IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VITO J. FENELLO, JR., and	:	
BEVERLY H. FENELLO,	:	
	:	
Plaintiffs,	:	**CIVIL ACTION FILE NO.**
	:	**1:11-CV-4139-WSD-AJB**
v.	:	
	:	
BANK OF AMERICA, N.A., and	:	
THE BANK OF NEW YORK	:	
MELLON (as Trustee for	:	
CWALT, Inc.),	:	
	:	
Defendants.	:	

O R D E R

Before the Court are Defendants' motion for leave to file excess pages, [Doc. 5], Plaintiff Vito Fenello's "motion for judicial disclosure and recusal," [Doc. 10], and Defendants' motion to strike Mr. Fenello's second response in opposition to Defendants' motion to dismiss, [Doc. 19].[1] For the reasons below, the motion for leave to file excess pages is **GRANTED**, the motion for judicial disclosure and recusal is **DENIED**, and the motion to strike Mr. Fenello's second response is **GRANTED**.

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[1] Only Mr. Fenello signed the motion for judicial disclosure and recusal and the"second response." [*See* Doc. 10 at 2; Doc. 18 at 8].

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I. Motion for Leave to File Excess Pages

In their motion for leave to file excess pages, Defendants move for leave to exceed the page limitation in their motion to dismiss and supporting memorandum, given the length of Plaintiffs' complaint and the "numerous theories of liability spread among 13 separate causes of action." [Doc. 5 at 1-2].

In response, Plaintiff Vito Fenello cites Judge Duffey's "Standing Order Regarding Civil Litigation" indicating that the Court generally does not approve extensions of page limitations, that any such requests must be made at least ten days before the filing deadline, and that requests filed at the same time the brief is due will be denied absent compelling and unanticipated circumstances. [Doc. 11 at 1]. Mr. Fenello further opposes the request on the merits, stating that instead of addressing the complaint in "an organized and factual way," Defendants used boilerplate responses that "devolve[d] into unrelated discussions about MERS and the validity of the Security Deed." [*Id.* at 2].

In reply, Defendants state that it was impossible to comply with the standing order because they could not have known which district judge would preside over the case upon removal to federal court, and because they were required to file a responsive pleading within seven days of filing the notice of removal. [Doc. 15 at 2-3]. They

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further indicate that an extension was necessary because they attempted to address all causes of action rather than baldly concluding that the complaint was indecipherable, lacks merit, and is ripe for dismissal. [*Id.* at 3].

The undersigned concludes that the motion should be granted. The undersigned is responsible for resolving all non-dispositive pretrial motions in this case and concludes that granting an exception to Judge Duffey's standing order in this case to be appropriate. The complaint in this case includes a substantial number of causes of action, and Defendants have convincingly contended that additional pages are required to address them. The motion, [Doc. 5], is therefore **GRANTED**.

II. Motion for Judicial Disclosure and Recusal

In his motion for judicial disclosure and recusal, Mr. Fenello requests that the undersigned and Judge Duffey immediately disclose their participation and role in any "conference, seminar, trade show, think tank, or other event attended by Mortgage Lenders, Mortgage Brokers, Loan Servicers, Loan Purchasers, Loan Securitizers, Investment Banks, or Attorneys serving these clients," as well as "[a]ny payments received as speaking fees, consulting fees, travel expenses, entertainment, gifts, or for any other purpose." [Doc. 10 at 1]. Mr. Fenello contends that the undersigned and Judge Duffey attended such events in the last year, and that "it appears that the law firm

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representing the defendants was also a speaker for at least one of these events." [*Id.* at 2]. According to Mr. Fenello, this provides a reasonable basis for questioning the impartiality of the undersigned and Judge Duffey pursuant to 28 U.S.C. § 455, and thus the undersigned and Judge Duffey should recuse themselves from this case. [Doc. 10 at 2].

In response, Defendants first state that they are unaware of any provision in the Federal Rules of Civil Procedure that allows Plaintiffs to propound judicial discovery on the Court, and thus the motion is unreasonable and unsupported by law. [Doc. 17 at 1-2]. Next, they contend that there is no evidence before the Court to infer that "the current judge" is not impartial or that recusal is warranted. [*Id.* at 2].

Mr. Fenello did not file a reply regarding the motion for judicial disclosure and recusal. [*See* Dkt.].

The undersigned concludes that the motion should be denied. With respect to the disclosure requests, the undersigned is unaware of any authority suggesting that a litigant may compel a federal judge to provide such information. Federal judges are required to make certain annual disclosures to the federal government, but they are not required to respond to *ad hoc* disclosure requests from litigants. With respect to the

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recusal request, the undersigned sees no basis for recusal. As a judge in the Middle District of Florida recently noted:

> "The right to a fair and impartial trial is fundamental to the litigant; fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside." *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995). "Justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L.Ed. 11.
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> Judicial recusal is governed by 28 U.S.C. § 455, which provides in pertinent part that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The standard for determining the propriety of a recusal is whether a reasonable person, fully informed of the relevant facts, would question the judge's impartiality. *Parrish v. Board of Commissioners*, 524 F.2d 98, 103 (5th Cir. 1975). Cases within § 455(a) are extremely fact-driven, and must be judged on their unique facts and circumstances more than by comparison to situations considered in prior jurisprudence. *United States v. Jordan*, 49 F.3d at 157. If the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal. *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993).
>
> Section 455(a), however, must not be construed so broadly that it becomes presumptive, and recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice. *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986). A judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation. If this occurred, the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges. *U.S. v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986).

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Osmar v. City of Orlando, --- F. Supp. 2d. ----, ----, No. 6:12-cv-185-Orl-31DAB, 2012 WL 592748, at *1 (M.D. Fla. Feb. 23, 2012). Here, recusal is not warranted. "A charge of partiality must be supported by some factual basis," *United States v. Cerceda*, 188 F.3d 1291, 1293 (11th Cir. 1999), but Mr. Fenello has not provided any *specific* factual basis at all. He suggests that the undersigned and Judge Duffey have attended seminar events related to mortgage loans, but he does not identify the events, the judges' roles, or how that which transpired at the events cause their impartiality to reasonably be questioned. He states that it "appears" that Defendants' law firm was "a speaker" at one of these events, but he does not provide any details or cite caselaw suggesting that this warrants recusal. Nor does the caselaw in fact support such a result. *See*, *e.g.*, *In re Aguinda*, 241 F.3d 194, 202-03 (2d Cir. 2001) (recusal for district judge not required where he attended a seminar sponsored by a non-profit organization that received a small portion of its general funding from the defendant; although the petitioners stated that the seminar had, or might have appeared to a reasonable person to have had, a pro-development, anti-environmental-protection slant, "[t]hey have not, however, identified any legal issue material to the disposition of a claim or defense in the underlying litigation that was discussed, either favorably or

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unfavorably to their cause, at the seminar. Nor have they shown that the judge had any informal conversation bearing on such an issue").

For these reasons, the motion for judicial disclosures and recusal is **DENIED**.

III. Motion to Strike Plaintiffs' Second Response in Opposition to Defendants' Motion to Dismiss

In their motion to strike Mr. Fenello's "second response" to their motion to dismiss, Defendants contend that the filing is a meritless and procedurally improper surreply, which should therefore be stricken. [Doc. 19 at 2].

In response, Mr. Fenello contends that the second response "was within the 14 day time limit specified under Rule 12 of Federal Rules of Civil Procedure, as well as the extended response period that resulted from the Defendants' own Motion to Stay Pretrial Deadlines." [Doc. 20 at 2]. He further argues that the second response is not meritless but instead builds on the positions outlined in the complaint and first response and counters Defendants' repeated attempts to distract this Court from the question whether Bank of America can foreclose without evidence that their client owned the promissory note. [*Id.*].

Defendants did not file a reply. [*See* Dkt.].

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The undersigned concludes that the "second response," actually a surreply, should be stricken. "Although neither the Federal Rules of Civil Procedure nor this Court's Local Rules authorize the filing of surreplies, the Court may, in its discretion, permit the filing of a surreply when a valid reason exists, 'such as where movant makes new arguments in its reply brief.' " *Branch v. Ottinger*, Civil Action No. 2:10-CV-128-RWS, 2011 WL 4500094, at *1 (N.D. Ga. Sept. 27, 2011) (Story, J.) (quoting *Fedrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190, 1197 (N.D. Ga. 2005) (Duffey, J.)). There is no contention that Defendants made new argument in their reply brief, nor does there appear to be any other valid reason for permitting the filing of a surreply; to the contrary, it appears that Mr. Fenello simply wants to present further arguments in support of his position. That is not a valid reason for filing a surreply. The motion to strike the "second response" is therefore **GRANTED**.

IV. Conclusion

For the reasons above, the motion for leave to file excess pages, [Doc. 5], is **GRANTED**; the "motion for judicial disclosure and recusal," [Doc. 10], is **DENIED**; and the motion to strike Plaintiff Vito Fenello's second response in opposition to

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Defendants' motion to dismiss, [Doc. 19], is **GRANTED**. The Clerk is **DIRECTED** to **STRIKE** the "second response," [Doc. 18].

IT IS SO ORDERED and DIRECTED, this 24th day of May, 2012.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

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