portion of her sales territory.

Herbst filed a complaint in State court on May 17, 2023, bringing numerous counts of employment discrimination, whistleblower, defamation, and tort claims against American Orthodontics under Florida state law.<sup>1</sup> The complaint also asserted claims against Bentson as a non-diverse individual defendant. On July 28, 2023, American Orthodontics filed an amended notice of removal under 28 U.S.C. § 1332 and attached two declarations alleging that Herbst's claims against Bentson were fraudulent. Herbst then filed several documents seeking remand based on a lack of complete diversity because both she and Bentson are domiciled in Florida,

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<sup>1</sup> Herbst initially filed a complaint in the Southern District of New York on November 9, 2022, but later filed a voluntary dismissal without prejudice with the intent of pursuing the case in State court.

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which the district court denied. On October 10, 2023, the district court issued an order striking Herbst's complaint as a shotgun pleading. Herbst now challenges the denial of the motion to remand and the dismissal of her complaint.

After careful review of the briefs and record, we **AFFIRM** the district court. We discuss the two issues raised on appeal in turn.

### I. Motion for Remand

"We review a district court's denial of a motion to remand *de novo*." *City of Vestavia Hills v. Gen. Fid. Ins. Co.*, 676 F.3d 1310, 1313 (11th Cir. 2012). Herbst argues that this case should not have been removed for lack of diversity jurisdiction. Herbst named Bentson as a defendant because she alleges that her role at American Orthodontics was reassigned to him, resulting in a reduction of her sales territory. According to Herbst, because Bentson is a Florida resident, the case is jurisdictionally barred from federal court as it lacks complete diversity pursuant to 28 U.S.C. § 1332. American Orthodontics responds by claiming that Herbst fraudulently joined Bentson because he is not a viable defendant in this case.

Under 28 U.S.C § 1447(e), if a plaintiff "seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." Our circuit has held that in removal cases "alleging fraudulent joinder, the removing party has the burden of proving that either: (1) there is no possibility the plaintiff can establish a cause of action against the resident

defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.” *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997). Further, in considering a remand, the district court “must evaluate the factual allegations in the light most favorable to the plaintiff and must resolve any uncertainties about state substantive law in favor of the plaintiff.” *Id.*

Here, the district court properly found fraudulent joinder based upon the first situation under *Crowe*. The district court grounded its decision in Florida’s pleading requirements, *see* Fla. R. Civ. P. 1.110(b), and Florida substantive law, *see* Dist. Ct. Order at 11–18. The district court walked through each of Herbst’s claims, describing how Herbst failed to meet required elements to satisfy each claim under Florida law, before ultimately finding that Herbst could not state a claim for relief against Bentson—the resident defendant. Because joinder is only proper where there is a “possibility that a state court would find” a cause of action against a defendant, joinder in this case is simply improper. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998) (quotation marks omitted). The district court concluded that Bentson was named by Herbst for the sole purpose of keeping the case out of federal court,<sup>2</sup> and denied the remand. On appeal, Defendants-Appellants argue that the district court correctly applied law concerning

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<sup>2</sup> “When a plaintiff names a non-diverse defendant solely in order to defeat federal diversity jurisdiction, the district court must ignore the presence of the non-diverse defendant and deny any motion to remand the matter back to state court.” *Henderson v. Wash. Nat’l Ins. Co.*, 454 F.3d 1278, 1281 (11th Cir. 2006).

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fraudulent joinder. A review of the record and precedent support affirming the district court in its finding that Benston was not properly joined, as Herbst did not state any viable claims of relief against him.

## II. Motion to Dismiss

We next consider the district court order striking Herbst's complaint as a shotgun pleading,<sup>3</sup> which we review for an abuse of discretion. *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015). In reviewing the district court order, we find that it did not abuse its discretion in categorizing Herbst's complaint as a shotgun pleading.<sup>4</sup> The district court described the complaint as "excessive in length, long on conclusions, [and] short on facts." Further, the district court found that every count referenced

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<sup>3</sup> Our circuit had identified four types of shotgun pleadings: (1) a pleading that contains "multiple counts where each count adopts the allegations of all preceding counts"; (2) a pleading that is "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action"; (3) a pleading that does not separate the counts by cause of action or claim for relief; and (4) a pleading that does not specify which defendant is responsible "for which acts or omissions, or which of the defendants the claim is brought against." *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1321–23 (11th Cir. 2015).

<sup>4</sup> In ruling that the complaint was a shotgun pleading, the district court provided Herbst ten days to file an amended complaint—Herbst failed to do so. *See Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1296 (11th Cir. 2018) ("When a litigant files a shotgun pleading, is represented by counsel, and fails to request leave to amend, a district court must sua sponte give him one chance to replead before dismissing his case with prejudice on non-merits shotgun pleading grounds.").

prior counts and provided no specification as to which claims were attributed to which defendants. Herbst’s complaint is, as the district court described, a “quintessential shotgun pleading.”

III.

For these reasons, we affirm the district court’s well-reasoned orders.

**AFFIRMED.**