SO ORDERED.

SIGNED this 12th day of September, 2022.

BENJAMIN A. KAHN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE: RABBI YITZHAK JOEL MILLER *aka* Rabbi Yitzhak Miller *aka* Joel Miller DEBTOR.	CASE NO. 22-50065 Chapter 11
RABBI YITZHAK MILLER, PLAINTIFF, v. RECOVCO MORTGAGE MANAGEMENT, LLC; HOF LEGAL TITLE TRUST LIENHOLDERS of the real properties herein by and through U.S. Bank Trust National Association, Trustee; SPECIALIZED LOAN SERVICING, LLC; FAY SERVICING, INC.; SELENE FINANCE, LP; DLJ MORTGAGE CAPTIAL; SN SERVICING CORP., DEFENDANTS.	ADVERSARY PROCEEDING CASE NO. 22-06005

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT AS TO ALL DEFENDANTS

THIS MATTER is before the Court on Rabbi Yitzhak Joel Miller's ("Plaintiff") *Motion for Leave to File Amended Complaint as to All*

Defendants, ECF No. 55 ("Motion to Amend"), and attached *Amended Complaint*, ECF No. 55-1 ("Amended Complaint"); and Defendants' *Joint Opposition to Plaintiff's Motion for Leave to File Amended Complaint*, ECF No. 56 ("Joint Response"). On March 28, 2022, Plaintiff filed his *Complaint*. ECF No. 1 ("Original Complaint").

Plaintiff moves to amend his Original Complaint as to all Defendants pursuant to Fed. R. Civ. P. 15(a)(2), made applicable to this proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedure. In their Joint Response, Defendants argue that the Plaintiff's Motion to Amend should be denied for (A) delay and unfair prejudice and (B) futility. ECF No. 56, at 4-8. Defendants further allege bad faith on the part of Plaintiff and seek to recover costs and attorneys' fees for filing their respective motions to dismiss, briefs in support, and Joint Response. Id. Upon review of the motion and the record in this matter, and for the reasons set forth herein, the Court will grant Plaintiff's motion.

Fed. R. Civ. P. 15(a)(1), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7015, provides that "[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."

Because 21 days had passed after service of an Answer or a motion under Fed. R. Civ. P. 12(b) from each Defendant, Plaintiff seeks leave from the Court to amend his Complaint under Fed. R. Civ. P. 15(a)(2). ("In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.").

I. Standard of Review

Although the Fourth Circuit reviews a district court's decision to deny a party leave to amend for an abuse of discretion, (Edwards v. City of Goldsboro, 178 F.3d 231, 242 (4th Cir. 1999)), denial of leave to amend is disfavored absent a substantial reason to deny. 3 Moore's Federal Practice – Civil § 15.14; see Foman v. Davis, 371 U.S. 178, 182 (1962) (citing 3 Moore, Federal Practice 92d ed. 1948) ("Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. . . [i]n the absence of any apparent or declared reason"); Galustian v. Peter, 591 F.3d 724, 729 (4th Cir. 2010) ("It is this Circuit's policy to liberally allow amendment in keeping with the spirit of Federal Rule of Civil Procedure 15(a)."); Mayfield v. NASCAR, 674 F.3d 369, 379 (4th Cir. 2012) (citing Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc., 576 F.3d 172, 193 (4th Cir. 2009)) (quoting Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006)) ("This directive 'gives effect to the federal policy in

favor of resolving cases on the merits instead of disposing of them on technicalities.'").

The Fourth Circuit recognizes three reasons to deny leave to amend: the amendment would be prejudicial to an opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile. Edwards, 178 F.3d at 242 (quoting Johnson v. Oroweat Foods Co., 785 F.2d 503, 209 (4th Cir. 1986)) (citations omitted) ("Delay alone is an insufficient reason to deny leave to amend. Rather, the delay must be accompanied by prejudice, bad faith, or futility."

II. Discussion

A. Defendants will not be unfairly prejudiced by Granting Plaintiff's Motion to Amend

Defendants have not demonstrated unfair prejudice that would be caused by permitting Plaintiff to amend the complaint.

i. Unfair Prejudice Standard of Review

When considering whether a proposed amendment will cause unfair prejudice, the Fourth Circuit has instructed:

> Whether an amendment is prejudicial will often be determined by the nature of the amendment and its timing. A common example of a prejudicial amendment is one that "raises a new legal theory that would require the gathering and analysis of facts not already considered by the [defendant, and] is offered shortly before or during trial." Id. An amendment is not prejudicial, by contrast, if it merely adds an additional theory of recovery to the facts already pled and is offered before any discovery has occurred. Davis v. Piper Aircraft Co., 615 F. 2d 606, 613 (4th Cir. 1980) ("Because defendant was from the outset made fully aware of the

> events giving rise to the action, an allowance of the amendment could not in any way prejudice the preparation of the defendant's case.").

Laber, 438 F.3d at 427. Nevertheless, the timing of the motion is not necessarily determinative. Even when cases have advanced, courts are reluctant to presume unfair prejudice solely from the timing of the motion. The court also must consider the surrounding circumstances. See Id.; see also Foman, 371 U.S. at 182 (reversing district court's denial of motion to amend made after the district court entered judgment of dismissal). In Laber, the court found no unfair prejudice where the case had progressed to the summary judgment stage, defendant had conducted no significant discovery, and the proposed amendments did not add new facts, but rather merely presented new theories of recovery. Id. at 429; see also Matrix Capital Mgmt. Fund, 576 F.3d at 195 (finding no unfair prejudice where defendants were aware of the circumstances giving rise to the action).

Delaying an amendment, standing alone, does not create unfair prejudice. In Edwards v. City of Goldsboro, the Fourth Circuit reversed a district court's denial of a plaintiff's motion requesting leave to amend. 178 F.3d 231. In that case, the district court denied a motion to amend after the case had progressed into the discovery stage. Id. at 240. The court was persuaded that the district court abused its discretion based on several factors: (1) "the allegations sought to be added to the

first amended complaint derived from evidence obtained during discovery regarding matters already contained in the complaint in some form and . . . merely sought to add specificity," (2) "the factual allegations [added] . . . arise from the same controversy as the balance of the complaint," and (3) "[b]ecause the statute of limitations had not yet barred [plaintiff] from asserting any parallel claims based upon these factual allegations against the Defendants, their inclusion in this lawsuit promotes judicial economy given that all of the legal issues would be identical." Id. at 242. The court stated that even if it assumed that the plaintiff intentionally delayed amending, it is not obvious that defendant would be prejudiced by the amendments. Id. at 243. In this case, Plaintiff filed the motion to amend at the inception of the proceeding and within the time contemplated by the scheduling order.

ii. Plaintiff filed his Motion to Amend within the timeframe set by the Court's Scheduling Order.

Despite Plaintiff moving to amend within the time contemplated by the scheduling order, Defendants contend that allowing Plaintiff to amend his complaint will unfairly prejudice them because Plaintiff has filed similar complaints in North Carolina and Louisiana state courts and voluntarily dismissed those complaints on the eve of Rule 12 decisions. ECF No. 56, at 6. Defendants further argue that Plaintiff's "languishing in

bankruptcy" has incurred unnecessary costs to the estate and creditors. Id. at 2. Defendants assert that because they have fully briefed motions to dismiss on the Original Complaint, and Plaintiff's counsel represented to Defendants that Plaintiff did not have intentions to amend the complaint, allowing Plaintiff to amend at this stage would unfairly prejudice them. Id.

Although Plaintiff's pattern of filing and voluntarily dismissing similar complaints in state courts constitutes evidence of dilatory motive and intentional delay, the Fourth Circuit has stated that even if a plaintiff intentionally delays amending its complaint, a defendant might not be unfairly prejudiced by such amendment. See Edwards, 178 F.3d at 243. Furthermore, the Fourth Circuit has routinely found that it is appropriate to grant motions to amend when proceedings have progressed into discovery, id., when proceedings have progressed to the summary judgment stage, Harvey, 438 F.3d at 427; Foman, 371 U.S. at 182, and even after the original complaint has been dismissed pursuant to a Fed. R. Civ. P. 12(b)(6) motion. Hill v. AQ Textiles LLC, No. 1:19-cv-983, 2002 U.S. Dist. LEXIS 15176, at *9-14 (M.D.N.C. Jan. 27, 2022) (finding that an amended complaint would survive a Fed. R. Civ. P. 12(b)(6) motion and granting a motion to amend, having dismissed the original complaint pursuant to Defendant's 12(b)(6) motion twelve days prior).

Regardless, Plaintiff has promptly requested leave to amend in this case. Plaintiff filed the motion prior to discovery, prior to any decision on Defendants' motions to dismiss, and, importantly, prior to the date set as the last day for filing motions to amend in the Court's Scheduling Order.[1] The Court, having used its discretion, with the consent of the parties, to set July 31, 2022, as the final day for filing motions to amend, declines to reverse course by using its discretion to deny Plaintiff's Motion to Amend, which was filed before that deadline.

The Court recognizes that Defendants have incurred expenses briefing motions which will be rendered moot by Plaintiff's amending his complaint; however, concerns regarding these expenses do not rise to the level of unfair prejudice for the purposes of a Fed. R. Civ. 15(a)(2) analysis. These concerns are mitigated by the fact that the proposed Amended Complaint largely attempts to clean up the Original Complaint, which was filed pro se, adds some specificity to claims that Defendants previously contended were ambiguous, and abandons certain claims for relief that Defendants contended were untenable. Furthermore, the proposed Amended Complaint contains factual allegations and legal claims that "arise from the same controversy as the balance of the [original] complaint." See Edwards, 178 F.3d at 243. Under these

[1] The Court set July 31, 2022, as the last day for filing motions to amend. ECF No. 49, at 2. Plaintiff filed his Motion to Amend on July 29, 2022. ECF No. 55.

circumstances, Defendants are not unfairly prejudiced by permitting an amendment within the time contemplated to do so in the scheduling order.

B. In the interests of judicial economy and efficient administration of the case, the Court will not deny the motion on the basis of futility.

Defendants argue that Plaintiff seeks "another bite at the apple" with his Amended Complaint, and that the Court should deny Plaintiff's Motion to Amend on the grounds that allowing the proposed amendment will be futile. ECF No. 56, at 2. Defendants assert that the proposed Amended Complaint is deficient under Fed. R. Civ. P. 12(b)(6) and 9(b). Id. at 7.

Although a court is not required to rule on the efficacy of the original complaint prior to considering the futility of a proposed amendment, arguments that amending a complaint would be futile are more frequently brought after a court has rendered an adverse decision on the original complaint. See HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross, 101 F.3d 1005 (4th Cir. 1996) (finding district court's denial to amend due to futility appropriate where it had granted summary judgment to the defendant and the proposed amended complaint would not survive a summary judgment analysis either); HCMF Corp. v. Allen, 238 F.3d 273, 277 (4th Cir. 2001) (finding a proposed amendment futile where the amended complaint presented a new legal theory which, like that of the original complaint, would be dismissed as a matter of law).

In this case, the Court has not rendered a decision on Plaintiff's Original Complaint; therefore, the Original Complaint remains pending. As a result, by arguing futility at this stage, not only do Defendants ask the Court to undertake Fed. R. Civ. P. 12(b)(6) and 9(b) analyses of all causes of action in Plaintiff's proposed Amended Complaint; but, if the amendment is denied, they further provide Plaintiff with a second "bite at the apple" with respect to the numerous claims for relief in the Original Complaint that Plaintiff proposes to abandon in his amendment.[2] Therefore,

[2] In their Motions to Dismiss the Original Complaint and Briefs/Memoranda in Support of Motion to Dismiss the Original Complaint, Defendants argue that the Original Complaint lacks the specificity required of pleadings under Fed. R. Civ. P. 10(b). See, e.g., ECF No. 35, at 8 (citation and quotation omitted) ("[T]his Court [has] held that dismissal of a complaint is appropriate when a pleading vaguely attributes discrete actions to all defendants—rather than to a specific party—and it deprives the defendants the opportunity of determining whether there are sufficient facts to make a claim against each of the defendants plausible."). Plaintiff's Amended Complaint seeks to resolve this issue to some degree, not only by removing certain claims, but also by limiting certain claims to only some defendants. Plaintiff asserted numerous claims in the Original Complaint as follows:

1) Unfair and Deceptive Trade Practices in Contract Formation and in Loan Servicing (All Defendants)
   a. Violations of:
      i. N.C. Gen. Stat. SS 75
      ii. Louisiana CC Art. 1401 et seq., 2324
      iii. Sections 1031 and 1036 of the Dodd-Frank Act
      iv. Consumer Financial Protection Act of 2010 "CFPA"
      v. Sections 5 and 18 of the Federal Trade Commission Act "FTCA"
2) Common Law Prevention of Performance (All Defendants)
   a. Louisiana Prevention of Performance, CC 1772
3) Tortious Interference with Contract (All Defendants)
   a. Louisiana Tortious Interference, CC Art. 2315
4) Slander/Jactitation of Title (All Defendants)
5) Common Law Recission of Mortgage for Failures of Warranty (All Defendants)
   a. Louisiana Rescission of Mortgage with Redhibitory Defect, CC 2520 et seq.

if the Court determines that all the proposed claims in the Amended Complaint would be deficient under Fed. R. Civ. P. 12(b)(6) and/or 9(b) and denies the request to amend, the Court then must consider the efficacy of the Original Complaint and all the otherwise abandoned claims for relief.

Accordingly, granting Plaintiff leave to amend his complaint will not unfairly prejudice Defendants and the Record is

---

6) Common Law Fraud in the Inducement/Fraudulent Omission in Origination of the Loan Itself (All Defendants)
   a. Louisiana Vice of Consent in Mortgage Contract—Fraud (CC Art. 1948, 1953-1959, 1966, 2324)
   b. Louisiana Fraudulent Misrepresentation (CC Art 2315, 2324)
   c. Louisiana Relative Nullification of Mortgage Contract (CC Art. 2031, 2324)
7) Common Law Error/Negligent Misrepresentation in Contract Formation (All Defendants)
   a. Louisiana Vice of Consent in Mortgage Contract—Error, CC Art. 1948-1952, 2324
   b. Louisiana Negligent Misrepresentation (CC Art. 2315)
8) Common Law Unconscionability of Contract as Contrary to Public Policy (All Defendants)
   a. Louisiana Nullification of Contract *Contra Bonos Mores* (CC Art. 12, 19, 1948, 1953-1958, 1892, 1895, 2031, 2030)
9) Rescission of Mortgage for Abuses of Process Premeditated Prior to Contract Formation (All Defendants)
   a. Louisiana Abuse of Process (CC 2315)
10) Intentional Violation of the Wall Street Reform and Consumer Protection Act of 2010 and Title XIV therein, The Mortgage Reform and Anti-predatory Lending Act (All Defendants)
11) Violation of the Implied Covenant of Good Faith and Fair Dealing (Recognized in Louisiana under CC Art. 1759, 1983, 2324) (All Defendants)
12) Breach of Fiduciary Duty in Loan Servicing (All Defendants)
13) Claim for Unjust Enrichment/Constructive Trust (All Defendants)
14) Breach of Contract to Pay Insurance (Fay Servicing)
15) Breach of Contract (Selene Finance)
16) Violation of the Racketeer Influence and Corrupt Organizations Act (All Defendants)
17) Violation of Plaintiff's Rights under the NC and Louisiana State Constitutions (All Defendants)
18) Violation of Plaintiff's Rights under the Due Process Clause of the 5th and 14th Amendments (All Defendants).

insufficient to support a finding that Plaintiff filed his Motion to Amend in Bad Faith.[3] Furthermore, at this stage of litigation and in the interest of efficient case administration, the Court will not deny the motion on the grounds that the amendments are futile, and will reserve ruling on the efficacy of the claims in the Amended Complaint.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Plaintiff's Motion for Leave to File Amended Complaint, ECF No. 55, is GRANTED under Fed. R. Civ. P. 15(a)(2) made applicable to this proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedure without prejudice to any defenses or further motions with respect to the Amended Complaint under Fed. R. Civ. P. 12, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012(b).

2. Plaintiff's Original Complaint is hereby deemed amended as filed. ECF No. 55-1.

3. Defendants' Motions to Dismiss Adversary Proceeding, ECF Nos. 27, 29, 33, 34, and 38, are DENIED as moot without prejudice as set forth in paragraph 1 above.

[3] Defendants argue that if the Motion to Amend is granted, the Court should order Plaintiff to verify any "Amended Complaint under the penalty of perjury" based upon Plaintiff's alleged pattern of dilatory conduct and bad faith motive. ECF No. 56, at p. 2, 9. Defendants further seek an award of attorneys' fees and costs. Id. Defendants have not cited authority supporting the Court granting such relief. To the extent Defendants believe any filing with the Court fails to meet the standards for filings in federal court that are required of all litigants, including without limitation those standards in Fed. R. Bankr. P. 9011(b), Defendants may seek appropriate relief.

4. Defendant SN Servicing Corp.'s defense of failure to state a claim upon which relief may be granted included in its Answer to Complaint, ECF No. 11, is overruled without prejudice as moot in light of the Amended Complaint.

5. Under Bankruptcy Rule 9006, the time to respond to the Amended Complaint under Fed. R. Civ. P. 15(a)(3), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7015, is hereby extended to 21 days from the entry of this Order.

[END OF DOCUMENT]

Parties to be Served
22-06005

All parties to this Adversary Proceeding.