APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

STATUTORY PROVISIONS

OPINION, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (NOVEMBER 22, 2024)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EXCLUSIVE GROUP HOLDINGS, INC.,

Plaintiff-Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, BBCG CLAIMS SERVICES, AIG CLAIMS, INC., AMERICAN INTERNATIONAL GROUP, INC., J.S. HELD, LLC, ET AL.,

Defendants-Appellees.

No. 24-10593

Non-Argument Calendar

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:22-cv-00474-JES-NPM

Before: ROSENBAUM, JILL PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

Appellant Exclusive Group Holdings, Inc., filed a lawsuit in state court against National Union Fire Insurance Company of Pittsburgh ("NUFIC"). NUFIC removed the lawsuit to federal court, but it was later remanded to state court. After remand, Exclusive Group filed a motion seeking attorney's fees. The district court denied the motion. On appeal, Exclusive Group challenges the order denying its motion for fees. Because the district court did not abuse its discretion in denying the request for fees, we affirm.

I.

This case arises from an insurance dispute. Exclusive Group, a wholesaler of international telecommunications, purchased long-distance minutes from telecommunications suppliers and then resold them to its customers. Because customers would use the long-distance minutes before paying Exclusive Group, it purchased trade credit insurance policies from NUFIC, which required NUFIC to indemnify Exclusive Group if a customer failed to pay. When several customers failed to pay their bills, Exclusive Group submitted claims to NUFIC, seeking close to $5,000,000. NUFIC denied the claims.

Exclusive Group filed suit in Florida state court against NUFIC for breach of contract. It also named as defendants several "Doe Corporations" and sought a declaration that these companies had tortiously interfered with its ability to obtain payment under the insurance policy. It alleged that NUFIC and the Doe Corporations engaged in a pattern of activity to delay the processing of Exclusive Group's claims and ultimately to deny them. According to the complaint, the

Doe Corporations were "believed to be related insurance or insurance service companies" who assisted in processing Exclusive Group's claims. Doc. 1-1 at 4.[1] The complaint noted that American International Group, Inc. ("AIG") and several related entities—AIG Specialty Insurance Company; AIG Property Casualty U.S., Inc.; AIG Property Casualty, Inc.; AIG Claims, Inc.; AIG Global Claims Services, Inc.; and AIG PC Global Services, Inc.—were involved in processing the claims. But the initial complaint did not name AIG or any of these related entities as defendants. Instead, Exclusive Group alleged that it could not ascertain the "identity and location of" the Doe Corporations "despite the exercise of due diligence." *Id.*

The complaint included allegations about the citizenship of Exclusive Group and NUFIC. It alleged that Exclusive Group was incorporated and had its principal place of business in Florida, and that NUFIC was incorporated in Pennsylvania and had its principal place of business in New York. The complaint also included allegations about the citizenship of AIG and its related entities, even though none was named as a defendant. According to the complaint, none of those entities was a citizen of Florida.

NUFIC removed the action to federal court based on diversity jurisdiction. *See* 28 U.S.C. § 1332(a). It asserted that there was complete diversity of citizenship because Exclusive Group was a citizen of Florida and NUFIC was a citizen of Pennsylvania and New York. NUFIC pointed out that for purposes of diversity jurisdiction, the citizenship of the Doe Corporations would be disregarded. *See id.* § 1441(b)(1) But

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[1] "Doc." numbers refer to the district court's docket entries.

even considering the fictitious defendants, NUFIC argued, complete diversity still existed because "upon information and belief, no entity matching Plaintiff's description of the . . . Doe defendants . . . is a citizen of the state of Florida." Doc. 1 at 4 n.1. NUFIC also asserted that the amount-in-controversy requirement was satisfied because Exclusive Group sought more than $75,000 in damages. After removing the case, NUFIC filed an answer.

In federal court, Exclusive Group filed an amended complaint, which dropped the Doe Corporations as defendants. It added as defendants two entities mentioned in the original complaint—AIG and AIG Claims. Exclusive Group also added another defendant, BBCG Claims Services, which allegedly had been hired to investigate Exclusive Group's insurance claims. It brought tortious interference and negligence claims against AIG, AIG Claims, and BBCG. Because none of the new defendants was a citizen of Florida, adding them as defendants did not destroy diversity jurisdiction. Exclusive Group later filed a second amended complaint, adding claims against AIG, AIG Claims, and BBCG for aiding and abetting tortious interference.

Through discovery, Exclusive Group learned that J.S. Held, LLC, was an adjuster that had investigated its insurance claims on NUFIC's behalf. Exclusive Group sought leave to file a third amended complaint to add J.S. Held as a defendant and to bring claims against it for tortious interference, negligence, and aiding and abetting tortious interference. In the proposed third amended complaint, Exclusive Group alleged that J.S. Held was a Delaware corporation with its principal place of business in New York.

The magistrate judge quickly identified a problem with the proposed third amended complaint. Because J.S. Held was a limited liability company, it was not a citizen of the states where it was incorporated and had its principal place of business. Instead, its citizenship "was determined based on the citizenship of its members." Doc. 91 at 1 (internal quotation marks omitted). But the proposed amended complaint "never mention[ed] JS Held's members, much less their citizenship." *Id.* at 2. If Exclusive Group wished to proceed with J.S. Held as a party, the magistrate judge directed, it would need to file a new pleading that included allegations about the citizenship of J.S. Held's members. And if any of the members was a limited liability corporation or partnership, Exclusive Group would need to "allege the citizenship of each of those members or partners" and "continue[] through however many layers of members or partners there may be." *Id.* at 2 n.1.

Exclusive Group then filed another motion to file a third amended complaint seeking to add J.S. Held as a defendant, and this time it included allegations about the citizenship of J.S. Held's members. Exclusive Group alleged that J.S. Held had two members, each of which was a limited liability company. Those limited liability companies, in turn, had members that were limited liability companies. And one or more of those limited liability companies had a member who was an individual and a citizen of Florida. As a result, Exclusive Group alleged that J.S. Held was a citizen of Florida. Because adding J.S. Held as a party would destroy complete diversity, Exclusive Group asked the district court to remand the case to Florida state court.

The district court allowed Exclusive Group to amend its complaint and add J.S. Held as a defendant. Because adding J.S. Held destroyed complete diversity, the district court remanded the case to state court.

After the case was remanded, Exclusive Group filed a motion in the district court seeking to recover attorney's fees it incurred while litigating in federal court. It made this request under 28 U.S.C. § 1447(c), which permits a district court to award attorney's fees when a case is remanded. Exclusive Group argued that an award was appropriate because "NUFIC removed the case to federal court in bad faith." Doc. 111 at 5. According to Exclusive Group, NUFIC knew about J.S. Held's role in adjusting the claims but had tried to "conceal" its involvement. *Id.* at 11. Given J.S. Held's role as adjuster and the allegations against the Doe Corporations in the original complaint, Exclusive Group asserted that "NUFIC should have never removed the case in the first instance." *Id.* at 4–5. It argued that a fee award was appropriate to "discourage the type of waste and expense caused by NUFIC's removal petition." *Id.* at 11.

The district court denied the motion. Although § 1447(c) authorized a district court to award fees after remanding a case, the court explained that "[a]bsent unusual circumstances," fees should be awarded "only where the removing party lacked an objectively reasonable basis for seeking removal." Doc. 115 at 2 (internal quotation marks omitted). The court concluded that NUFIC had an objectively reasonable basis for removal. Although J.S. Held later was added as a party and its addition destroyed diversity jurisdiction, the court explained that "[i]t was not until the Magistrate Judge questioned counsel about J.S. Held's citizenship" that

the parties conducted a further inquiry and learned that J.S. Held was a citizen of Florida. *Id.* at 3.

This is Exclusive Group's appeal.

II.

We review for abuse of discretion a district court order declining to award attorney's fees after remanding a case to state court. *See MSP Recovery Claims, Series LLC v. Hanover Ins. Co.*, 995 F.3d 1289, 1296 (11th Cir. 2021). "Discretion means the district court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Betty K Agencies, LTD v. M/V Monada*, 432 F.3d 1333, 1337 (11th Cir. 2005) (internal quotation marks omitted).

III.

When a case is remanded to state court, a statute permits a district court to award attorney's fees. *See* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). Under this statute, a district court may, but is not required to, award attorney's fees. *See Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 134 (2005).

On its face, § 1447(c) provides "little guidance on when such fees are warranted." *Id.* But this "does not mean that no legal standard governs" a district court's exercise of its discretion. *Id.* at 139. After all, "[d]iscretion is not whim." *Id.* Looking to "the large objectives" of the removal statute, the Supreme Court has announced that "[t]he appropriate test

for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Id.* at 139–40.

After discussing these concerns, the Court announced that "[a]bsent unusual circumstances," a district court "may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Id.* at 141. "Conversely, when an objectively reasonable basis [for removal] exists, fees should be denied." *Id.* In addition, the Supreme Court recognized that "district courts retain[ed] discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." *Id.* The Court gave a few examples of when unusual circumstances would be present: when the plaintiff "delay[ed] in seeking remand" or "fail[ed] to disclose facts necessary to determine jurisdiction." *Id.* Even when a district court considers unusual circumstances, "its reasons for departing from the general rule should be faithful to the purposes of awarding fees under § 1447(c)." *Id.* (internal quotation marks omitted).

Here, we cannot say that the district court abused its discretion when it denied Exclusive Group's motion for fees. As an initial matter, we agree with the district court that, at the time of removal, NUFIC had an objectively reasonable basis for seeking removal. At that point, there was complete diversity because the parties to the action were Exclusive Group, which was a citizen of Florida, and NUFIC, which was a citizen of

Pennsylvania and New York. *See* 28 U.S.C. § 1441(b) (explaining that in determining whether a civil action is removable based on diversity jurisdiction, "the citizenship of defendants sued under fictitious names shall be disregarded").

Exclusive Group nevertheless argues that unusual circumstances warranted an award of fees because, given the allegations against the Doe Corporations in the original complaint as well as NUFIC's knowledge about J.S. Held's role in reviewing Exclusive Group's claims, at the time of removal NUFIC would have known that J.S. Held would be added as a party. But even if NUFIC knew from the allegations against the Doe Corporations in the original complaint that Exclusive Group intended to name J.S. Held as a defendant, there is nothing in the record suggesting that at that point in time NUFIC knew or should have known that J.S. Held was a citizen of Florida. Indeed, to uncover this information, Exclusive Group would have had to know that one of J.S. Held's members was a limited liability corporation with a member that was itself a limited liability corporation with a member who was a Florida citizen. Given the absence of any evidence that NUFIC knew or should have known that adding J.S. Held would destroy diversity jurisdiction, we cannot say that the district court abused its discretion in refusing to award fees.[2]

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[2] Exclusive Group nevertheless argues that we should vacate the district court's order denying fees because it failed to "analyze whether this case creates unusual circumstances where fees are warranted." Appellant's Br. 16 (internal quotation marks omitted). It is true that to allow for meaningful appellate review a district court must adequately explain the basis for a decision not to exercise its discretion. *See In re Trinity Indus., Inc.*, 876 F.2d 1485,

IV.

For the reasons set forth above, we affirm the district court.[3]

AFFIRMED.

1496 (11th Cir. 1989) (remanding case for district court to explain the basis for its denial of a party's request for attorney's fees). But the district court adequately explained its decision here. Exclusive Group argued to the district court that unusual circumstances were present because at the time of removal, NUFIC was aware of and concealed J.S. Held's role in adjusting Exclusive Group's insurance claims. The district court considered and rejected this argument when it pointed to the absence of evidence showing that NUFIC knew at the time of removal that J.S. Held was a citizen of Florida.

[3] NUFIC moved for sanctions pursuant to Federal Rule of Appellate Procedure 38, alleging that Exclusive Group's appeal is frivolous. "Rule 38 sanctions are appropriately imposed against appellants who raise clearly frivolous claims in the face of established law and clear facts." *Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1371 (11th Cir. 2016) (internal quotation marks omitted). We cannot say that Exclusive Group's appeal was so utterly devoid of merit as to be frivolous. Accordingly, we DENY this motion.

**ORDER DENYING ATTORNEYS' FEES,
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
(JANUARY 30, 2024)**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

EXCLUSIVE GROUP HOLDINGS, INC.,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA, BBCG CLAIMS SERVICES, AIG CLAIMS, INC., AMERICAN INTERNATIONAL GROUP, INC., and J.S. HELD, LLC,

Defendants.

Case No: 2:22-cv-474-JES-NPM

Before: John E. STEELE,
Senior United States District Judge.

ORDER

This matter comes before the Court on plaintiff's *Opposed* Motion for Entitlement to Costs and Attorneys' Fees (Doc. #111) filed on December 22, 2023. Defendant National Union Fire Insurance Company of Pittsburgh,

PA (NUFIC) filed a Response (doc. #114) on January 19, 2024.

Plaintiff seeks entitlement to fees and costs pursuant to 28 U.S.C. § 1447(c) arguing that NUFIC removed the case in bad faith and improper removal cost plaintiff substantial litigation costs and expenses. "There is no presumption in favor of awarding attorney's fees and costs under Section 1447(c)." *MSP Recovery Claims, Series LLC v. Hanover Ins. Co.*, 995 F.3d 1289, 1296 (11th Cir. 2021) (citations omitted).

Under Section 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 140 (2005). "'Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.'" *Bauknight v. Monroe Cnty.*, Fla., 446 F.3d 1327, 1329 (11th Cir. 2006) (quoting *Martin* at 141). The standard turns "on the reasonableness of the removal." *Martin* at 141.

On December 12, 2023, the Court issued an Opinion and Order (Doc. #110) granting in part plaintiff's motion to amend and allow the Third Amended Complaint, without Count IX, to be deemed

the operative pleading. As such, the case was remanded as the Court was divested of diversity jurisdiction. The Court twice noted that the case was originally "properly removed" based on diversity jurisdiction. (Doc. #110, pp. 1, 17.) "This Complaint was removed to federal court on August 5, 2022. Exclusive learned of J.S. Held and its role through post-removal discovery in federal court. Exclusive first learned of J.S. Held's existence on or about October 27, 2022, and did not meaningfully know its specific involvement until subpoenaed documents were produced on January 30, 2023." (*Id*. at 21.) It was not until the Magistrate Judge questioned counsel about J.S. Held's citizenship that the parties realized it was an issue. (*Id*.) "Both sides essentially argue that they have a "right" to proceed in the forum of their choice, with Plaintiff choosing the state forum and Defendants choosing the federal forum. Neither is wrong." (*Id*. at 34.)

The Court finds that an objectively reasonable basis for removal existed at the time, and that fees should be denied. Accordingly, it is hereby

ORDERED:

Plaintiff's Opposed Motion for Entitlement to Costs and Attorneys' Fees (Doc. #111) is DENIED.

DONE and ORDERED at Fort Myers, Florida, this 30th day of January 2024.

/s/ John E. Steele
Senior U.S. District Judge

Copies:
Counsel of Record

**OPINION AND ORDER,
U.S. DISTRICT COURT MIDDLE DISTRICT OF FLORIDA FORT MYERS DIVISION
(DECEMBER 12, 2023)**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

EXCLUSIVE GROUP HOLDINGS, INC.,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA, BBCG CLAIMS SERVICES, AIG CLAIMS, INC., and AMERICAN INTERNATIONAL GROUP, INC.,

Defendants.

Case No: 2:22-cv-474-JES-NPM

Before: John E. STEELE,
Senior United States District Judge.

OPINION AND ORDER

This matter comes before the Court on Defendants' Objections to Magistrate Judge's Order Dated July 31, 2023. (Doc. #108). Plaintiff filed an Opposition. (Doc. #109). For the reasons set forth below, the objections are sustained in part and overruled in part. After *de*

novo review, the underlying Motion for leave to file a Third Amended Complaint (Doc. #92) is granted in part, a modified Third Amended Complaint is allowed, and the case is remanded to state court for further proceedings.

I.

This case was originally filed in state court and was properly removed to federal court. After removal, plaintiff was permitted, without objection, to file a Second Amended Complaint (SAC) (Doc. #79) setting forth ten state-law claims. (Doc. #77.) In the SAC, plaintiff Exclusive Group Holdings, Inc. (Exclusive or Plaintiff) sues its insurer (National Union Fire Insurance Company of Pittsburgh Pennsylvania (NUFIC)), and three others: AIG Claims, Inc. (AIG Claims), BBCG Claims Services (BBCG)[1], and AIG Property Casualty, Inc (AIG) (collectively Defendants). Defendant NUFIC issued two insurance policies to Exclusive. The three additional defendants allegedly caused NUFIC to wrongfully deny Exclusive's sixteen insurance claims. AIG Claims, a third-party claims administrator, and BBCG, a third-party adjusting firm, were engaged by NUFIC to help evaluate Exclusive's claims. AIG is a large insurance underwriter, and both NUFIC and AIG Claims are wholly owned subsidiaries of AIG. Federal jurisdiction is premised on complete diversity of citizenship. (Doc. #79, 1 12.)

On March 23, 2023, Exclusive filed a motion (Doc. #92) seeking leave to file a third amended complaint

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[1] The Court recognizes that defendants assert BBCG is a misnamed party (Doc. #108, p. 1 n.1), but this issue need not be resolved here.

adding J.S. Held, Inc. (J.S. Held) as an additional defendant and adding claims against it. J.S. Held is a corporate investigation firm engaged by counsel for NUFIC to investigate portions of the insurance claims filed by Exclusive. As it turns out, J.S. Held is a non-diverse entity whose presence as a party-defendant would destroy federal diversity jurisdiction. Because of this, remand to state court would be mandatory if the motion was granted. 28 U.S.C. § 1447(e)[2]. *See also Ingram v. CSX Transp., Inc.,* 146 F.3d 858, 862 (11th Cir. 1998).

On July 31, 2023, the Magistrate Judge issued an Order Granting Leave to Add Party and Remanding Case to State Court (Doc. #103) (the Order). The Order granted leave to file the Third Amended Complaint which added three state law claims against J.S. Held as a named defendant. Because complete diversity of citizenship was no longer present, the Order also remanded the case to state court. The Order gave the parties fourteen days to file objections, noting this was the time allowed for objections to a non-dispositive order under Fed. R. Cv. P. 72(a). If no objection was filed, the case would be remanded to state court pursuant to the Order. (Doc. #103 at 14-15.)

All Defendants timely filed the following four objections to the Magistrate Judge's Order: (1) the Magistrate Judge had no authority to remand the case in an order, but instead was required to issue a report and recommendation (R&R) to the district judge for

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[2] "If after removal the 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." 28 U.S.C. § 1447(e).

de novo review; (2) the Magistrate Judge erred by relying almost exclusively on the fraudulent joinder test as the applicable standard to determine whether to grant the motion to amend; (3) the Magistrate Judge erred in finding that a Florida court would conceivably allow the claims against J.S. Held to proceed; and (4) the Magistrate Judge misapplied some of the appropriate factors in weighing whether to grant leave to file the Third Amended Complaint. (Doc. # 108.) Plaintiff responded that the Magistrate Judge got it right in all respects. (Doc. # 109.)

II.

As summarized above, the Magistrate Judge issued an "Order" which (1) allowed the filing of a Third Amended Complaint (TAC) that would destroy the court's subject matter jurisdiction by adding a non-diverse defendant, and (2) remanded the case to the state court from which it had been removed. The Magistrate Judge then essentially stayed the Order to allow the filing of objections. The Magistrate Judge reasoned that "[b]ecause a motion to remand does not address the merits of the case but merely changes the forum . . . it is a non-dispositive matter that does not require a report and recommendation." (Doc. #103, p. 14, n.10) (quoting *Lockhart v. Greyhound Lines, Inc.*, No. 2:22-CV-473-SPC-KCD, 2023 WL 155279, at *5 n.3 (M.D. Fla. Jan. 11, 2023) (Dudek, M.J.)).

Defendants essentially assert that, in the circumstances of this case, a magistrate judge has no authority to remand a case to state court by an order. Instead, defendants argue, a magistrate judge is required to issue an R&R to a district judge who, as an Article III judge, has the authority to remand the case

to state court after *de* novo review. (*See* Doc. #108, pp. 9-10.)

This issue goes to the legal authority of a magistrate judge: Does a magistrate judge have the authority to issue an order (as opposed to an R&R) which (1) grants a motion to amend a complaint when the amendment will destroy federal diversity jurisdiction and require remand, and (2) remands the case to state court based upon the resulting lack of subject matter jurisdiction? This is a question of law and is therefore subject to *de novo* review. *United States v. Shamsid-Deen,* 61 F.4th 935, 944-45 (11th Cir. 2023).

A.

The basics are well-established. Federal courts are created pursuant to Article III of the United States Constitution. U.S. Const. art. III. Article III, § 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress in turn established the one Supreme Court, 28 U.S.C. §§ 1-6, and various Courts of Appeal, 28 U.S.C. §§ 41-49, and District Courts, 28 U.S.C. §§ 81-144, composed of judges who enjoy the protections of Article III: life tenure and pay that cannot be diminished. Congress later authorized district courts to appoint magistrate judges to assist Article III courts in their work. 28 U.S.C. § 631(a); *see also Wellness Intern. Network, Ltd. v. Sharif,* 575 U.S. 665, 677-678 (2015).

While district courts may appoint magistrate judges, Congress has restricted the power and authority of such magistrate judges. "Magistrate judges do not

share the privileges or exercise the authority of judges appointed under Article III of the United States Constitution; rather, magistrate judges draw their authority entirely from an exercise of Congressional power under Article I of the Constitution." *Thomas v. Whitworth,* 136 F.3d 756, 758 (11th Cir. 1998). "The jurisdiction and duties of federal magistrate judges are outlined principally in [28 U.S.C. § 636]." *Id. See, e.g.,* 28 U.S.C. § 636(a) (1)-(5), § 636(b) (1)-(4), § 636(c) (1)-(5).

> It is clear, however, that the Article III judge must retain final decision-making authority. *See [United States v. Raddatz,* 447 U.S. 667, 681-82 (1980)]. The district court must retain "total control and jurisdiction" of the entire process if it refers diapositive motions to a magistrate judge for recommendation. *Thomas v. Arn,* 474 U.S. 140, 153, 106 S. Ct. 466, 474, 88 L. Ed. 2d 435 (1985) (quoting *Raddatz,* 447 U.S. at 681, 100 S. Ct. at 2415).

Williams v. McNeil, 557 F.3d 1287, 1291 (11th Cir. 2009).

Title 28 U.S.C. § 636(b) (1) (A) provides that a district court judge may designate a magistrate to "hear and determine" any civil pretrial matter pending before the court, except certain specified motions:

> Notwithstanding any provision of law to the contrary–
>
> (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or

> quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b) (1) (A).[3] A district judge may "reconsider" such determinations by a magistrate judge if the magistrate judge's order is shown to be "clearly erroneous or contrary to law." *Id.* Although the statute provides no time limit for seeking such reconsideration, a party must file an objection to such an order within fourteen days of receiving a copy of the order. Fed. R. Civ. P. 72(a).

Additionally, a district court may designate a magistrate judge to conduct hearings and submit proposed findings and recommendations concerning a variety of motions, including those which the magistrate judge may not "hear and determine":

> (B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge

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[3] The original 1968 version of the Federal Magistrate Act allowed magistrates to be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States," including "assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions." 28 U.S.C. § 636(b) (2) (1968). This was amended in 1976 to allow designation of a magistrate to "hear and determine any pretrial matter pending before the court, except . . . " for eight types of matters. *See* 28 U.S.C. § 636(b) (1) (A) (1976).

> of the court, of any motion excepted in subparagraph (A). . . .

28 U.S.C. § 636(b) (1) (B); *see also Williams,* 557 F.3d at 1291-92. As to these types of matters, the magistrate judge must file "proposed findings and recommendations" to which a party may file written objections. 28 U.S.C. § 636(b) (1). A party must file an objection within fourteen days of being served with a copy of the R&R. Fed. R. Civ. P. 72(b) (2). If objections are filed, "[a] judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b) (1); *see also* Fed. R. Civ. P. 72(b) (3).

By Local Rule, the district judges of the Middle District of Florida have provided that a magistrate judge "can exercise the maximum authority and perform any duty permitted by the Constitution and other laws of the United States." M.D. Fla. R. 1.02(a). In the Administrative Order required by Local Rule 1.02(b), the Chief Judge has set forth the specifics of this authority in some detail. *See In re*: *Authority of United States Magistrate Judges in the Middle District of Florida,* Case No. 8:20-mc-00100-SDM, Doc. #3 (M.D. Fla.) (the Administrative Order). As to pretrial motions in civil cases, the Administrative Order states:

> Absent a stipulation by all affected parties, however, a magistrate judge may not appoint a receiver, enter an injunctive order, enter an order dismissing or permitting maintenance of a class action or collective action, grant in whole or in part a motion for judgment on the pleadings or for summary judgment, enter an order of involuntary dismissal, or enter

> any other final order or judgment that would be appealable if entered by a district judge, but a magistrate judge may file a report and recommendation concerning these matters.

(*Id.* at p. 4, ¶ (e)(1)).

B.

The Eleventh Circuit has not published a decision addressing whether a magistrate judge may "hear and determine" by order a motion to amend which requires a mandatory remand pursuant to 28 U.S.C. § 1447(e) if granted. The Eleventh Circuit has held, however, that 28 U.S.C. § 636(b) (1)(A) authorizes magistrate judges to "hear and determine" a pretrial matter which is not identified in or analogous to the specific statutory exceptions. *United States v. Schultz,* 565 F.3d 1353, 1357 (11th Cir. 2009). Neither a remand to state court nor an analogous matter is included in the excepted matters identified in § 636(b) (1)(A) which cannot be heard and decided by a magistrate judge.

The Administrative Order does not allow a magistrate judge to "enter any other final order or judgment that would be appealable if entered by a district judge. . . . " Administrative Order, p. 4, ¶ (e) (1). As a result, some remand orders may be entered by a magistrate judge (because such orders are not appealable), while other remand orders may not be entered by a magistrate judge (because such orders are appealable).[4] The type of remand involved in this

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[4] Only remand orders issued under 28 U.S.C. § 1447(c) are immune from review under § 1447(d). *MSP Recovery Claims, Series LLC v. Hanover Ins. Co.,* 995 F.3d 1289, 1294 (11th Cir. 2021); *New v. Sports & Recreation, Inc.,* 114 F.3d 1092, 1095-96 (11th Cir. 1997). Remands for which review is barred under

case is not reviewable, and therefore is within the matters authorized by the Administrative Order to be heard and determined by a magistrate judge by order.

Although motions to remand are not included in the list of excepted motions in § 636(b) (1) (A), and this type of remand order is not contrary to the Administrative Order, every court of appeals to consider the question has held that remand to state court should be treated as a matter which may not be resolved by a magistrate judge by order. *See Davidson v. Georgia-Pac., L.L.C.,* 819 F.3d 758, 762-65 (5th Cir. 2016); *Flam v. Flam,* 788 F.3d 1043, 1045-47 (9th Cir. 2015); *Williams v. Beemiller, Inc.,* 527 F.3d 259, 266 (2d Cir. 2008); *Vogel v. U.S. Office Prods. Co.,* 258 F.3d 509, 516-17 (6th Cir. 2001); *First Union Mortg. Corp. v. Smith,* 229 F.3d 992, 995-96 (10th Cir. 2000); *In re U.S. Healthcare,* 159 F.3d 142, 145-46 (3d Cir. 1998). The undersigned agrees with the reasoning of these cases, particularly the Fifth Circuit:

> Allowing magistrate judges to enter remand orders at a minimum approaches the constitutional line because "a remand order is dispositive insofar as proceedings in the federal court are concerned" and thus is "the

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§ 1447(c) include remands based on lack of subject matter jurisdiction. *Powerex Corp. v. Reliant Energy Services Inc.,* 551 U.S. 224 (2007); *Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.,* 254 F.3d 1317, 1319 (11th Cir. 2001). When a district court remands a case to state court for lack of subject matter jurisdiction, it cannot even review its own decision by entertaining a motion for reconsideration. *Shipley v. Helping Hands Therapy,* 996 F.3d 1157, 1159-60 (11th Cir. 2021); *Bender v. Mazda Motor Corp.,* 657 F.3d 1200, 1204 (11th Cir. 2011); *Harris v. Blue Cross/Blue Shield of Ala., Inc.,* 951 F.2d 325, 330 (11th Cir. 1992).

functional equivalent of an order of dismissal." [] Treating motions to remand as nondispositive would create a situation in which an Article III judge might never exercise *de novo* review of a case during its entire federal lifespan. And although a remand order is a final disposition only of the jurisdictional question, a merits determination is not a necessary feature of a "dispositive" matter as the statute labels requests for preliminary injunctions and class certification as dispositive. 28 U.S.C. § 636(b) (1)(A).

. . . Additionally, an order of remand issued by a magistrate judge "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Yet the statute and rule governing magistrate judge rulings on nondispositive matters provides for an appeal to the district court under the "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b) (1)(A); Fed. R. Civ. P. 72(a). Classifying motions to remand as dispositive matters on which magistrate judges may enter recommendations but not orders of remand avoids a potential collision between these review provisions. It also avoids a timing problem that would result even if the magistrate-specific review provisions govern a magistrate judge's entry of a remand order: absent a stay, a remand order sends the case back to state court and deprives the federal court of jurisdiction that would allow for district court review. 28 U.S.C. § 1447(c) [] *Dahiya v. Talmidge Int'l, Ltd.,* 371 F.3d 207, 208 (5th Cir. 2004)

> (concluding that district court's remand order deprived the court of appeals of further federal jurisdiction).[]
>
> We therefore join the uniform view of the courts of appeals that have considered this question and hold that a motion to remand is a dispositive matter on which a magistrate judge should enter a recommendation to the district court subject to *de novo* review.

Davidson, 819 F.3d at 763-65 (5th Cir. 2016) (footnote omitted).

The instant case is an example of how allowing a magistrate judge to remand a case by order either deprives the litigants of the decision-making and control of an Article III judge, or requires the court to violate a statute by reviewing actions that are unreviewable. The Magistrate Judge lessened the Article III concerns by essentially staying his Order to provide the opportunity to file objections. But if the Magistrate Judge's Order was really an order, it was effective when entered and cannot be reviewed, even by the magistrate judge himself. *See* 28 U.S.C. § 1447(d).

Accordingly, the Court sustains Defendants' objection, finds that the Magistrate Judge did not have the authority to remand this case to state court by order, and therefore had no authority to grant a motion to amend which would require such a remand. The Court will therefore treat the Magistrate Judge's Order as a report and recommendation and address the other objections where appropriate.

III.

Defendants object that the Magistrate Judge "applied the incorrect standards for evaluating remand under 28 U.S.C. § 1447(e)." (Doc. #108, p. 10.) Defendants argue that the Magistrate Judge "expressly imported" the fraudulent joinder test, which was allowed to "supplant and overrule" the applicable multi-factor standard. (*Id.* at 10-11.) Defendants further argue that the fraudulent joinder test is "highly deferential to plaintiffs," while the proper standard is "deferential to defendants." (*Id.* at 11-12.)

The Court reviews this objection under a *de novo* standard for two reasons: a *de* novo standard of review is required pursuant to 28 U.S.C. § 636(b)(1), and the objection raises an issue of law, which are reviewed *de novo. Shamsid-Deen,* 61 F.4th at 944-45.

Resolution of a motion to amend a complaint is a matter within the discretion of the court. *Johnson v. Lewis,* 83 F.4th 1319, 1331 (11th Cir. 2023). This discretion is generally governed by the liberal standard set forth in Fed. R. Civ. P. 15(a) (2), which requires a court to "freely give leave [to amend] when justice so requires." *Bryant v. Dupree,* 252 F.3d 1161, 1163 (11th Cir. 2001). Even under this usual standard, however, a motion to amend may be denied "(1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Garcia v. Chiquita Brands Int'l, Inc.,* 48 F.4th 1202, 1220 (11th Cir. 2022) (quoting *Bryant* at 1163).

"Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant." *Cockrell v. Sparks,* 510 F.3d 1307, 1310 (11th Cir. 2007) (citation omitted). A finding of futility is a "conclusion that as a matter of law an amended complaint would necessarily fail." *In re Gaddy,* 977 F.3d 1051, 1056 (11th Cir. 2020) (citation omitted). *See also Greene v. Well Care HMO, Inc.,* 778 So.2d 1037, 1041-42 (Fla. 4th DCA 2001).

A motion to amend to add a defendant whose joinder would destroy diversity and deprive the court of subject matter jurisdiction is also addressed in the discretion of the court. *Ingram,* 146 F.3d at 862. In such circumstances, however, nonbinding decisions[5] in the Eleventh Circuit direct district courts to "more closely scrutinize the pleading and be hesitant to allow the new non-diverse defendant to join." *Reyes v. BJ's Restaurants, Inc.,* 774 F. App'x 514, 516-17 (11th Cir. 2019) (citing *Hensgens v. Deere & Co.,* 833 F.2d 1179, 1182 (5th Cir. 1987)). *Reyes* instructed that "[i]n so scrutinizing the pleading, the district court should use its discretion in deciding whether to allow that party to be added by balancing 'the defendant's interests in maintaining the federal forum with the competing interests of not having parallel lawsuits.'" *Id.* at 517 (quoting *Hensgens,* 833 F.2d at 1182). The equitable balance is to be guided by four non-exclusive factors: (1) plaintiff's motive for seeking joinder; (2) the timeliness of the request to amend; (3) whether the plain-

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[5] "Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants." *Bonilla v. Baker Concrete Const., Inc.,* 487 F.3d 1340, 1345 n.7 (11th Cir. 2007).

tiff will be significantly injured if amendment is not allowed; and (4) any other relevant equitable considerations. *Id. See also Hickerson v. Enter. Leasing Co. of Georgia, LLC,* 818 F. App'x 880, 885 (11th Cir. 2020); *Dever v. Family Dollar Stores of Georgia, LLC,* 755 F. App'x 866, 869-70 (11th Cir. 2018). The Court finds these non-published decisions persuasive.

The Court also finds that traditional principles concerning fraudulent joinder may be considered in deciding a motion to amend in the circumstances of this case. As relevant to this case, fraudulent joinder requires a showing by clear and convincing evidence that there is no possibility the plaintiff can establish a cause of action against the non-diverse defendant. *Stillwell v. Allstate Ins. Co.,* 663 F.3d 1329, 1332 (11th Cir. 2011). "If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court." *Stillwell,* 663 F.3d at 1333 (citations omitted). As Defendants recognize, the fraudulent joinder test can be "considered by courts as a supplement to the *Hensgens* analysis." (Doc. #108, p. 4.)

The legal standard employed by the Magistrate Judge is fully consistent with the standard set forth above, albeit stated more succinctly. The Magistrate Judge started with the applicable statute, 28 U.S.C. § 1447(e); found that the decision on whether to allow amendment was a matter within the discretion of the court; found that in the context of the case the court was required to scrutinize the motion more closely than under Rule 15; and, without citing *Hensgens,* identified the same four factors to consider under § 1447(e) as

set forth in *Hensgens*. *See* Doc. #103, pp. 3-4. Defendants' objection that the Magistrate Judge used the wrong legal standard is therefore overruled.

IV.

Defendants' remaining objections relate to the application of the legal standards to the facts of this case. The Court reviews these objections *de novo*. 28 U.S.C. § 636(b)(1). Application of the legal standards to this case first requires a more detailed examination of the record.

On June 25, 2022, Exclusive filed suit in a Florida state court against NUFIC "and Doe Corporations 1-7." The "identity and location" of the Doe Corporations "could not be ascertained despite the exercise of due diligence," but were "believed to be related insurance or insurance service companies who handled EXCLUSIVE'S claims." (Doc. #4, ¶¶ 8, 11.) The Complaint further asserted "[o]n information and belief," that at least some of the involved underwriters and adjusters "are employees, agents, or representatives of one of the Doe Corporations 1-7. . . . " (*Id.* at ¶ 118.) The original Complaint alleged claims against NUFIC for a declaratory judgment, for breach of contract, and statutory bad faith pursuant to Fla. Stat. § 624.155. *(Id.)* On August 5, 2022, NUFIC properly removed the case to federal court based on diversity jurisdiction. (Doc. #1.)

On August 25, 2022, Exclusive filed its First Amended Complaint (Doc. #15), which removed the bad faith claim against NUFIC and added claims of tortious interference and negligence against new defendants BBCG, AIG Claims, and AIG. NUFIC filed an Answer and Affirmative Defenses (Doc. #27),

while the new defendants filed motions to dismiss (Docs. #34, 47).

On October 27, 2022, the Defendants provided Exclusive with initial disclosures identifying individuals likely to have discoverable information, including:

Peter Pender-Cudlip, J. S. Held (formerly GPW+ Co Ltd.) Office 521, Level 5, Standard Chartered Building, Dubai, UAE Peter.Pender-Cudlip@jsheld.com +971 4881 3199 Mr. Pender-Cudlip has information regarding the evaluation of Plaintiff's alleged buyers and other counterparties in the claimed transactions.

Paola Tenconi, Office 521, Level 5, J.S. Held (formerly Ltd.) Office 521, Level 5, Standard Chartered Building, Dubai, UAE Paola.Tenconi@jsheld.com +971 4881 3199 Ms. Tenconi has information regarding the evaluation of Plaintiff's alleged buyers and other counterparties in the claimed transactions.

(Doc. #92-23, p. 4.)

When discussing possible deadlines to amend pleadings at a scheduling conference on November 2, 2022, the Magistrate Judge and Exclusive's counsel had the following exchange:

> The Court: Is there anything right now? Is there like an entity or a claim that you're

> currently, you know, entertaining possibly adding?
>
> Exclusive's counsel: I don't know. There are some new entities that came out in the initial disclosures from the other side, some entities based in Dubai.

(Doc. #63, p. 30.)

On November 30, 2022, Exclusive served a document subpoena on J.S. Held. On December 14, 2022, J.S. Held acknowledged receipt and explained its specific role:

> GPW (Middle East) Limited, an entity acquired by J.S. Held in April 2022, was engaged by [Hastings], who NUFIC and AIG Claims, Inc. engaged to provide legal advice regarding the existence and scope of coverage for the 16 insurance claims (the "Claims") that Plaintiff submitted under two trade credit insurance policies issued by NUFIC (the "NUFIC Policies") to Plaintiff. GPW's activities, which consisted of conducting an investigation into Plaintiff's alleged buyers in the wholesale telecommunications industry (the "Buyers") that Plaintiff named in the Claims, were directed by NUFIC's Outside Counsel for purposes of identifying and providing information to NUFIC's Outside Counsel, NUFIC, and AIG Claims, Inc. and to assist NUFIC's Outside Counsel in providing legal advice to NUFIC and AIG Claims, Inc. (who at all times acted as NUFIC's authorized third-party claims administrator). In this capacity, and under

> the direction of NUFIC's Outside Counsel, GPW researched, investigated, obtained and otherwise collected information regarding the Buyers and other counterparties involved in Plaintiff's alleged transactions with the Buyers that formed the underlying basis for its Claims. As part of its investigation, GPW provided NUFIC's Outside Counsel with its mental impressions regarding the information it collected and communicated to NUFIC's Outside Counsel, NUFIC, and AIG Claims, Inc. regarding its investigation and the findings derived therefrom.

(Doc. #92-25, p. 2.)

On January 6, 2023, plaintiff filed a Second Amended Complaint (Doc. #79.) This mooted the pending motions to dismiss. (Doc. #80.) NUFIC filed an Answer and Affirmative Defenses (Doc. #83) and a Motion to Strike Allegations of, and Request for Extra-Contractual Consequential Damages (Doc. #84), and the other defendants filed motions to dismiss (Docs. ## 85, 86). The documents subpoenaed from J.S. Held were produced on January 30, 2023. (Doc. #103, p. 6.)

On March 1, 2023, Exclusive filed an *Unopposed* Motion for Leave to File a Third Amended Complaint and Add a Party. (Doc. #89.) Among other things, Exclusive sought to add J.S. Held as a defendant and asserted that its joinder was "not [previously] possible until the production of documents by J.S. Held on January 30, 2023 in response to a subpoena served by [Exclusive] on J.S. Held on November 30, 2022." (Doc. #89 at ¶ 10.) The Magistrate Judge, recognizing that Exclusive never mentioned J.S. Held's citizenship,

denied Exclusive's motion without prejudice for "fail[ure] to show that J.S. Held would not destroy diversity. . . . " (Doc. #91, pp. 1-2.) Exclusive was afforded the opportunity to "renew its motion within fourteen days of th[e] order." (*Id.* at p. 2.)

The parties conferred and realized J.S. Held was a non-diverse entity. (*See* Doc. #92-26.) On March 23, 2023, Exclusive re-filed a motion for leave to file a TAC, seeking to add J.S. Held as a defendant and remand the case to state court because J.S. Held's presence as a defendant would destroy diversity jurisdiction. (Doc. #92.) This time, defendants opposed the motion. (Doc. #93.) The Magistrate Judge's Order (deemed to be a R&R) granting the motion is now before the Court on Defendants' objections.

Defendants assert that the Magistrate Judge made several errors in his application of the factors set forth in *Hensgens*. (Doc. #108, pp. 4, 12-20.) The Court applies the *Hensgens* standard *de novo,* addressing the specific objections where appropriate.

(1) Purpose of Amendment

The first factor to consider is Plaintiff's motive for seeking the amendment to add J.S. Held as a defendant. *Hensgens,* 833 F.2d at 1182. Defendants asserted before the magistrate judge "that the purpose of Plaintiff's Motion is to eliminate federal jurisdiction" (Doc. #93, p.2), and continues to take that position here. (Doc. #108, p. 5) ("[T]he Remand Order misapplies the *Hensgens* factors relating to Plaintiff's motives. . . . ").

The original Complaint filed in state court made specific reference to Doe Corporations whose identity had not been determined. This Complaint was removed

to federal court on August 5, 2022. Exclusive learned of J.S. Held and its role through post-removal discovery in federal court. Exclusive first learned of J.S. Held's existence on or about October 27, 2022, and did not meaningfully know its specific involvement until subpoenaed documents were produced on January 30, 2023. (Docs. #92, p. 12; Doc. #108, p. 23.)

The record clearly establishes that Exclusive sought to add J.S. Held as a defendant before realizing it was a non-diverse entity. Exclusive's first motion to file a TAC (Doc. #89) did not recognize any potential jurisdictional issues and it was unopposed. It was not until the Magistrate Judge questioned J.S. Held's citizenship that the parties conferred and realized federal jurisdiction was implicated by the motion. The Court finds that plaintiff's motive in adding J.S. Held was to proceed against one of the recently identified Doe Corporations, not to destroy federal diversity jurisdiction. Thus, the Court agrees with the finding of the Magistrate Judge that the purpose for the amendment was not concerned with avoiding federal jurisdiction. (Doc. #103, pp. 4-5.) Defendants' objection is therefore overruled, and this factor weighs in favor of amendment and remand.

(2) Timeliness of Amendment/Dilatory Tactics

The second factor to consider is the timelines of the amendment and any dilatory tactics by Plaintiff in its efforts to add J.S. Held as a defendant. *Hensgens,* 833 F.2d at 1182. Defendants accuse Plaintiff of engaging in "dilatory tactics" to destroy federal jurisdiction. (Doc. #108, p. 22.)

"A plaintiff is dilatory in adding a non-diverse party when the plaintiff waits an unreasonable amount

of time before asking for an amendment, despite having been able to ascertain the party's role in the suit all along." *Hickerson,* 818 F. App'x at 886. The evidence establishes that Exclusive was not dilatory.

The timeline indicates that no unreasonable amount of time elapsed before Exclusive moved to amend to add J.S. Held:

- October 27, 2022: Exclusive learned of J.S. Held's existence.
- November 2, 2022: Exclusive alerted the Court and Defendants of its possible desire to join J.S. Held.
- November 30, 2022: Exclusive subpoenaed J.S. Held.
- December 14, 2022: J.S. Held acknowledged the subpoena and outlined its role in the events.
- January 30, 2023: J.S. Held responded to subpoena by producing documents.
- March 1, 2023: Exclusive moved to amend pleadings and add J.S. Held as a defendant.

Thus, Exclusive notified all parties it was contemplating adding J.S. Held six days after first learning of its existence. Twenty-eight days later, it subpoenaed documents from J.S. Held. Sixty-one days later, J.S. Held responded to the subpoena. Thirty days later, Exclusive filed its first motion to amend to add J.S. Held as a defendant. The Court finds that Exclusive acted with reasonable speed and diligence; the most sizable delay came not from Exclusive, but from J.S. Held in complying with the subpoena.

An additional "dilatory tactic" identified by Defendants is that Exclusive filed its motion to amend on the last day of the court-mandated deadline for such amendments. (*See* Doc. #108, pp. 22-23.) Complying with the schedule set forth in a court order simply cannot be considered dilatory. *See e.g., S. Waste Sys., LLC v. City of Coral Springs, Fla.,* No. 06-61448-CIV, 2008 WL 11333808, at *2 (S.D. Fla. Apr. 1, 2008) (rejecting defendant's argument that a dilatory motive was evident because the motion was filed on the last day of deadline). This is particularly so here, where defendants initially proposed a longer (May 1, 2023) deadline for Exclusive to amend the pleadings than that adopted by the Magistrate Judge (March 1, 2023). (*See* Doc. #63, p. 29.) Additionally, Defendants filed motions to extend various deadlines during the pretrial proceedings (Docs. ## 28, 81) and, with one exception (Doc. #29), both sides consented to extensions of time requested by an opposing party. (Docs. ## 50, 75, 81, 87.)

The Court finds that Exclusive has not utilized dilatory tactics, and its motion was timely. Thus, the Court agrees with the Magistrate Judge that plaintiff was not dilatory in seeking the amendment. (Doc. #103, pp. 5-6.) Therefore, Defendants' objection is overruled, and this factor weighs in favor of amendment and remand.

(3) Injury to Plaintiff

The third factor to consider under *Hensgens* is whether plaintiff will be significantly injured if the amendment is not allowed. *Hensgens,* 833 F.2d at 1182. The Magistrate Judge found Plaintiff would be

significantly injured if the motion was not granted. Defendants assert this was error.

Exclusive seeks to bring three alternative claims against J.S. Held: (1) Count V alleges a claim of tortious interference with Exclusive's relationship with NUFIC which caused NUFIC to wrongfully deny the insurance claims (Doc. #92-1, ¶ 284); (2) Count IX alleges a claim of negligence, asserting that J.S. Held "negligently interfered with Exclusive Group's ability to obtain payment for the Claims" (*Id.* at ¶ 383); and (3) Count XIII alleges of that J.S. Held "aided and abetted AIG and AIG CLAIMS in tortiously interfering with Exclusive Group's ability to obtain payment for the Claims." (*Id.* at ¶ 484). Thus, Exclusive claims that J.S. Held either tortiously interfered with its contractual relationship with NUFIC, or negligently did so, or aided and abetted the other non-NUFIC defendants in doing so.

(a) Parallel Litigation

The Magistrate Judge found that denying the amendment would require Plaintiff to maintain parallel litigation in state court. This would impose substantial and inappropriate burdens on Exclusive considering the similarity and overlap of the claims and the resulting unnecessary expense, waste of limited judicial resources, and risk of inconsistent outcomes. (Doc. #103, pp. 6-7.)

Parallel litigation in state court does not necessarily amount to a significant injury — even if it results in duplicative efforts on plaintiffs' part. *Hickerson,* 818 F. App'x at 886. For example, the Eleventh Circuit in a different context identified nine non-exclusive factors to consider in determining

"whether to abstain from exercising jurisdiction over state-law claims in the face of parallel litigation in the state courts." *Ameritas Variable Life Ins. Co. v. Roach,* 411 F.3d 1328, 1331 (11th Cir. 2005). Here, all the claims are interrelated state-law claims. In this case, forcing Plaintiff to bear the extra cost and time to litigate interrelated and overlapping claims in two different forums places a significant burden on Plaintiff. It also adversely impacts the public's interest in conserving scarce judicial resources and avoiding potentially inconsistent rulings. After *de novo* review, the Court agrees with the Magistrate Judge that denying the motion would result in parallel litigation which would significantly injure Plaintiff.

(b) No Fraudulent Joinder

The Magistrate Judge also found that under Florida law both the tortious interference claim and the aiding and abetting tortious interference claim against J.S. Held were "possible," thus defeating the fraudulent joinder argument. (Doc. #103, pp. 9-14.) The Magistrate Judge did not address the negligence claim. Defendants argue at some length that Plaintiff will not suffer significant injury because Florida law precludes all the claims Exclusive asserts against J.S Held. (Doc. #108, pp. 12-20.) Defendants assert that the Magistrate Judge failed to consider the propriety of Plaintiff's claims under applicable Florida insurance law, that such claims are prohibited under Florida insurance law, and that it would therefore be futile to allow such an amendment. (*Id.)* Defendants state that "Florida courts have consistently rejected attempts by plaintiffs to evade this statutory framework [Fla. Stat. § 624.155] by masquerading their bad faith claims under alternative common law tort labels." (*Id.*

at 14.)[6] In a footnote, Defendants cite five cases in support of this proposition. (*Id.* at 14-15, n.9.)

After a *de novo* review, the Court agrees with the Magistrate Judge that the fraudulent joinder standard has not been satisfied in this case. The tortious interference and aiding and abetting claims clearly satisfy the Florida pleading standard[7], so it is more than possible that a Florida state court would conclude Plaintiff stated causes of action.

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[6] Along the same lines, Defendants assert that: "[t]he Remand Order is contrary to the letter and spirit of Florida's statutory insurance framework, because it allows Plaintiff to add improper third-party tort claims against J.S. Held." (Doc. #108, p. 3); "The Remand Order fails to consider, much less assess, the propriety of Plaintiff's claims under applicable Florida insurance law" which "would not allow Plaintiff's unbundled insurance bad faith 'tort' claims against adjusters, administrators, investigators or other third parties retained to assist the insurer to proceed past the pleading stage." (*Id.* at 4); "Plaintiff's purported claims against J.S. Held are nothing more than run-of-the-mill insurance bad faith claims" which are being improperly directed "at the third parties that assisted its insurer's investigation." (*Id.* at 9); "Plaintiff's causes of action against J.S. Held, while dressed up with tort labels, are nothing more than an unbundled cause of action for statutory insurance bad faith. *See* Fla. Stat. § 624.155." (*Id.* at 12); the allegations against J.S. Held "precisely fit within the contours of a Florida statutory insurance bad faith claim and Unfair Claims Settlement Practices Act. *See* Fla. Stat. § 624. 155(1)(a)1; Fla. Stat. 626.9541(i)." (*Id.* at 14); and "the proper inquiry is whether an insured can circumvent Florida's established statutory insurance framework by asserting what are, in effect, insurance bad faith claims against third parties that participated in the claims handling process, before that insured has established the insurer's breach by failing to pay a covered claim." (*Id.* at 5.)

[7] *See* footnote 9.

(c) Futility of Amendment

Defendants also argue that the Magistrate Judge improperly let only the fraudulent joinder test drive the outcome in the Order. (Doc. #108, pp. 4, 12.) The Court agrees that the Magistrate Judge's analysis ended too soon. The futility of a proposed amendment is a relevant factor, so it is necessary to determine whether adding such claims would be futile. As discussed earlier, a futility determination utilizes a significantly different legal standard than required to determine fraudulent joinder. Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed. *Cockrell,* 510 F.3d at 1310. Futility requires a conclusion that as a matter of law an amended complaint would necessarily fail. *In re Gaddy,* 977 F.3d at 1056. For the reasons discussed below, after *de* novo review the Court finds that, except for the negligence claim, Defendants have not shown that the J.S. Held claims would be properly dismissed, either by a federal[8] or a Florida[9] court.

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[8] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quotation omitted). To be considered plausible, the allegations in the complaint must "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

[9] "Florida is a fact-pleading jurisdiction, not a notice-pleading jurisdiction." *Graulau Maldonado v. Orange Cnty. Pub. Library Sys.,* 273 So.3d 278, 279 (Fla 5th DCA 2019) (citation omitted). "To survive a motion to dismiss, a complaint must allege a prima facie case. In evaluating a motion to dismiss, the court confines its consideration to the four corners of the complaint and must accept all well-pleaded allegations as true." *Alvarez v. E & A Produce Corp.,* 708 So.2d 997, 999 (Fla. 3d DCA 1998). "Whether

Therefore, amendment to add these two claims is not precluded as futile.

Defendants' principal argument describes all of Exclusive's claims against J.S. Held as an improper "unbundled" statutory bad faith claim against an insurer pursuant to Fla. Stat. § 624.155. The Court is not convinced.

In Florida,

> . . . a claim for bad faith pursuant to section 624.155(1)(b)1 is founded upon the obligation of the insurer to pay when all conditions under the policy would require an insurer exercising good faith and fair dealing towards its insured to pay. This obligation on the part of an insurer requires the insurer to timely evaluate and pay benefits owed on the insurance policy. We hasten to point out that the denial of payment does not mean an insurer is guilty of bad faith as a matter of law. The insurer has a right to deny claims that it in good faith believes are not owed on a policy.

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a prima facie case has been pled depends on the sufficiency of the plaintiff's allegations of fact, excluding the bare conclusions of the plaintiff." *Id.* at 999-1000. *See also Suzmar, LLC v. First Nat'l Bank of S. Miami,* ___ So.3d ___, 2023 WL 5597394, *1 (Fla. 3d DCA Aug. 30, 2023). "Those allegations are then reviewed in light of the applicable substantive law to determine the existence of a cause of action." *Age of Empire, Inc. v. Ocean Two Condo. Ass'n, Inc*., 367 So.3d 1278, 1279-80 (Fla. 3d DCA 2023) (citation omitted). "A motion to dismiss tests the legal sufficiency of the complaint and does not determine factual issues. [] To state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *TR Inv'r, LLC v. Manatee Cnty.,* 355 So.3d 1004, 1010 (Fla. 2d DCA 2023) (citations omitted).

> Even when it is later determined by a court or arbitration that the insurer's denial was mistaken, there is no cause of action if the denial was in good faith. Good-faith or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder.

Vest v. Travelers Ins. Co., 753 So.2d 1270, 1275 (Fla. 2000). "[T]he duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith." *Boston Old Colony Ins. Co. v. Gutierrez,* 386 So.2d 783, 785 (Fla. 1980). Before asserting a bad faith claim under § 624.155, plaintiff must establish a prior determination of the existence of liability and the extent of the insured's damages. *Blanchard v. State Farm Mut. Auto. Ins. Co.,* 575 So.2d 1289, 1291 (Fla. 1991); *Vest,* 753 So.2d at 1276 ("We continue to hold in accord with *Blanchard* that bringing a cause of action in court for violation of section 624.155(1)(b)1 is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract.") First-party bad faith claims are not considered to be willful torts but are "purely a creature of statute that did not previously exist at common law." *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Assn, Inc.,* 164 So.3d 663, 667 (Fla. 2015).

The claims against J.S. Held are not claims against an "insurer" within the meaning of Fla. Stat. § 624.155. None of the cases cited by Defendants in their footnote discussed "unbundled" bad faith claims or held that Fla. Stat. § 624.155 provided some sort of

immunity to a third party whose wrongful conduct enabled an insurer to engage in its bad faith conduct.

(i) Tortious Interference by J.S. Held

The Florida Supreme Court has recognized a cause of action for tortious interference with a business relationship. *Stone v. Wall,* 734 So.2d 1038, 1044 (Fla. 1999) (citations omitted). "Four elements are required to establish tortious interference with a contractual or business relationship: (1) the existence of a business relationship or contract; (2) knowledge of the business relationship or contract on the part of the defendant; (3) an intentional and unjustified interference with the business relationship or procurement of the contract's breach; and (4) damage to the plaintiff as a result of the interference." *Howard v. Murray,* 184 So.3d 1155, 1166 (Fla. 1st DCA 2015) (citations omitted).

Count V alleges a claim of tortious interference with Exclusive's relationship with NUFIC which caused NUFIC to wrongfully deny the insurance claims. (Doc. #92-1, ¶ 284.) Count V alleges all four elements of a tortious interference claim. (*Id.* at ¶¶ 273-275, 285.) These allegations are sufficient to satisfy the Florida pleading standard.

Contrary to Defendants' arguments, Florida courts have recognized that, in insurance cases, "[a]n agent is individually liable to a third person for the agent's tortious conduct." *Liberty Surplus Ins. Corp. v. First Indem. Ins. Servs., Inc.,* 31 So.3d 852, 856 (Fla. 4th DCA 2010) (citation omitted). Florida law attaches liability to an insurer's agent not "based upon the existence of any contractual relationship between the agent and a principal but upon the common law obligation that every person must so reasonably act or use

that which he or she controls as not to harm another." *Sussman v. First Fin. Title Co. of Fla.,* 793 So.2d 1066, 1069 (Fla. 4th DCA 2001). "An agent or broker also has a duty of reasonable care [to a customer] in rendering advice on insurance matters." *Wachovia Ins.* Servs., Inc. *v. Toomey,* 994 So.2d 980, 990 n.4 (Fla. 2008) (quoting 5 *Florida Torts* § 150.24 (2007)). Ultimately, "[a]n intermediary may be liable to an insured on both tort and contract theories." Douglas R. Richmond, *Insurance Agent and Broker Liability,* 40 Tort Trial & Ins. Prac. L.J. 1, 10 (2004).

(ii) Aiding and Abetting

Count XIII of the TAC alleges that J.S. Held "aided and abetted AIG and AIG CLAIMS in tortiously interfering with Exclusive Group's ability to obtain payment for the Claims." (Doc. #92-1, ¶ 484).

Generally, to state a claim for aiding and abetting a tort plaintiff must allege: "(1) an underlying violation on the part of the primary wrongdoer; (2) knowledge of the underlying violation by the alleged aider and abetter; and (3) the rendering of substantial assistance in committing the wrongdoing by the alleged aider and abettor." *Taubenfeld v. Lasko,* 324 So.3d 529, 543-44 (Fla. 4th DCA 2021) (citing *Lawrence v. Bank of Am., N.A.,* 455 F. App'x 904, 906 (11th Cir. 2012) (applying Florida law)). Thus, a cause of action for aiding and abetting tortious interference requires a plaintiff to allege: 1) the existence of the underlying tortious interference on the part of a primary wrongdoer; 2) knowledge of the tortious interference by the alleged aider and abettor; and 3) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *Logan v. Morgan, Lewis & Bockius*

LLP, 350 So.3d 404, 410 (Fla. 2d DCA 2022). The allegations in Count XIII of the TAC (Doc. #92-1, ¶¶ 471, 473-474, 475, 480) are sufficient to satisfy the Florida pleading standard.

(iii) Negligence Claim

Count IX alleges a claim of negligence, asserting that J.S. Held "negligently interfered with Exclusive Group's ability to obtain payment for the Claims" (*Id.* at ¶ 383). The Magistrate Judge's Order did not discuss the negligence claim. As noted above, tortious interference requires an intentional and unjustified interference with the business relationship or procurement of the contract's breach. *Howard,* 184 So.3d at 1166. Florida does not recognize a claim for negligent tortious interference with a contract or business relationship. *Florida Power & Light Co. v. Fleitas,* 488 So.2d 148, 151-52 (Fla. 3d DCA 1986). Since this count does not state a claim upon which relief may be granted, Count IX of the TAC will be stricken.

(4) Equitable Factors

Finally, a district court must balance the equities which may be involved in the case. *Hensgens,* 833 F.2d at 1182. Both sides essentially argue that they have a "right" to proceed in the forum of their choice, with Plaintiff choosing the state forum and Defendants choosing the federal forum. Neither is wrong. It has long been the law that "absent fraudulent joinder, plaintiff has the right to select the forum, to elect whether to sue joint tortfeasors and to prosecute his own suit in his own way to a final determination." *Parks v. The New York Times Co.,* 308 F.2d 474, 478

(5th Cir. 1962).[10] On the other hand, the federal removal statute specifically gives a defendant the ability to remove a case to federal court under certain circumstances. 28 U.S.C. § 1441. Given the Court's prior findings that Plaintiff was not dilatory and has alleged two causes of action which satisfy the Florida pleading standards, the Court concludes that the equitable factor favors Plaintiff.

After analyzing all four of the *Hensgens* factors *de novo,* the Court concludes, with the exception of Count XIII, the motion for leave to file a Third Amended Complaint should be granted and the case remanded to state court.

Accordingly, it is now

ORDERED:

1. Defendants' Objections to Magistrate Judge's Order (Doc. #108) is **SUSTAINED IN PART AND OVERRULED IN PART**.
2. Plaintiff's Motion to Amend (Doc. #92) is **GRANTED IN PART AND DENIED IN PART**. Count IX of the Third Amended Complaint (Doc. #92-1) is stricken for failure to state a claim upon which relief may be granted. The Third Amended Complaint, as thus modified, shall be deemed filed on the date of this Opinion and Order, and becomes the operative pleading in this case.

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[10] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

3. The case is remanded to the Collier County Twentieth Judicial Circuit Court and the Clerk of the Court shall transmit a certified copy of this Order to the Clerk of that Court. The Clerk shall terminate all pending motions and close the file.

DONE and **ORDERED** at Fort Myers, Florida, this 12th day of December 2023.

/s/ John E. Steele
Senior U.S. District Judge

Copies:
Counsel of Record

ORDER GRANTING LEAVE TO ADD PARTY AND REMANDING CASE TO STATE COURT, U.S. DISTRICT COURT MIDDLE DISTRICT OF FLORIDA (JULY 31, 2023)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

EXCLUSIVE GROUP HOLDINGS, INC.,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA, BBCG CLAIMS SERVICES, AIG CLAIMS, INC., AMERICAN INTERNATIONAL GROUP, INC.,

Defendants.

Case No: 2:22-cv-474-JES-NPM

Before: Nicholas P. MIZELL, U.S. Magistrate Judge.

ORDER GRANTING LEAVE TO ADD PARTY AND REMANDING CASE TO STATE COURT

Plaintiff Exclusive Group Holdings, Inc. ("Exclusive Group") moves for leave to join a non-diverse defendant and for remand to state court. (Doc.

92). For the reasons discussed below, the motion is granted, and the case is remanded.

I. Background

Exclusive Group brings this action for breach of an insurance contract. Defendant National Union Fire Insurance Co. of Pittsburgh, Pennsylvania ("NUFIC") issued an insurance policy providing coverage to Exclusive Group. From August to October 2020, Exclusive Group filed several claims with NUFIC seeking indemnification under the policy, which NUFIC ultimately denied. But NUFIC did not act alone. Defendant BBCG Claims Services, an outside adjusting firm, was appointed to help review several of Exclusive Group's claims.[1] So Exclusive Group believes BBCG shares fault for NUFIC's allegedly improper denial of indemnification.

Now, Exclusive Group claims that it has identified another agency, J.S. Held LLC, that was also involved in rejecting NUFIC's insurance claims. And Exclusive Group seeks leave to amend the complaint to add J.S. Held as a defendant. (Doc. 92). The proposed claims against J.S. Held include negligence, tortious interference of contract, and aiding and abetting tortious interference. (Doc. 92-1). But as it turns out, J.S Held is non-diverse,[2] which means joining J.S. Held would

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[1] It is disputed whether NUFIC, AIG Claims, Inc., or AIG Inc. appointed BBCG.

[2] J.S. Held is a limited liability company with a Florida member. (Doc. 92 at 8-9; Doc. 92-1 ¶ 11). Because an LLC is a citizen of every state in which its members are a citizen, J.S. Held is a Florida citizen. *See Bal Harbour Shops, LLC v. Saks Fifth Ave. LLC,* No. 1:20-cv-23504, 2022 WL 17733824, *2 (S.D. Fla. Dec. 9, 2022) ("It is well-established that the citizenship of a limited

divest the court of subject-matter jurisdiction. *Flintlock Const. Servs., LLC v. Well-Come Holdings, LLC,* 710 F.3d 1221, 1224 (11th Cir. 2013) ("Diversity jurisdiction requires complete diversity; every plaintiff must be diverse from every defendant.").[3] So in addition to adding J.S. Held, Exclusive Group also asks the court to remand this matter to state court. (Doc. 92). The defendants oppose the motion arguing that joinder of J.S. Held would be improper. (Doc. 93).[4]

II. Analysis

The court begins, as it must, with 28 U.S.C. § 1447(e). *See Ingram v. CSX Transp., Inc.,* 146 F.3d 858, 862 (11th Cir. 1998). This section provides that "[i]f after removal the 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." 28 U.S.C. § 1447(e). This decision "is left to the sound discretion of the court." *Laposa v. Walmart Stores E. LP,* No. 2:20-cv-182FTM29NPM, 2020 WL 2301446, *2 (M.D. Fla. May 8, 2020) (citing *Dean v. Barber,* 951 F.2d 1210, 1215 (11th Cir. 1992)). But "because the

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liability company is determined based on the citizenship of its members."). Exclusive Group is also a Florida citizen. (Docs. 79 ¶ 6, 92-1 ¶ 6).

[3] Unless otherwise indicated, all internal quotation marks, citations, and alterations have been omitted in this and later citations.

[4] Notably, Exclusive Group previously moved (unopposed) to add J.S. Held. (Doc. 89). But the court denied the motion without prejudice because Exclusive Group did not address whether J.S. Held's citizenship might affect this court's subject-matter jurisdiction. (Doc. 91).

court's decision will determine the continuance of jurisdiction . the district court should scrutinize a motion to amend to join a non-diverse party more closely than a motion to amend under Rule 15[.]" *Kleopa v. Prudential Inv. Mgmt., Inc.,* No. 08-81386-CIV, 2009 WL 2242606, *2 (S.D. Fla. July 27, 2009).

Section 1447(e) does not provide how a court should determine whether to remand, and the Eleventh Circuit "has no binding precedent that addresses how a district court should decide whether to permit the joinder of a non-diverse defendant after removal." *Hickerson v. Enterprise Leasing Co. of Ga., LLC,* 818 F. App'x 880, 885 (11th Cir. 2020). Courts typically consider several factors, including:

> (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; (2) whether the plaintiff has been dilatory in asking for the amendment; (3) whether the plaintiff will be significantly injured if the amendment is not allowed; and (4) any other factors bearing on the equities.

Laposa, 2020 WL 2301466, at *2. No one factor is dispositive. The court addresses each in turn.

A. The purpose for the amendment is not concerned with avoiding federal jurisdiction.

Although defendants argue that Exclusive Group seeks to add J.S. Held to defeat federal jurisdiction, the court is not convinced. Exclusive Group first sought leave to add J.S. Held without realizing it was a non-diverse party. (Doc. 89). It was the court that prompted Exclusive Group to correctly identify J.S.

Held's citizenship, which just so happened to be Florida. It is only upon this realization that Exclusive Group now seeks remand. The court will not fault J.S. Held for complying with the court's order.

Exclusive Group also seems to have contemplated J.S. Held in its original complaint. At the time of removal, the complaint included seven corporate Doe defendants.[5] These Doe corporations were "believed to be related insurance or insurance service companies who handled [Exclusive Group's] claims" that "may be responsible for the claims management [and] adjustment" of such claims. (Doc. 4 ¶¶ 8, 11). And they "had an intentional and unjustified interference with" Exclusive Group and NUFIC's business relationship "by improperly causing NUFIC to deny the claims." (Doc. 4 ¶ 130). This almost mirrors the current allegations against J.S. Held, suggesting J.S. Held was an anticipated defendant even before removal; Exclusive Group just needed the time to identify it.

B. Plaintiff was not dilatory in seeking the amendment.

By definition, Exclusive Group's motion to join J.S. Held is timely because it was filed within the deadline set forth in the scheduling order.[6] *See, e.g.,*

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[5] Doe defendants are not permitted in federal court. *See Vielma v. Gruler,* 808 F. App'x 872, 880 (11th Cir. 2020) ("As a general matter, fictitious-party pleading is not permitted in federal court."). So Exclusive Group had to remove them from the original state-court complaint.

[6] The deadline to add or join parties was March 1, 2023. (Doc. 62). Exclusive Group filed its initial motion for leave to amend on this date. But, after denying the motion without prejudice on March 9, 2023, the court permitted Exclusive Group another two

Morton v. Starbucks Corp., No. 2:21-cv-00314-NAD, 2021 WL 6113768, *7 (N.D. Ala. Dec. 27, 2021) (finding the plaintiff was not dilatory when she filed the amended complaint before the court-ordered deadline to add parties); *Farach-Loveira v. Cleveland Steel Tool Co.,* No. 19-21403-CIV, 2019 WL 11506124, *3 (S.D. Fla. Aug. 23, 2019), *report and recommendation adopted,* 2019 WL 11506125 (Sept. 17, 2019) (same). A plaintiff may nevertheless be dilatory in adding a non-diverse party when it "waits an unreasonable amount of time before asking for an amendment, despite having been able to ascertain the party's role in the suit all along." *Lockhart v. Greyhound Lines, Inc.,* No. 2:22-cv-473-SPC-KCD, 2023 WL 155279, *4 (M.D. Fla. Jan. 11, 2023) (citing *Hickerson,* 818 F. App'x at 886). While Exclusive Group is seeking this amendment almost eight months after removal, it did not become aware of J.S. Held's role in the insurance-claims-denial process until October 2022 (well after defendants removed this case), at which time it promptly investigated further. A month later, it served a document subpoena on J.S. Held, the responses to which were not received until January 30, 2023. A month after that, Exclusive Group moved to add J.S. Held as a defendant. This is not an unreasonable timeline.

C. Denying the amendment would impose substantial and inappropriate burdens.

Exclusive Group asserts that denying amendment and remand would result in parallel litigation. Although true, this factor is "likely to be present whenever a

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weeks to renew its motion. (Doc. 91). It timely filed the current motion on March 23.

plaintiff in a removed case seeks to add a nondiverse defendant." *Gallegos v. Safeco Ins. Co. of Indiana,* No. CIV.A. H-09-2777, 2009 WL 4730570, *5 (S.D. Tex. Dec. 7, 2009). Nevertheless, the claims against J.S. Held, BBCG, AIG Claims, Inc., and AIG Inc. are identical. Similarly, Exclusive Group alleges J.S. Held aided AIG and AIG Claims in tortiously interfering with the insurance contract. (Doc. 92-1 ¶¶ 466-86). Given the similarity and overlap of the claims, parallel litigation should be avoided. *See Laposa,* 2020 WL 2301446, at *4 ("The Court agrees [parallel litigation] would constitute a significant injury . . . given the similarity of the claims."). Plus, requiring Exclusive Group to maintain two separate lawsuits—both based entirely on state law—in two different forums would lead to unnecessary expense (for all parties), waste limited judicial resources (both state and federal), and run the risk of inconsistent outcomes. *See Clark v. Doe,* No. 1:20-cv-3756-MLB, 2021 WL 1439931, *3 (N.D. Ga. Apr. 16, 2021) ("The Court recognizes the expense, waste of judicial resources, and risk of inconsistent outcomes that would result from denying the amendment and requiring Plaintiff to initiate parallel litigation in state court, all of which weigh in favor of allowing the amendment.").

D. The balance of equities favors the joinder and remand.

As for other factors bearing on the equities, the court addresses two raised by defendants: prejudice to defendants and the legitimacy of Exclusive Group's claims against J.S. Held.

1. Remand does not pose any undue prejudice.

Defendants argue that Exclusive Group's delay in adding J.S. Held will prejudice their ability to return to federal court. Specifically, 28 U.S.C. § 1446(c)(1) bars a defendant from removing a case to federal court based on diversity "more than 1 year after commencement of the action." Since Exclusive Group filed this action in state court on June 25, 2022 (Doc. 4), the one-year removal period expired on June 25, 2023—a few weeks ago. Defendants assert that, if this action is remanded, they will be statutorily barred from removing it. This point is unmoving.

Ultimately, Congress was aware circumstances such as this would arise when it established the one-year-removal limitation for diversity cases. And in 2011, Congress amended the statute to add an exception to the one-year rule for cases in which "the district court finds that the plaintiff acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1); *Hajdasz v. Magic Burgers, LLC,* No. 6:18-cv-1755ORL22KRS, 2018 WL 7436133, at *6 (M.D. Fla. Dec. 10, 2018) ("Congress amended 28 U.S.C. § 1446(c) in 2011 to allow for a bad faith exception to the one-year limitation on diversity removal, recognizing that without such an exception, plaintiffs could intentionally avoid removal of an otherwise removable case."). Courts have found that bad faith can be inferred when the plaintiff seeks amendment outside the statutory time bar. *See Noyes v. Universal Underwriters Ins. Co.,* 3 F. Supp. 3d 1356, 1363 (M.D. Fla. 2014). But here, the one-year removal period had not yet expired when Exclusive Group filed its timely motion. And, as previously

observed, there is no indication Exclusive Group had the one-year deadline in mind, or even a potential remand to state court, when it sought to add J.S. Held. With Exclusive Group acting in good faith, remand does not subject defendants to any undue prejudice.

2. The joinder of J.S. Held is not fraudulent.

Defendants argue that if the case is remanded, Exclusive Group's claims against J.S. Held would be dismissed by the state court. But they carry the heavy burden of demonstrating by clear and convincing evidence that "there is no possibility the plaintiff can establish a cause of action against the resident defendant." *Henderson v. Wash. Nat'l Ins. Co.,* 454 F.3d 1278, 1281 (11th Cir. 2006); *see also Stillwell v. Allstate Ins. Co.,* 663 F.3d 1329, 1332 (11th Cir. 2011). "This standard does not require that the plaintiff have a winning case against the allegedly fraudulent defendant; he need only have a possibility of stating a valid cause of action in order for the joinder to be legitimate." *Lockhart,* 2023 WL 155279, at *3. In other words, "if there is *any* possibility that the state law might impose liability on a resident defendant under the circumstances alleged in the complaint" remand is necessary. *Florence v. Crescent Res., LLC,* 484 F.3d 1293, 1299 (11th Cir. 2007) (emphasis added).

Exclusive Group proposes claims against J.S. Held for negligence, tortious interference of contract, and aiding and abetting tortious interference.[7] As for

[7] The court does not address the negligence claim.

the tortious interference claim, Florida law provides that:

> One cannot tortiously interfere with a contract to which it is a party. Consequently, an agent generally cannot be held liable for tortiously interfering with the contract of its principle because the agent is privileged to act in the best interest of the principle. However, the agent can be considered a third party to the contract for the purposes of a tortious interference claim if the agent acts outside the scope of agency or is not acting in the principle's best interests.

Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 527 F. Supp. 2d 1355, 1367-68 (M.D. Fla. 2007) (applying Florida law). Accordingly, a claim for tortious interference is possible against J.S. Held (the alleged agent of NUFIC) if Exclusive Group can demonstrate that J.S. Held acted outside the scope of its agency relationship or against NUFIC's best interests. Exclusive Group has pled as much in the proposed third-amended complaint. (Doc. 92-1 ¶ 281).

The aiding and abetting claim is also possible. Defendants argue that Exclusive Group "has not cited any case allowing such an action." (Doc. 93 at 15). This is not entirely true. As Exclusive Group points out, "Florida courts have recognized aiding and abetting *the commission of a tort* as a standalone claim." *S. Y. v. Wyndham Hotels & Resorts, Inc.,* 519 F. Supp. 3d 1069, 1093 (M.D. Fla. 2021) (emphasis added). The court is unaware of any case (and defendants have not directed the court to any) finding an exception when the underlying tort is for tortious interference. So it is not inconceivable that a Florida court would recognize

such a claim. *See Taubenfeld v. Lasko,* 324 So.3d 529, 544 (Fla. 4th DCA 2021) (observing the Second Restatement of Torts "recognizes liability for aiding and abetting the tortious conduct of another without distinguishing among different underlying torts").

Defendants also argue that, even if these claims are viable, they would be dismissed by the state court as contingent and premature. Given J.S. Held is only liable for tortious interference and aiding and abetting if Exclusive Group prevails on the underlying breach-of-contract claim against NUFIC, defendants believe the claims against J.S. Held are not ripe until after an underlying coverage determination is made. Thus, the argument goes, a Florida court would likely dismiss the "contingent" claims as premature pending resolution of the underlying coverage dispute. (Doc. 93 at 16-17). This argument fails on multiple fronts.

Florida law dictates that a cause of action accrues "when the last element constituting a cause of action occurs." Fla. Stat. § 95.031(1). So Exclusive Group's tortious interference claim accrued when the breach occurred, not when a court determination is made that NUFIC breached. It is true that a resulting breach of the insurance contract is necessary, and must be alleged, to prevail on the tortious-interference claim. *See Niemis v. CCC Intelligent Sols., Inc.,* No. 8:20-cv-2956-WFJ-JSS, 2021 WL 3508882, *3 (M.D. Fla. Aug. 10, 2021) ("To establish a claim for tortious interference, [plaintiff] must show there was a breach of the insurance policy."); *Sourcing Sols. USA, Inc. v. Kronos Am., LLC,* No. 10-23476-CIV, 2011 WL 13223514, *3 (S.D. Fla. Jan. 26, 2011) ("[A] breach of the contract is a necessary element of a claim for tortious interference with a contractual relationship.").

But a judicial determination that NUFIC breached the insurance contract is not a prerequisite to bringing a tortious-interference cause of action. Similarly, only the allegation of an underlying tort is required to assert an aiding-and-abetting claim. *See Lawrence v. Bank of Am., NA.,* 455 F. App'x 904, 906 (11th Cir. 2012) (noting that to state a claim for aiding and abetting a tort in Florida, a plaintiff must *allege* an underlying violation on the part of the primary wrongdoer). So Exclusive Group's claims are not premature.[8]

To be sure, there are instances in which an underlying judicial proceeding must conclude before a claim ripens. For instance, insurance-bad-faith litigation.[9] Fla. Stat. § 624.1551. And the Florida Supreme Court has held that negligent-procurement-of-coverage and malpractice claims accrue "when the client incurs damages at the conclusion of the related or underlying judicial proceedings." *Blumberg v. USAA Cas. Ins. Co.,* 790 So.2d 1061, 1065 (Fla. 2001). But notably, this

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[8] Adopting defendants' logic could result in three separate lawsuits. First, the underlying breach of insurance contract. If coverage is determined, the parties would then litigate the tortious interference claims. And if any defendant is held liable for tortious interference, the parties would then have to litigate whether any defendant aided and abetted such tortious interference. This would be incredibly inefficient, and such is not the law.

[9] Defendants insist that Exclusive Group's claims against J.S. Held are "premised on allegedly improper claims handling" and "are nothing but a proxy for [Exclusive Group's] premature bad faith claims and pursuit of broader discovery and damages that [Exclusive Group] could seek against NUFIC in a bad faith claim." (Doc. 93 at 12). But Exclusive Group is master of its complaint and, as pleaded, it does not advance an insurance-bad-faith claim.

holding is limited to negligent-procurement and malpractice claims and was based on "the circumstances presented." *Id.* Indeed, each case cited by defendants to support their position is a negligent-procurement-of-coverage action. *See Pebb Cleveland, LLC v. Fireman's Fund Ins. Co.,* No. 14-81496-CIV, 2015 WL 328247, *2 (S.D. Fla. Jan. 23, 2015); *Looney v. Protective Life Ins. Co.,* No. 8:07-cv-1020T-17TBM, 2007 WL 2669190, *3 (M.D. Fla. Sept. 6, 2007); *Fontainebleau Gardens Condo. Ass 'n, Inc. v. Pac. Ins. Co.,* 768 F. Supp. 2d 1271, 1277 (S.D. Fla. 2011). The court is unaware of any case extending *Blumberg's* holding to tortious-interference or aiding-and-abetting claims.

Even accepting defendants' position that the claims against J.S. Held are premature, it is still questionable whether a state court would dismiss them. "Florida law is unclear regarding whether a premature [claim] against an insurance agent should be abated or stayed or, rather, dismissed without prejudice while an underlying action to determine insurance coverage is ongoing." *Sperling v. Banner Life Ins. Co.,* No. 10-22289-CIV-HUCK, 2010 WL 4063743, *3 (S.D. Fla. Oct. 14, 2010). In fact, the *Blumberg* court noted that "the proper remedy for premature litigation is an abatement or stay of the claim for the period necessary for its maturation under the law." *Blumberg,* 790 So.2d at 1065 n.2. Considering some Florida courts (including the Florida Supreme Court in *Blumberg)* suggest that premature claims should be abated, not dismissed, "there is more than a 'possibility' that a state court would find that the [third-amended complaint] states a cause of action" against J.S. Held. *Sperling,* 2010 WL 4063743, at *3.

Either way, the dismissal versus abatement dispute is immaterial. As one federal court explained:

> The remand analysis does not concern itself with whether Florida procedural law prefers dismissal without prejudice or stay/abatement. The remand analysis instead finds the very fact of that ambiguity or inconsistency in Florida procedural law to warrant remand. Indeed, if there is this dispute in Florida case law between dismissal without prejudice and stay/abatement, then the Florida courts are the better forum to answer that question of Florida law. Neither does the remand analysis answer the merits of the contingent claim against the insurance agent. The remand analysis asks only whether there is a possibility that the Plaintiff can establish a prima facie cause of action against the non-diverse party[.]

Robrecht v. United of Omaha Life Ins. Co., No. 15-14149-CIV, 2015 WL 12857354, *3 (S.D. Fla. Oct. 23, 2015), *report and recommendation adopted,* 2015 WL 12859119 (Nov. 18, 2015); *see also Sperling,* 2010 WL 4063743, at *3 ("This Court is faced with a motion to remand, not a motion to dismiss [plaintiff's] complaint, and, hence, expresses no opinion on the proper result under Florida law."). As noted above, it is possible Exclusive Group can establish tortious-interference and aiding-and-abetting claims against J.S. Held. For present purposes, this is enough.

III. Conclusion

Based on the foregoing, Exclusive Group's motion for leave to add J.S. Held as a defendant and for

remand (Doc. 92) is GRANTED. If no objections are filed within 14 days of this order, which is the time allotted under Civil Rule 72(a),[10] the clerk is directed to remand this case back to state court by transmitting a certified copy of this order to the clerk of court for the Twentieth Judicial Circuit in and for Collier County, Florida. Following remand, the clerk is directed to deny any pending motions, terminate all deadlines, and close the case. If any objections are timely filed, then the clerk is directed to withhold disposition until so ordered by the District Judge.

ORDERED on July 31, 2023.

/s/ Nicholas P. Mizell
U.S. Magistrate Judge

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[10] "Because a motion to remand does not address the merits of the case but merely changes the forum, the Court finds it is a non-dispositive matter that does not require a report and recommendation." *Lockhart,* 2023 WL 155279, at *5 n.3. Nor is it "appealable if entered by a district judge[.]" *In re: Authority of United States Magistrate Judges in the Middle District of Florida,* 8:20-mc-100-T-23, Doc. 3, at *4 (M.D. Fla. Oct. 29, 2020); 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise" subject to limited exceptions not applicable here).

RELEVANT STATUTORY PROVISION

28 U.S. Code § 1447
Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the 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.