APPENDIX

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10243
Non-Argument Calendar

MATTHEW MCCURLEY,

Plaintiff-Appellant,

versus

WELLS FARGO BANK N.A.,
HOUSING & URBAN DEVELOPMENT,
ARSENI ZAITSEV,
RANDAL ALONSO MANGHAM,

Defendants-Appellees,

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:22-cv-04976-SEG

Before WILSON, BRASHER, and ABUDU, Circuit Judges.

PER CURIAM:

Matthew McCurley, proceeding pro se, appeals the district court's grant of the defendants' motions to dismiss his pro se amended complaint raising claims related to fraud, negligence, and Racketeering Influenced and Corrupt Organizations (RICO) Act violations. On appeal, he argues that the district court abused its discretion by dismissing his amended complaint as a shotgun pleading because he claims to have fixed the deficiencies identified in his original complaint. After careful review, we affirm.

I. Background

McCurley's claims trace back to October 2014, when he attempted to purchase a residential property at 559 Pryor Street in Atlanta as his principal residence through Wells Fargo's "Homebuyers Priority Program." This program aimed to prioritize selling homes to first-time homebuyers over real estate investors. Wells Fargo sold the property to Arseni Zaitsev—who McCurley alleges was a real estate investor—for less than McCurley allegedly offered. McCurley alleges the sale resulted from Wells Fargo colluding and price rigging with Zaitsev. McCurley emailed the Wells Fargo Board of Directors about this incident in November 2014.

Throughout 2015, McCurley attempted to purchase additional properties in New York and Georgia, which he alleges he was unable to buy because of fraudulent conduct by Wells Fargo. McCurley retained Randal A. Mangham as counsel in February

2016, related to his claims against Wells Fargo. Although McCurley appears to have been aware of his potential claims against Wells Fargo at that time, his counsel does not appear to have ever filed a lawsuit.

McCurley filed his initial pro se complaint in December 2022. The two-page complaint did not identify specific legal claims, but the civil cover sheet listed seven causes of action: (1) Negligent Misrepresentation, (2) Negligence by Failure to Disclose, (3) Real Estate Fraud, (4) Statutory Fraud, (5) Intentional Misrepresentation (Common Law Fraud), (6) Deceptive Trade Practices Act Violations, and (7) Racketeering (RICO Act violations). In July 2023, the district court granted Wells Fargo and Zaitsev's motions to dismiss without prejudice. Given McCurley's pro se status, the district court permitted him to file an amended complaint and provided specific instructions such as "set forth specific, discrete causes of action" and "provide specific facts—in separately numbered paragraphs— to support each allegation."

McCurley filed an amended complaint in August 2023. This amended complaint contained 70 pages and had 141 pages of attachments. Liberally construed, McCurley's amended complaint seems to assert negligent misrepresentation claims against Wells Fargo and Zaitsev and fraud claims against all defendants.[1] Wells

Fargo and Zaitsev filed motions to dismiss. McCurley's response requested leave to amend the complaint to add new defendants and a motion for default judgment as to U.S. Department of Housing and Urban Development (HUD). In December 2023, the district court granted Wells Fargo and Zaitsev's motions to dismiss with prejudice for two reasons: (1) McCurley's amended complaint was an improper shotgun pleading and (2) McCurley's claims were time barred. McCurley timely appealed.

II. Applicable Law

We review a district court's dismissal of a complaint as a shotgun pleading for abuse of discretion. *Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021). We also review the denial of motions for default judgment for abuse of discretion. *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1244 (11th Cir. 2015) (per curiam).

Shotgun pleadings are complaints that do not provide "a short and plain statement of the claim showing that the pleader is entitled to relief" as is

[1] McCurley's amended complaint listed the defendants as follows: "Wells Fargo Bank NA, Housing and Urban Development, Arseni Zaitsev, corrupt and negligent regulators known and unknown and others. Malpractice of Attorney Randal Alonso Mangam, Defendants' failure of Bar."

required by Federal Rule of Civil Procedure 8(a)(2). Shotgun pleadings include complaints that: (1) contain "multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint"; (2) contain pervasive "conclusory, vague, and immaterial facts not obviously connected" to a specific claim; (3) fail to "separate each cause of action or claim for relief into a different count"; or (4) assert "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts

or omissions, or which of the defendants the claim is brought against." *Barmapov*, 986 F.3d at 1324–25 (quotations omitted).

Though pro se pleadings will be liberally construed, a court may not "rewrite an otherwise deficient pleading in order to sustain an action." *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1169 (11th Cir. 2014) (quotations omitted). When pro se plaintiffs receive "non-merits dismissals on shotgun pleading grounds, we have required district courts to sua sponte allow a litigant one chance to remedy such deficiencies." *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1295 (11th Cir. 2018). If the plaintiff does not correct the deficiencies of the initial complaint, the court may dismiss the action. *Id.*

Several other federal and state rules are relevant to our review. First, requests for leave to amend a complaint cannot be made in a response motion. *See Chabad Chayil, Inc. v. Sch. Bd. Of Miami-Dade Cnty.*, 48 F.4th 1222, 1236 (11th Cir. 2022). Further, to serve process upon a federal agency, "a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency." Fed. R. Civ. P. 4(i)(2). Entering "default judgment is only warranted when there is a sufficient basis in the pleadings for the judgment entered." *Surtain*, 789 F.3d at 1245 (internal quotations omitted).

Under Georgia law, fraud has a four-year statute of limitations. O.C.G.A. § 9-3-31. Federal RICO claims also have a four-year statute of limitations. *See Rotella v. Wood*, 528 U.S. 549, 553

(2000). Georgia RICO claims have a five-year statute of limitations. O.C.G.A. § 16-14-8.

III. Analysis

McCurley raises twelve issues on appeal, many of which track with the two reasons the district court dismissed his case: failure to fix the shotgun pleading deficiencies in his amended complaint and his claims being time barred.[2]

After his first complaint was deemed a shotgun complaint, McCurley received directions from the district court about how to eliminate those deficiencies in an amended complaint. McCurley's amended complaint retained the traits of a shotgun pleading, such as several "conclusory, vague, and immaterial facts," not clearly connected to any specific claim. *See Barmapov*, 986 F.3d at 1324–25. Further, even when liberally construed, the amended complaint continued to lack clarity regarding which claims were brought against each of the multiple defendants. *See id.* The district court did not abuse its discretion in deeming McCurley's amended complaint a shotgun pleading.

Further, the district court did not abuse its discretion in denying McCurley's attempt to add parties to the case in his response to Wells Fargo and Zaitsev's motions to dismiss below. McCurley could not add parties to the case via his response. *See Chabad Chayil*, 48 F.4th at 1236. Similarly, the

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[2] McCurley also raises the following issues on appeal: violation of his Seventh Amendment right to a jury trial; improper discovery practices, undermining the "just, speedy, and inexpensive determination of every action" as required by Federal Rule of Civil Procedure 1; characterizing what he intended to be exhibits as "miscellaneous attachments"; not recognizing a genuine issue of material fact; and a lack of updates from the counsel he obtained in 2016. We do not find these arguments meritorious.

district court's denial of McCurley's motion for default judgment as to HUD was not an abuse of discretion given his inability to show appropriate service of process to HUD or a sufficient basis for the claim in his pleadings. Fed. R. Civ. P. 4(i)(2); *Surtain*, 789 F.3d at 1245.

Beyond deeming McCurley's amended complaint a shotgun pleading, the district court also found that his claims were time barred because they stemmed from events that occurred in 2014. McCurley wrote a letter to the Wells Fargo board of directors in 2014 and retained an attorney related to these claims in 2016. Both actions indicate that McCurley was aware of his potential claims arising out of the sale of the Pryor Street property. McCurley's initial complaint in this case was filed in 2022. By bringing the claim seven years after 2015 and eight years after 2014, McCurley well surpassed Georgia's four-year statute of limitations for fraud cases, Georgia's five-year statute of limitations for RICO cases, and the federal four-year statute of limitations for RICO cases. *See* O.C.G.A. §§ 9-3-31, 16-14-8; *Rotella*, 528 U.S. at 553.

For the foregoing reasons, we find that the district court did not abuse its discretion.

AFFIRMED.

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10243

MATTHEW MCCURLEY,

Plaintiff-Appellant,

versus

WELLS FARGO BANK N.A.,
HOUSING & URBAN DEVELOPMENT,
ARSENI ZAITSEV,
RANDAL ALONSO MANGHAM,
Malpractice of Attorney,

Defendants-Appellees,

CORRUPT AND NEGLIGENT REGULATORS
KNOWN AND UNKNOWN AND OTHERS,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:22-cv-04976-SEG

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgement of this Court.

Entered: August 19, 2024

For the Court: DAVID J. SMITH, Clerk of Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MATTHEW RYAN MCCURLEY, Plaintiff, v. WELLS FARGO BANK N.A., HOUSING, HOUSING AND URBAN DEVELOPMENT, ARSENI ZAITSEV, MALPRACTICE OF ATTORNEY RANDAL ALONSO MANGHAM, Defendants.	CIVIL ACTION NO. 1:22-CV-04976-SEG

ORDER

This case is before the Court on (1) Wells Fargo's motion to dismiss Plaintiff's amended complaint (Doc. 26), (2) Arseni Zaitsev's motion to dismiss Plaintiff's amended complaint (Doc. 27), (3) Plaintiff's request for leave to amend his complaint (Doc. 28), and (4) Plaintiff's motion for default judgment as to Defendant United States Department of Housing and Urban Development (Doc. 33). Having considered the parties' positions and applicable law, the Court enters the following order.

I. Background

Plaintiff Matthew McCurley filed this lawsuit on December 19, 2022. (Doc. 1.) McCurley's original complaint did not identify any particular legal claim, but the civil cover sheet accompanying it listed the following causes of action: "(1) Negligent Misrepresentation, (2) Negligence By Failure to Disclose, (3) Real Estate Fraud, (4) Statutory Fraud, (5) Intentional Misrepresentation (Common Law Fraud), (6) Deceptive Trade Practices Act Violations, [and] (7) Racketeering (RICO Act violations)[.]" (Doc. 1-1 at 2.) The central allegation in the original complaint was that Defendant Wells Fargo allegedly engaged in fraud in 2014 when it sold a residential property located at 559 Pryor Street SW, Atlanta, Georgia 30301 (the "Pryor Street Property") to a real estate investor, Defendant Arseni Zaitsev, instead of Plaintiff. (Doc. 1.)

On July 21, 2023, the Court granted Wells Fargo's motion to dismiss and dismissed Plaintiff's complaint without prejudice. (Doc. 17.) The Court found that Plaintiff's pleading was an improper shotgun complaint and that his claims were likely barred by applicable statutes of limitation. The Court further noted that "[i]t seems unlikely that McCurley will be able to plead facts in an amended complaint that will save his claims from the statutes of limitation discussed" in the order. (*Id.* at 16.) In consideration of Plaintiff's *pro se* status, however, the Court permitted Plaintiff to file an amended complaint to attempt to cure the deficiencies described in the Court's order. The Court additionally stated that any amended filing must:

1. Set forth specific, discrete causes of action;
2. State specific details about each of [Plaintiff's] alleged injuries;
3. Provide specific facts—in separately numbered paragraphs—to support each allegation;
4. Allege a type or amount of damages sought with regard to each legal claim; and
5. State a basis for this Court's jurisdiction and venue.

(*Id.* at 16–17.) Finally, the Court put Plaintiff on notice that he had failed properly to serve Defendants. (*Id.* at 20–21.)

Plaintiff filed his amended complaint on August 24, 2023. (Doc. 24.) The amended complaint is 70 pages long and has 141 pages of miscellaneous attachments. (Doc. 24, 24-1.) The amended complaint, which is, if anything, more difficult to decipher than the original complaint, appears to re-allege that Wells Fargo engaged in fraud in connection with the sale of the Pryor Street Property. (Doc. 24 at 69.) Specifically, Plaintiff appears to allege that in October 2014, Plaintiff tried to purchase the Pryor Street Property through Wells Fargo's "Homebuyers Priority Program"—a program that was meant to prioritize the sale of homes to first-time homebuyers over real estate investors. (Doc. 24-1 at 20, 25–31.) Wells Fargo allegedly sold this property to Defendant Zaitsev instead of Plaintiff. (Doc. 24 at 4.) This sale was allegedly the result of Wells Fargo's "collusion" and "bid-rigging" with Zaitsev. (*Id.* at 2–3.).

Liberally construed, Plaintiff's amended pleading further alleges that Wells Fargo engaged in additional fraudulent conduct by refusing to sell to Plaintiff four other residential properties: (1) a property located at 522 142nd Street, New York, New York 10031 (the "New York Property"), (2) a property located at 140 Valley Road, Atlanta, Georgia 30305 (the "Valley Road Property"), (3) a property located at 908 N. Highland Ave. NE, Atlanta, Georgia 30306 (the "Highland Ave. Property"), and (4) a property located at 535 Forest Hills Drive, Sandy Springs, Georgia 30342 (the "Forest Hills Drive Property"). (*Id.* at 69–70.) The amended complaint provides few details about these transactions, but Plaintiff seeks damages for "lost opportunities and price differentials" relating to these properties, which were allegedly "promised" to him by Wells Fargo employees. (*Id.*)

The amended complaint incorporates the causes of action that Plaintiff identified in the civil cover sheet accompanying his original complaint. (Doc. 24 at 2.) It appears that Plaintiff asserts his negligent misrepresentation claim against Defendants Zaitsev and Wells Fargo (Doc. 24 at 3) and his fraud claims against Wells Fargo and possibly others (*id.* at 3–6). It is unclear against whom the remaining claims are asserted.

II. Procedural History

Defendants Wells Fargo and Zaitsev—the only Defendants to have appeared in this case—have filed motions to dismiss Plaintiff's amended complaint.[1] (Doc. 26, 27.) Plaintiff filed a response in opposition to Defendants' motions, in which he requested leave to amend his complaint again by adding as new Defendants the broker and listing agent—Atlanta Communities Real Estate Brokerage and Wayne Flanagan—who allegedly assisted Wells Fargo in connection with the sale of the Pryor Street Property. (Doc. 28.) Plaintiff has additionally filed a motion for default judgment as to Defendant United States Department of Housing and Urban Development ("HUD"). (Doc. 33.)

III. Motions to Dismiss (Doc. 26, 27)

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although detailed factual allegations are not required, the

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[1] The other named Defendants are "Housing and Urban Development," which the Court construes as the United States Department of Housing and Urban Development ("HUD"), and Randal Mangham. The record does not reflect any service on Mangham. The record reflects an attempt on August 10, 2023, to serve HUD through service on an attorney at Atlanta's HUD office. (Doc. 23.)

pleading must contain more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Importantly, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For a complaint to be "plausible on its face," the facts alleged must "allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wooten v. Quicken Loans, Inc.* 626 F.3d 1187, 1196 (11th Cir. 2010). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), a court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Accordingly, evaluation of a motion to dismiss entails a two-pronged approach: (1) a court must identify any allegations in the pleading that are merely legal conclusions to which the "assumption of truth" should not apply, and (2) where there are remaining well-pleaded factual allegations, a court should "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

When a plaintiff is *pro se*, his or her complaint is "held to less stringent standards than formal pleadings drafted by lawyers" and must be "liberally construed." *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation and quotation omitted); *see also Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir. 2006). At the same time, *pro se* plaintiffs must comply with relevant law and threshold requirements of the Federal Rules of Civil Procedure. *See Trawinski v. United Techs.*, 313 F.3d 1295, 1299 (11th Cir. 2002).

B. Discussion

Defendants Wells Fargo and Arseni Zaitsev seek dismissal of Plaintiff's amended complaint. The Court finds that such dismissal is warranted. The

same deficiencies that resulted in the dismissal of Plaintiff's original complaint are also found in the amended complaint. Namely, the amended pleading is an improper shotgun complaint, and it is apparent from the face of the pleading and attached documents that Plaintiff's claims are time-barred.

1. Plaintiff's Amended Complaint is a Shotgun Pleading

Like his original complaint, Plaintiff's amended complaint is a shotgun pleading. Shotgun pleadings include those that do not provide a "short and plain statement" of a legal claim, as required by Fed. R. Civ. P. 8(a)(2). *Jackson v. Bank of America, N.A.*, 898 F.3d 1348, 1356 (11th Cir. 2018). A complaint may also be deemed a shotgun complaint when it is "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action," *Weiland v. Palm Beach Cnty. Sheriff's Off.*,792 F.3d 1313, 1322 (11th

Cir. 2015), and when it does "not separat[e] into a different count each cause of action or claim for relief." *Id.* at 1322–1323. "The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323.

At 70 pages long (214 pages including the many attached documents), Plaintiff's amended complaint "is neither 'short' nor 'plain.'" *Jackson*, 898 F.3d at 1356 (28-page complaint that "incorporated all 123 paragraphs of allegations into all sixteen counts" constituted a shotgun pleading). The pleading is also "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action." *Weiland*, 792 F.3d at 1322. It is exceedingly difficult to determine the relevant allegations in Plaintiff's amended complaint. It appears that Plaintiff primarily seeks relief for the allegedly fraudulent sale of the Pryor Street Property to Zaitsev in 2014. Yet his amended complaint contains facts that jump from one topic to another and often bear little relationship to any claim. It is further comprised of lengthy excerpts from cases, statutes, rules of procedure, and commentaries that are included without explanation. (*See, e.g.*, Doc. 24 at 31–33, 40–42, 50–69.) The Court and Defendants are left to guess at the precise nature of the allegations and which facts pertain to any individual Defendant.

The complaint additionally fails to "separat[e] into a different count each cause of action or claim for relief." *Weiland*, 792 F.3d at 1322–23. Even after the Court's prior instruction, it remains unclear what causes of action Plaintiff asserts against which Defendants. Plaintiff seemingly seeks to incorporate the causes of action identified in the civil cover sheet. (Doc. 24 at 2.) Those causes of action are: "Negligent Misrepresentation, Negligence By Failure to Disclose, Real Estate Fraud, Statutory Fraud, Intentional Misrepresentation (Common Law Fraud), Deceptive Trade Practices Act Violations, [and] Racketeering (RICO Act violations) . . . ." (Doc. 1-1 at 1.) It is impossible to discern from the amended pleading what facts form the basis of many of these claims. It is further impossible, for the most part, to discern which Defendants are alleged to have engaged in which alleged violations of the law.

Plaintiff's response brief fails to clarify matters. His brief argues that Defendants should be held liable in ways that are not alleged in the amended complaint. For instance, Plaintiff argues that Wells Fargo and Zaitsev should be held civilly and *criminally* liable for violating Georgia's theft by deception statute, O.C.G.A. § 16-8-3. (Doc. 28 at 6–7.) Plaintiff's response also suggests that he is asserting a claim under 42 U.S.C. § 1983, a breach of contract claim, and a quiet title claim, but his brief does not explain which, if any, factual allegations in his amended pleading give rise to such claims.[2] (*Id.* at 9–11.) Plaintiff's response brief further invokes Georgia's adverse possession statute and appears to argue that the "squatters" currently residing in the Pryor Street Property should be removed. (*Id.* at 10–11.) Lastly, Plaintiff's response enumerates "all known remedies for relief" available to Plaintiff and asks the Court to "decide among them" in adjudicating this case. (*Id.* at 4–6.)

Although Plaintiff's amended complaint must be liberally construed, it must also put Defendants on adequate notice of the claims levied against them and the grounds on which the claims are based. Plaintiff has now twice failed to draft such a pleading and has essentially ignored the Court's prior instructions as to the deficiencies in the original complaint. The amended complaint is accordingly due to be dismissed as a shotgun pleading. *See Jackson*, 898 F.3d at 1357 ("[W]e have repeatedly held that a District Court retains authority to dismiss a shotgun pleading on that basis alone.").

[2] A litigant cannot amend a complaint by attempting to add claims in a response brief. *See Cunningham v. RAS Crane, LLC*, No. 1:19CV02853-TWTLTW, 2020 WL 9810008, at *3 (N.D. Ga. Feb. 3, 2020) ("[A] plaintiff cannot amend a complaint by attaching documents to a response to a motion to dismiss, or by asserting new facts or theories in the response.") (internal quotation marks omitted); *see also Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (observing that the court could not consider contracts attached to response brief in connection with motion to dismiss, because the court "may consider only the complaint itself and any documents referred to in the complaint which are central to the claims").

2. Plaintiff's Claims are Time-Barred

Plaintiff's claims must be dismissed for the additional reason that they are barred by applicable statutes of limitation. A claim may be dismissed on statute of limitations grounds if it is "apparent from the face of the complaint" that it is time-barred. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). As discussed in the Court's prior order, O.C.G.A. § 9-3-31 provides a four-year limitations period for negligent misrepresentation, fraud, and deceptive trade practices claims in Georgia. O.C.G.A. § 9-3-31; *Coe v. Proskauer Rose, LLP*, 878 S.E.2d 235, 241 (Ga. 2022) ("It is well settled that the statute of limitation for fraud and negligent misrepresentation claims is found in O.C.G.A. § 9-3-31[.]"); *Kason Indus. v. Component Hardware Grp., Inc.*, 120 F.3d 1199, 1205 (11th Cir. 1997) ("We thus deem the four-year limitations period set forth in § 9-3-31 the proper statute of limitations for [the Georgia Uniform Deceptive Trade Practices Act] to borrow."). And RICO claims are subject to a four-year statute of limitations under federal law, and a five-year statute of limitations under Georgia law. *Rowe v. Gary, Williams, Parenti, Watson & Gary, P.L.L.C.*, 181 F. Supp. 3d 1161, 1173 (N.D. Ga. 2016) (quoting *Maiz v. Virani*, 253 F.3d 641, 676 (11th Cir. 2001)), *rev'd on other grounds*, 703 F. App'x 777 (11th Cir. 2017); O.C.G.A. § 16-14-8.

The facts giving rise to Plaintiff's claims occurred when (1) Wells Fargo sold the Pryor Street Property to Zaitsev instead of to Plaintiff in October 2014, (2) Wells Fargo sold the New York Property sometime in 2015, (3) Plaintiff attempted to purchase the Valley Road Property in April 2015, and (4) Plaintiff attempted to purchase the Highland Avenue Property in April 2015.[3] (Doc. 24 at 18–19, 123.) Plaintiff filed his lawsuit on December 19, 2022. Even under the longest, potentially applicable statute of limitations—five years— Plaintiff's claims are untimely.

Construed liberally, Plaintiff argues that his claims are not time-barred because the applicable limitations periods were tolled under O.C.G.A. § 9-3-96, which provides that "[i]f the defendant . . . [is] guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." In order to toll a limitations period under this statute, a plaintiff must make three showings: "first, that the defendant committed actual fraud; second, that the fraud concealed the cause of action from the plaintiff, such that the plaintiff was debarred or deterred from bringing an action; and third, that the plaintiff

[3] Plaintiff seeks damages for the alleged sale of another property located at 535 Forest Hills Drive, Sandy Springs, Georgia 30342, (Doc. 24 at 70), but other than the damages request, the Court is unable to discern any factual allegations in the complaint relating to this alleged sale.

exercised reasonable diligence to discover his cause of action despite his failure to do so within the statute of limitation." *Doe v. St. Joseph's Cath. Church*, 870 S.E.2d 365, 371 (Ga. 2022) (quotation marks omitted). "Fraud will toll the limitation period only until the fraud is discovered or by reasonable diligence should have been discovered." *Id.* at 376 (quotation marks omitted).

As an initial matter, McCurley has failed to allege specific facts indicating that any Defendant committed fraud. He recites the elements of fraud without linking them to this case and offers only vague assertions that Wells Fargo committed fraud when it wrongfully sold certain properties. But even if Plaintiff had properly alleged fraud, Plaintiff's amended complaint and attached documents make clear that Plaintiff had actual knowledge of his causes of action since at least 2016, more than six years before he filed this lawsuit.[4] For example, Plaintiff has attached to his amended complaint an email that he sent to the Wells Fargo board of directors on November 12, 2014, in which he complained of Wells Fargo's allegedly improper refusal to sell him the Pryor Street Property. (Doc. 24 at 123–24.) Specifically, Plaintiff wrote:

> I would like to highlight a transaction that I believe was not handled fairly, ethically, or perhaps lawfully and has lead to a loss of value for both myself and Wells Fargo. In short I do not believe

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[4] A district court may consider exhibits attached to the complaint on a 12(b)(6) motion because exhibits are part of the pleadings. Fed. R. Civ. P. 10(c); *Thaeter v. Palm Beach Cnty. Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006).

> the Wells Fargo property (a REO property that was put up for sale by the bank) at 559 Pryor St SW, Atlanta, GA 30312 was an arms length transaction and I believe I have provided factual information to your staff to outline and support this view.
>
> . . .
>
> Wells Fargo representatives refused to lend to me for a purchase of a property in your own portfolio, I was lied to by your listing agent and circumvented from having my lawful and timely offer entertained, even though I made a higher cash offer on favorable terms I was rejected by your agent and by staff, despite factual presentation of evidence to this effect, high level staff members refused to act or resolve the problem in an equitable manner. I am writing you to encourage the use of your authority to prevent this type of circumstance in the future and/or to remedy where this has happened in the past.

(*Id.*) The conduct complained of in this 2014 letter is the same conduct for which Plaintiff seeks relief in his amended complaint.

Plaintiff further apparently attempted to obtain legal recourse for Wells Fargo's alleged misconduct in February 2016. Attached to Plaintiff's amended complaint is a February 17, 2016, engagement letter from the law firm of Randal Alonzo Mangham, LLC. (Doc. 24 at 171.) In the letter, Mr. Mangham wrote to Plaintiff:

> It is our understanding that [you] believe you have been unfairly treated in an attempt to purchase in the Wells Fargo REO program as a first time owner occupied homeowner when you offered $105,000 for a property listed at $92,000. It is my further understanding that you have come to understand that the property actually sold to an investor . . . at a lesser amount of $97,400 in violation of a number of possible provisions.

(*Id.*) Mr. Mangham further agreed to represent Plaintiff's "legal rights and interests" regarding Wells Fargo's possible violations of law relating to the Pryor Street Property. (*Id.*) This letter refers to the same facts asserted by Plaintiff in his amended complaint, indicating that Plaintiff was aware of his claims as to the Pryor Street Property, and indeed hired an attorney in connection with them, in 2016.

As for the New York Property, Plaintiff alleges that he submitted an offer to purchase the property on January 2, 2015, but the property was instead sold to a real estate developer. (Doc. 24 at 18.) Plaintiff further alleges that he notified HUD of the sale of the New York Property as early as December 1, 2015. (*Id.* at 19.) Plaintiff does not explain how any act of Defendants tolled the limitations period with respect to the New York Property. And the same is true for the Valley Road Property and the Highland Avenue Property, for which Plaintiff submitted offers in April 2015. (*Id.* at 18.) These transactions occurred more than seven years before Plaintiff filed his lawsuit in December 2022, and Plaintiff has not alleged that any fraudulent conduct tolled the statutes of limitation with respect to them.

In sum, it is clear from the face of Plaintiff's complaint, and the documents attached thereto, that Plaintiff's claims are barred by the applicable statutes of limitation and that tolling does not apply here. Because Plaintiff's amended complaint is a shotgun pleading and because Plaintiff's claims are time-barred, Wells Fargo's and Zaitsev's motions to dismiss are **GRANTED.**

IV. Plaintiff's Request for Leave to Amend (Doc. 28)

In his response to Defendants' motions to dismiss, Plaintiff seeks leave to amend his complaint by adding as defendants Wells Fargo's alleged broker, Atlanta Communities Real Estate Brokerage, and a listing agent, Wayne Flanagan. According to Plaintiff, these individuals were involved in Wells Fargo's sale of the Pryor Street Property.

Plaintiff's request for leave to amend is procedurally improper. "Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly." *Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cnty., Fla.*, 48 F.4th 1222, 1236 (11th Cir. 2022) (quotation marks omitted); *Cita Trust Co. AG v. Fifth Third Bank*, 879 F.3d 1151, 1157 (11th Cir. 2018) (holding that plaintiff "failed to properly move for leave to amend" when the request was "imbedded within an opposition memorandum"). Under Fed. R. Civ. P. 7(b)(1), "[a] request for a court order must be made by motion." Such motion must "state with particularity the grounds for seeking the order and state the relief sought." Fed. R. Civ. P. 7(b)(1). A motion for leave to amend must also "set forth the substance of the proposed amendment or attach a copy of the proposed amendment." *Newton v. Duke Energy Fla., LLC*, 895 F.3d 1270, 1277 (11th Cir. 2018). A request for leave to amend a complaint that does not comport with these requirements is of "no legal effect." *Id.* Plaintiff's request for leave to amend, which is embedded within his response brief and fails to comply with the rules governing such motions, is therefore of no legal effect.[5]

Even if Plaintiff had filed a separate motion for leave to amend, the proposed amendment would be futile. Federal Rule of Civil Procedure 15(a) allows a party to amend its pleading only by leave of the court or with written consent of the adverse party once more than 21 days have passed after service of the pleading, responsive pleading, or certain Rule 12 motions. Fed. R. Civ. P. 15(a)(2). Rule 21 allows a party to be added to an action "on just terms" by order of the Court on motion of any party. *See* Fed. R. Civ. P. 21. "The standard for deciding a motion for leave to add parties under Rule 21 is the same as the standard under Rule 15(a) for a motion seeking leave to file an amended complaint." *Sherman v. Bank of Am. Corp.*, No. 1:12-CV-03089-CC-RGV, 2014

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[5] Plaintiff argues that "Rule 27" permits him to "combine the response and the new motion [for leave to amend] in the same document." (Doc. 28 at 1.) Federal Rule of Civil Procedure 27 governs "Depositions to Perpetuate Testimony" and is not applicable. Plaintiff may be referring to Federal Rule of *Appellate* Procedure 27, which provides that under certain circumstances, "[a] response may include a motion for affirmative relief." Fed. R. App 27(a)(3)(B). The Federal Rules of Appellate Procedure are inapplicable at this stage of the case.

WL 12857987, at *8 (N.D. Ga. July 16, 2014) (citation omitted). Rule 15 provides that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, it is within the district court's "extensive discretion" to deny leave to amend where the proposed amendment would be futile. *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999).

Here, Plaintiff's proposed addition of Flanagan and Atlanta Communities Real Estate Brokerage would be futile. As with the claims asserted against the other Defendants, it is not clear what Plaintiff claims these individuals did to violate the law. It appears that Plaintiff seeks to assert against them claims relating to their involvement with the sale of the Pryor Street Property. But as discussed above, those claims are time-barred because Plaintiff has known of them since at least 2016. Plaintiff's request for leave to amend contains no additional factual allegations that would indicate that the proposed defendants engaged in fraud that tolled the applicable statutes of limitation. Plaintiff's request for leave to amend must therefore be **DENIED**.

V. Plaintiff's Motion for Default Judgment as to HUD

Plaintiff seeks default judgment against Defendant Department of Housing and Urban Development ("HUD"). "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Under this rule, a plaintiff must follow a two-step process when seeking default judgment. The first step is to petition the Clerk to enter default. Only after this step has been taken can the plaintiff move for default judgment. *See Frazier v. Absolute Collection Serv., Inc.*, 767 F. Supp. 2d 1354, 1360 n.1 (N.D. Ga. 2011) ("First, the clerk must enter a party's default . . . . Second, after a default is entered, the party must then apply to the court for a default judgment."). The Clerk's entry of default is thus a prerequisite for seeking default judgment. *Id.* at 1360 n.1 ("[T]he clerk's entry of default must precede an application for default judgment.") (internal quotations omitted). Here, the Clerk has not entered default as to HUD. Nor would it be appropriate to do so because Plaintiff has failed properly to effect service on HUD.[6]

Even if Plaintiff had properly served HUD and satisfied the first step of the default-judgment process, his motion would still fail. A defaulted

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[6] Plaintiff has not complied with Fed. R. Civ. P. 4(i) governing service on a United States agency. Rule 4(i) provides: "To serve a United States agency . . . a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency[.]" Fed. R. Civ. P. 4(i)(2). Rule 4(i)(1) sets forth the required process for serving the United States. Here, Plaintiff has filed a proof of service as to HUD, which indicates that an attorney was served at HUD's Atlanta office. (Doc. 23.) But there is no indication that Plaintiff has served the United States in the manner required by Rule 4(i)(1), or that he has otherwise complied with the rule.

defendant is deemed to admit only "the plaintiff's well-pleaded allegations of fact[.]" *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1278 (11th Cir. 2005). "Entry of default judgment is only warranted when there is 'a sufficient basis in the pleadings for the judgment entered.'" *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1245 (11th Cir. 2015) (per curiam) (quoting *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). This "sufficient basis" standard is "akin to that necessary to survive a motion to dismiss for failure to state a claim." *Id.* In this case, there is no sufficient basis in the pleadings for judgment to be entered against HUD because, as explained above, Plaintiff's amended complaint is a shotgun pleading and his claims are barred by applicable statutes of limitation. Plaintiff's motion for default judgment must therefore be **DENIED.**

VI. Conclusion

For the foregoing reasons, Well Fargo's motion to dismiss (Doc. 26) and Arseni Zaitsev's motion to dismiss (Doc. 27) are **GRANTED**. Plaintiff's amended complaint is **DISMISSED WITH PREJUDICE**. Plaintiff's request for leave to amend his complaint (Doc. 28) and motion for default judgment as to HUD (Doc. 33) are **DENIED**. As no further matters are pending before the Court, the Clerk is **DIRECTED** to close this case.

SO ORDERED this 29th day of December, 2023.

s/ SARAH E. GERAGHTY

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MATTHEW RYAN MCCURLEY, Plaintiff, vs. WELLS FARGO BANK NA, HOUSING AND URBAN DEVELOPMENT, ARSENI ZAITSEV, AND RANDAL ALONSO MANGHAM, MALPRACTICE OF ATTORNEY, Defendants.	CIVIL ACTION FILE NO. 1:22-cv-04976-SEG

J U D G M E N T

This action having come before the court, Honorable Sarah E. Geraghty, United States District Judge, for consideration of Well Fargo's motion to dismiss and Arseni Zaitsev's motion to dismiss, and the court having granted said motions, it is

Ordered and Adjudged that the action be, and the same hereby is, DISMISSED WITH PREJUDICE.

Dated at Atlanta, Georgia, this 29th day of December, 2023.

KEVIN P. WEIMER
CLERK OF COURT
By: s/A. Edwards
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
December 29, 2023
Kevin P. Weimer
Clerk of Court

By: s/ A. Edwards
Deputy Clerk

The District Court's decision should be reversed because its legal conclusion is contrary to the text and history of Fair Housing Act and associated laws and agreements of the defendants. To clarify that the complaint is not a "shotgun pleading" the visual below structures the text in a more readably summary grid.

Count (Law)	**Page Number (Filing) Page)**	**Defendant**
Fair Housing Act (HUD employee Sara Pratt Quote)	USDC Doc 24, Page 13-14 Jodi Kness of Wells Fargo Pg. 17	Wells Fargo (and Agents)
Bid Rigging (Sherman Act), Deceptive Trade Practices	USDC Doc 24, Pages 1-11	Arseni Zaitsev, Wayne Flanagan, Thomson Hatfield, Wells Fargo
RICO Statute	USDC Doc 24, Pages 11-12	Arseni Zaitsev, Listing Brokers Wells Fargo, HUD
Negligent Misrepresentation, Intentional Misrepresentation	USDC Doc 24, Page 4	Arseni Zaitsev, Listing Brokers, Wells Fargo, HUD
Fiduciary	USDC Doc 24, Page 34, 36, 111, 123, and 151	Wells Fargo
Procurement Fraud, Contract Negotiation, Contract Law, Housing Law (Civil Rights)	USDC Doc 24, Page 2	HUD

370 Other Fraud, 371 Truth in Lending	Cover Sheet	Wells Fargo
Ineffective Assistance of Counsel	USDC Doc 24, Page 1	Randall Alonso Mangham
Fraud "internal fraud list" Tyler Smith Wells Fargo	USDC Doc 24, Page 17-18 Well Fargo Employee Tyler Smith	Arseni Zaitsev, Listing Brokers, Closing Attorney and Wells Fargo
Fraudulent non-disclosure	USDC Doc 24, Page 3-4	Arseni Zaitsev, Wells Fargo, HUD

The 1900+ page 4th Edition of Black's Law dictionary published in 1968 digital version which is searchable makes no mention of a "Shotgun Pleading". A word search of the 5th Edition also yielded no word "shotgun". The 8th Edition available to search digitally also did not make mention of the word shotgun upon a text search even though I was able to locate "Pleading Shotgun, Black's Law Dictionary 9th Ed., "A pleading that encompasses a wide range of contentions [plea], usu. supported by vague factual allegations." In a Superior Court document but I do not yet have the pleasure of owning the recent copy of Black's Law dictionary even though I have attempted to be a Thomson Reuters Westlaw customer.

There is proof of service in the docket, proof of certified mail and proof of independent process server that service was done, completed and or attempted successfully and to be even more certain a timely and early motion was filed to request US Marshall service, if there was any doubt of this, yet the Court writes in this final order and disposition: "Court put Plaintiff on notice that he had failed properly to serve Defendants." Yet, here are multiple third parties who entered, signed attestations regarding service, and the defendants have signed some or all of the certified mail receipts that have been returned. Arseni Zaitsev being served multiple times in multiple ways.

Accounting measurements of time and expense likely exceed the value of the original property bid and certainly if one calculates the revenue (spread on prime rates charged on deposits) over 20 years of deposits (Plaintiff's) a number above the price of the home could likely be reached. The Fiduciary responsibility of the Bank is at issue to the depositor, shareholder, customer and now Plaintiff.

THERE WAS A BREACH OF CONCILIATION AGREEMENT (BASED ON THE FAIR HOUSING ACT) WHICH LED TO FRAUD AND CONCEALMENT OF FRAUD

In the year 2013, defendants Wells Fargo and HUD (Housing and Urban Development, as an agency of our federal government) entered into a conciliation agreement based on requirements of federal and state law relating to the auction of foreclosed homes and the Fair Housing Act. The conciliation agreement is listed as (USDC Doc 24 – Pg 73-90, Exhibit 1) of the plaintiff, Matthew Ryan McCurley.

Link to Conciliation Agreement -

https://www.hud.gov/sites/documents/HUDVWFCONCILIATION.PDF

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE EVIDENCE, AT THE JUDGMENT STAGE WAS INSUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT

ED CARNES, Chief Judge: "The true rule ought to be this: the statement ought to consist precisely of what has to be [proven]. It ought not to fall short, or go beyond. If it goes beyond, it has surplusage matter that is unnecessary. Whatever is irrelevant, whatever is non-essential in statement, ought not to be in. Let the law declare that every man's pleadings shall embrace a full and clear statement of all matters of fact, which he is required to [prove], and no other."

Logan Bleckley, "Pleading," 3 Ga. Bar Assoc. Report 40, 41–42 (1886). The complaint that gave rise to this appeal does not approach that ideal, but it claims that the plaintiff has a case, and parts of it do a good enough job in telling what that case is to require the defendants to say "either that that is not so, or something else is so."

PREMIERE ASSET' SERVICES
Premiere Asset Services is a dba of Wells Fargo
Home Mortgage, a division of Wells Fargo Bank, N.A.

Owner Occupancy Certification Form

In connection with the purchase of the property located at __________ (the "Property), I, __________ ("Buyer," "I," "me" or "my"), hereby certify, agree, represent and acknowledge that:

1. Any and all documents executed in connection with the purchase of the. Property provided to Seller by me, are true and correct.

2. I understand that Seller will rely upon the information provided by me herein in determining whether to enter into the contract for purchase and complete the sale of the Property to me.

3. I will occupy, establish and use the Property as my primary residence as soon as possible after the Closing Date, and I will continue to occupy the Property as my primary residence for at least one (1) year after the first date of occupancy.

4. I agree and understand that any misstatement or misrepresentation in this Owner Occupancy Certification Form will constitute a breach by me of the contract for purchase, and will afford Seller the right to terminate the contract for purchase and exercise any and all remedies available to it under the contract for purchase and applicable law.

5. I understand that any misstatement or misrepresentation in this Owner Occupancy Certification Form may subject me to criminal and/or civil liability. Capitalized terms used but not otherwise defined herein shall have the meaning given to such terms in the contract for purchase.

Dated: _____

Buyer Name (printed)	Buyer (signature)

Dated: _____

Buyer Name (printed)	Buyer (signature)

Statement and Acknowledgment of Buyer's Agent
Buyer's Agent agrees and represents that, to the best of their knowledge and belief, Buyer intends to establish and use the Property as Buyer's primary residence as soon as possible after the Closing Date, and Buyer will continue to occupy the Property as Buyer's primary residence for at least one (1) year after the first date of occupancy. Buyer's Agents acknowledge that Seller is relying on the above representations.

Dated: _________

Buyer Agent Name Buyer (printed)	Agent (signature)

1

Exclusive Listing Period Purchase Addendum for Individual Owner-Occupant Buyers
to Form HUD-9548, Sales Contract

Certification for Individual Owner-Occupant Buyers
I/we ____________, submit this offer to purchase the property located at ________________ as an owner-occupant buyer or buyers. I/we certify that I/we have not purchased a HUD-owned property within the past 24 months as an owner-occupant. This offer is being submitted with the representation that I/we will occupy the property as my/our primary residence for at least 12 months.

The undersigned understands that any misrepresentations made on this form as to the agreed to provisions may be subject to criminal and/or civil penalties including, but not limited to, fine or imprisonment, or both, under the provisions of Title 18, United States Code, Sections 1001 and 1010.

Buyer's name	Buyer's Signature	Date
Buyer's name	Buyer's Signature	Date

Selling Broker Certification

I certify that I have not knowingly submitted the HUD-9548, Sales Contract, for the above-listed property, on behalf of an investor buyer. I further certify that I have discussed with the buyer(s) that HUD will prosecute false claims and statements and that conviction may result in criminal and/or civil penalties.

The undersigned understands that any misrepresentations made on this form as to the agreed to provisions may be subject to criminal and/or civ il penalties including, but not limited to, fine or imprisonment, or both, under the provisions of Title 18, United States Code, Sections 1001 and 1010.

Selling Broker's name	Selling Broker's Signature

Date

ref. Handbook 4000.1 (6/2018)

Appendix to Petition to the
Writ of Certiorari Respectfully Submitted,

Matthew R. McCurley

Matthew McCurley, Petitioner
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Dalton, Georgia 30720
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DECEMBER 03, 2024