

# APPENDIX A



Twombly, 550 U.S. 544, 570 (2007)). A complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Id. (citing Twombly, 550 U.S. at 556).

At the motion to dismiss stage, “all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff.” FindWhat Inv’r Grp. v. FindWhat.com, 658 F.3d 1282, 1296 (11th Cir. 2011) (quoting Garfield v. NDC Health Corp., 466 F.3d 1255, 1261 (11th Cir. 2006)).

## **II. BACKGROUND**

In the complaint, Plaintiff alleges that he consumed Five Hour Energy product in the weeks leading up to April 19, 2013, consumed one Red Bull energy drink in the morning of April 19, 2013, and consumed two Yuengling beers that evening. Dkt. No. 1-1 ¶ 14. He awakened early the next morning and fainted in his home. Id. Upon waking from the fainting episode, he was driven to the hospital by his father and was subsequently diagnosed with and hospitalized for atrial fibrillation. Id. ¶¶ 11, 14, 15. This injury is the subject of his current suit.

Plaintiff filed his complaint in the Superior Court of Fulton County, Georgia, on July 12, 2021. Id. at 1. On August 16, 2021, Defendants removed the

matter to this Court, Dkt. No. [1],<sup>1</sup> and thereafter filed the motions to dismiss that are presently under consideration, Dkt. Nos. [3, 4, 10].

### III. DISCUSSION

In Georgia, the statute of limitations for personal injury claims, including claims for intentional infliction of emotional distress, is two years. O.C.G.A. § 9-3-33; M.H.D. v. Westminster Schs., 172 F.3d 797, 803 (11th Cir. 1999) (citing Alpharetta First United Methodist Church v. Stewart, 472 S.E.2d 532, 533 (Ga. Ct. App. 1996)). Because the breach of fiduciary duty claim is derived from the personal injury, the limitation period for that claim is also two years. Huddle v. Heindel, 821 S.E.2d 61, 66 (Ga. Ct. App. 2018) (explaining that Georgia has no specific statute of limitations for breach of fiduciary duty claims and that courts must examine the injury alleged and the conduct giving rise to the claim to determine the appropriate limitations period). “The statute of limitation for claims alleging fraud and misrepresentation is four years,” Nash v. Ohio Nat’l Life Ins. Co., 597 S.E.2d 512, 515 (Ga. Ct. App. 2004) (citing O.C.G.A. § 9-3-31), as is the limitation period for an unjust enrichment claim, Burns v. Dees, 557 S.E.2d 32, 39 (Ga. Ct. App. 2001) (applying the limitations period of O.C.G.A. § 9-3-26), and a claim asserted under Georgia’s Uniform Deceptive Trade Practices Act, Unique Sports Prods., Inc. v. Babolat VS, 403 F. Supp. 2d 1229, 1240 (N.D. Ga.

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<sup>1</sup> On September 8, 2021, the Court entered an Order directing Defendants to supplement their notice of removal to properly state the parties’ citizenships. Dkt. No. [13]. There was an issue as to whether Living Essentials could file its complete information regarding its LLC members under seal. See Dkt. Nos. [19, 25]. The Court has examined Living Essentials’ filings and has determined that the Court’s Order to Show Cause was satisfied.

2005) (citing O.C.G.A. § 10-1-372). Therefore, counting from the date Plaintiff claims to have been injured and diagnosed, he would have reached the end of the limitations period on all of his claims no later than April 20, 2017.<sup>2</sup>

In Plaintiff's response to the motions to dismiss, he attempts to oppose Defendants' arguments by arguing facts not alleged in his complaint. Dkt. No. [12] at 4-5. That is not allowed, however, because the Court is restricted to the facts alleged in the complaint and the inferences the Court can make on Plaintiff's behalf. See Brooks v. Blue Cross and Blue Shield of Fla, Inc., 116 F.3d 1364, 1368-69 (11th Cir. 1997) ("[T]he analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and attachments thereto."); cf. Burgess v. Religious Tech. Ctr., Inc., 600 F. App'x 657, 665 (11th Cir. Jan. 26, 2015) ("We repeatedly have held that plaintiffs cannot amend their complaint through a response to a motion to dismiss."). Based on the allegations as stated in the complaint, Plaintiff's claims are barred by the statute of limitations.<sup>3</sup>

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<sup>2</sup> Because a punitive damages claim is derivative of substantive claims, the punitive damages claims fail with the underlying substantive claims. See Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1304-05 (11th Cir. 2009) (explaining that under Georgia law, a punitive damages claim is derivative of a tort claim).

<sup>3</sup> While the Court does not decide the motion on this basis, it is also worth noting that Plaintiff stated in the complaint that he "recalls [feeling] an unusual sensation in his chest after consuming the 5-Hour Energy Berry Regular Strength product," Dkt. No. 1-1 ¶ 11, which reduces the plausibility of Plaintiff's allegation in his response brief that he did not become aware of the cause of his injuries until the time he filed this lawsuit.

#### **IV. CONCLUSION**

For the reasons set forth above, Defendants' Motions to Dismiss [Doc. 3, 4, 10], are **GRANTED**. The case is **DISMISSED WITHOUT PREJUDICE**. All other motions are **DENIED AS MOOT**. The Clerk is instructed to **CLOSE** this case.

**IT IS SO ORDERED** this 5th day of November, 2021.

  
**Leigh Martin May**  
**United States District Judge**