

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

ALTA COLLEGES, INC., et al.

Defendants.

Hon. Kathleen G. Kennedy

No. 12 CH 01587

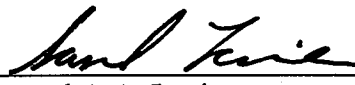
NOTICE OF MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

TO: Joseph Duffy, Esq.
Stetler, Duffy & Rotert, Ltd
10 S. LaSalle Street, Ste 2800
Chicago, IL 60603
jduffy@sdrlegal.com

2014 MAR 20 AM 5:55
CIRCUIT COURT OF COOK COUNTY ILLINOIS
J.V. HARRISON

PLEASE TAKE NOTICE that on THURSDAY 2014
MARCH 27, at 9:30 a.m. or as soon

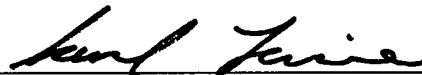
thereafter as counsel may be heard, I will appear in Courtroom 2502 of the Cook County Circuit Court – Chancery Division and present the attached motion.


Samuel A.A. Levine
Assistant Attorney General
Attorney for Plaintiff
100 West Randolph St., 12th Floor
Chicago, Illinois 60601
312/814-4984

CERTIFICATE OF SERVICE

I, Samuel Levine, an Assistant Attorney General, certify under penalties provided by law that on March 20, 2014, I served this Notice and the attached Motion for Leave by e-mailing the following individual:

Joseph Duffy, Esq.
jduffy@sdrlegal.com



SAMUEL A.A. LEVINE
Assistant Attorney General

Attorney No. 99000
LISA MADIGAN
Illinois Attorney General

Samuel A.A. Levine
Assistant Attorney General
Consumer Fraud Bureau
100 W. Randolph Street, 12th floor
Chicago, IL 60601
(312) 814-4984

2014 MAR 20 AM 5:56
CIRCULATED BY CLERK
COURT OF APPEALS
FIRST JUDICIAL DISTRICT
OF ILLINOIS
CLERK

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

2014 MAR 20 AM 5:55

5 11 12 PM

No. 12 CH 01587

Hon. Kathleen G. Kennedy

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff,)

vs.)

ALTA COLLEGES, INC., a Delaware Corporation;)
WESTWOOD COLLEGE, INC., a Colorado)
Corporation d/b/a Westwood College and)
Westwood College Online; WESGRAY)
CORPORATION, a Colorado corporation d/b/a/)
Westwood College-River Oaks and Westwood)
College-Chicago Loop; ELBERT, INC., a Colorado)
Corporation d/b/a Westwood College-DuPage; and)
EL NELL INC., a Colorado corporation d/b/a)
Westwood College-O'Hare Airport;)

Defendants.)

**PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED
COMPLAINT**

NOW COMES the Plaintiff, THE PEOPLE OF THE STATE OF ILLINOIS, by LISA
MADIGAN, Attorney General of the State of Illinois, and moves this Honorable Court, pursuant
to Section 2-616 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-616, to grant Plaintiff
leave to file a Second Amended Complaint so that the Plaintiff may conform its pleadings to the
facts recently obtained in discovery. Plaintiff has attached its Proposed Second Amended
Complaint ("Second Amended Complaint") as Exhibit A, and states the following in support its
Motion:

Introduction and Summary of Argument

1. Defendants operate an in-house financing program known as APEX, whereby Defendants lend money to students to finance a portion of their education at Westwood. In Plaintiff's Complaint and Amended Complaint, Plaintiff alleges, *inter alia*, that Defendants make misrepresentations to students concerning the cost and terms of APEX financing. In the eighteen months since the Amended Complaint was filed, the parties have engaged in extensive discovery with regard to Defendants' APEX institutional financing. As part of this discovery, Plaintiff requested data on APEX's default rate for Illinois Criminal Justice students, and Defendants produced this data in batches between December 2013 and February 2014. This data demonstrated that the default rate on Westwood's APEX institutional financing has consistently exceeded [REDACTED] and in certain years has exceeded [REDACTED]. Given this extraordinary rate of failure for Illinois consumers enrolled in Defendants' Criminal Justice program, coupled with the fact that Defendants do not tell their students that the majority of them will default on their APEX obligation, Defendants' APEX institutional financing constitutes an unfair financial product under the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* and an unfair and abusive product under the Consumer Financial Protection Act of 2010, 12 U.S.C. §5481, *et seq.* Accordingly, Plaintiff seeks leave to amend its Complaint in order to incorporate these new allegations in light of the newly discovered evidence. These allegations should not surprise or prejudice Defendants, who not only have responded to oral and written discovery concerning students' default rate on their APEX obligations, but also have retained an expert witness to rebut the claim that APEX is unfair to students.

Background

2. Plaintiff filed its original Complaint in January 2012, and its Amended Complaint in September 2012.

3. The Court entered a Case Management Order on December 12, 2012, and a Revised Case Management Order on September 5, 2013.

4. Per the Revised Case Management Order, fact discovery closed on November 15, 2013, but the parties, by agreement, continued to supplement their production thereafter. Expert discovery closes on April 11, 2014.

5. Throughout discovery, Plaintiff has proffered and Defendants responded to document requests and interrogatories regarding alleged misrepresentations regarding Defendants' in-house APEX financing program. Plaintiff also deposed numerous Westwood employees including Norm Blome, William Ojile and Deborah McKenzie concerning APEX.

6. Mr. Blome, Westwood's former Chief Financial Officer, has been deposed twice. His first deposition took place on August 20, 2013. Defendants later retroactively designated Mr. Blome's testimony as representative pursuant to Illinois Supreme Court Rule 206(a)(1).

7. In September of 2014, subsequent to Mr. Blome's testimony, Plaintiff requested data sufficient to establish the APEX default rate in its Seventh Request for Production and also requested the default rate through Plaintiff's Second Set of Interrogatories to Westwood. In late 2013, the parties negotiated an agreement whereby Defendants would agree to provide Plaintiff with data sufficient to establish the default rate on APEX for Criminal Justice students in Illinois.

8. Defendants provided two spreadsheets containing the requested default rate data on December 11, 2013. These spreadsheets provided Plaintiff—for the first time—with data sufficient to calculate Westwood's Illinois student default rate on the APEX lending product.

9. Defendants informed Plaintiff on January 3, 2014 that the two spreadsheets produced in December contained an error and would have to be revised.

10. Defendants then provided Plaintiff with two amended spreadsheets, first on January 22, 2014, and then on February 4, 2014.

11. On January 10, 2014, Defendants supplemented their Illinois Supreme Court Rule 213(f) disclosures by expanding the scope of Mr. Blome's testimony on, among other matters, the APEX financing program, and indicated that Mr. Blome would be made available for a supplemental deposition. *See Exhibit B, Excerpt from Def.' 3rd Supp. to Resp. to Pl.'s 1st Interrog.*

12. In separate correspondence, Defendants informed Plaintiff that Mr. Blome would be able to explain the spreadsheet errors during his supplemental deposition. *See Exhibit C, 201(k) correspondence at 3 ("With regard to your questions about the error rate, Norm Blome will best be able to answer those for you.").*

13. Plaintiff deposed Mr. Blome again on February 20, 2014. Plaintiff received the transcript for the deposition on March 11, 2014.

14. Expert depositions, which are scheduled to be completed by April 11, 2014, have not yet begun.

15. Both parties already have retained and disclosed experts to testify concerning the APEX program, including on the topic of whether the APEX financing is unfair to students because of its high default rate.

Plaintiff's Second Amended Complaint

16. Plaintiff's Amended Complaint, which was filed in September of 2012, alleged that Defendants violated the Illinois Consumer Fraud Act by making various misrepresentations,

including but not limited to misrepresentations about the cost of the Criminal Justice program, the impact of Westwood's lack of regional accreditation, and the likely outcomes for students that graduate the program. Specifically, with respect to its APEX program, the Amended Complaint alleges that Defendants made certain misrepresentations concerning the program's cost and terms. *See* ¶ 608 (o) and ¶ 608 (p) of Amended Complaint, September 17, 2012.

17. Plaintiff's Second Amended Complaint removes or revises certain factual allegations with respect to the misrepresentations and adds various material facts that Defendants failed to disclose to Illinois consumers. In addition, with respect to Defendants' APEX institutional financing, the Second Amended Complaint now alleges three additional counts: a standalone unfairness count under the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* ("CFA"); an unfairness count under the Consumer Financial Protection Act of 2010, 12 U.S.C. §5481 *et seq.*, ("CFPA"); and an abusive count under the CFPA. *Id.*

18. Plaintiff's three additional counts all concern Defendants' APEX institutional financing program. These counts are based entirely on facts ascertained through discovery, particularly the fact that the default rate has consistently exceeded █████ for Illinois Criminal Justice students and had exceeded █████ in certain years.

19. Plaintiff's Second Amended Complaint adds the allegation that Defendants know that a majority of its Illinois Criminal Justice students will default on their APEX obligations, but fail to inform prospective students of this material fact. *See, e.g.*, Ex. A at ¶ 456 (r). The Second Amended Complaint further alleges that the APEX product is unfair and abusive based on the misrepresentations and facts not disclosed to students, as well as the product's high rate of default. *See, e.g.*, Ex. A at ¶¶ 457-491.

20. Plaintiff's new counts rely in part on evidence developed through Mr. Blome's February 2014 deposition as well as the two original and two amended spreadsheets provided by Defendants in late 2013 and early 2014. This evidence demonstrates that Defendants' lending conduct violated the CFPA and CFA. Plaintiff seeks leave to add these new counts.

21. Plaintiff's Second Amended Complaint will not require either party to engage in additional fact or expert discovery, and it will not affect the Revised Case Management Order.

22. Over the course of discovery, Defendants have designated nearly every document they have produced as confidential. Because certain of Plaintiff's allegations arguably are based on these documents, in an abundance of caution, Plaintiff is filing today (as Exhibit A to this Motion) a redacted version of its Second Amended Complaint and is providing the Court with a courtesy copy of the redacted version. This procedure is consistent with how Plaintiff filed its Amended Complaint. At a later date, however, Plaintiff intends to seek leave from the Court to file its Second Amended Complaint without redactions of allegations that arise from documents that were improperly designated as confidential. Pursuant to the terms of the Protective Order entered in this matter, Plaintiff further reserves the right to challenge Defendants' designation of documents as confidential.

Legal Standard

23. The Illinois Rules of Civil Procedure provide that:

(a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.

735 ILCS 5/2-616 (a).

24. Illinois courts are encouraged to freely and liberally allow the amendment of pleadings if so doing furthers the ends of justice. See *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992) (“trial court has broad discretion in motions to amend pleadings prior to entry of final judgment”); *American Nat. Bank & Trust Co. of Chicago v. Dozoryst*, 256 Ill.App.3d 674, 679 (1st Dist. 1993) (“Any doubt as to whether pleadings should be amended should be resolved in favor of an amendment.”); *Cvengros v. Liquid Carbonic Corp.*, 99 Ill. App. 3d 376, 379 (1st Dist. 1981) (“One of the fundamental purposes of the Civil Practice Act . . . is to remove obstructions which preclude the resolution of a case on its merits; therefore, amendments to pleadings are to be liberally allowed to enable a party to fully present his case.”).

25. In determining whether to allow for amended pleadings, a court should consider the following four factors (the “*Loyola*” factors): “(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Loyola*, 146 Ill. 2d at 273.

26. The first *Loyola* factor may be disregarded if the amended complaint does not attempt to cure a defect. See *Clemons v. Mech. Devices Co.*, 202 Ill. 2d 344, 356 (2002) (first *Loyola* factor is not relevant where “[p]laintiff did not move to amend his complaint to cure a defective pleading.”).

27. “The most important of the *Loyola* factors is the prejudice to the opposing party, and substantial latitude to amend will be granted when there is no prejudice or surprise to the nonmovant.” *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 628 (3d Dist. 2004). “For a delay to prejudice a party, it must operate to hinder his ability to present his case on the merits.” *Miller v. Pinnacle Door Co., Inc.*, 301 Ill. App. 3d 257, 261 (4th Dist. 1998).

28. “Any doubts as to whether leave to file an amended complaint should be granted should be decided in favor of the allowance of the amendment.” *Savage v. Mui Pho*, 312 Ill. App. 3d 553, 557 (5th Dist. 2000). Illinois courts have allowed the addition of new counts as late as trial. *See, e.g., Bresland v. Ideal Roller & Graphics Co.*, 150 Ill. App. 3d 445, 451 (1st. Dist. 1986) (finding that trial court did not err in allowing a party to add a new count during trial); *N. Shore Marine, Inc. v. Engel*, 81 Ill. App. 3d 530 (2nd. Dist. 1980) (same).

Argument

29. The *Loyola* factors counsel in favor of granting Plaintiff leave to amend. *See Loyola*, 146 Ill. 2d at 273.

30. The first *Loyola* factor is whether the proposed amendment would cure the defective pleading. 146 Ill. 2d at 273. Here, where the Court has denied Defendants’ Motion to Dismiss, Plaintiff does not seek to cure any defects in its Amended Complaint but rather to add new counts based on newly discovered evidence. The first *Loyola* factor may therefore be disregarded. *See Clemons*, 202 Ill. 2d at 356.

31. The second *Loyola* factor is whether the non-movant would sustain prejudice or surprise by virtue of the proposed amendment. *Id.* Here, Defendants will sustain no prejudice or surprise by virtue of Plaintiff’s Second Amended Complaint. As discussed *supra*, the most significant modification of Plaintiff’s pleadings is the addition of one count brought under the CFA and two counts brought under the CFPA, each concerning the APEX program.

32. Extensive discovery has put Defendants on notice of Plaintiff’s concerns with the excessive and expected default rate of Defendants’ APEX institutional financing. To address any surprise, Plaintiff indicated to Defendants on October 16, 2013, its position that “continuation of the APEX financing program is not only deceptive, but also unfair and an offense to public

policy, by issuing a financial product with such a high likelihood of default.” *See* Exhibit D, Excerpts from Pl’s 4th Supp. Resp. to Def.’s 1st Interrog. at 7.

33. Given the seriousness of the allegation, however, Plaintiff sought a developed record regarding the default rate before Plaintiff amended the Complaint to allege a separate CFA unfairness claim from the default rate or include a CFPA claim. Accordingly, in its Seventh Request for Production in September of 2013, Plaintiff sought complete data regarding the default rate of the financing program by Criminal Justice students in Illinois, data that Plaintiff did not receive, as discussed *supra*, until late 2013 and early 2014. Plaintiff then deposed Defendants’ former Chief Financial Officer, Norm Blome, concerning the default data in February of 2014. Defendants have thus been on notice of Plaintiff’s concern with the APEX default rate.

34. Defendants have also been put on notice through expert discovery. Plaintiff has disclosed to Defendants that one of its experts—David Bergeron—will testify, based in part on the spreadsheets provided to Plaintiff, concerning the default rate on APEX financing and the potential unfairness to students. Defendants have retained a rebuttal expert, Charles Andrews, who is expected to testify that “Westwood’s recognition for financial statement purposes of the collectability of APEX accounts does not indicate any weakness in the APEX program or unfairness to students.” *See* Exhibit E, Excerpt of Def.’s 5th Supp. to Resp. to Pl.’s 1st Interrog at 29. Depositions of both experts are to take place over the next month, and Defendants will have ample opportunity to challenge Mr. Bergeron’s theories and conclusions.

35. With both sides having already staked out a position on the legality of the APEX program, both factually and through expert testimony, Defendants cannot claim an inability to present their case on the merits. *See Miller*, 301 Ill. App. 3d at 261.

36. Thus, Defendants would suffer no prejudice as a result of the filing of Plaintiff's Second Amended Complaint. The Second Amended Complaint would require a) no additional discovery; b) no delay to expert depositions; c) no delay to dispositive motions; and d) no delay to trial.

37. The third *Loyola* factor is whether the proposed amendment is timely. *Loyola*, 146 Ill. 2d at 273. Plaintiff's Motion for Leave is timely as it is being filed far in advance of final judgment. *See* 735 ILCS 5/2-616(a). *See also Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 508 (1992) (reviewing a trial court's decision to grant plaintiff leave to amend its complaint prior to closing arguments at trial and stating that "because amendments may be allowed at any time before the entry of a final judgment, the timeliness of plaintiff's amendment is not at issue."). In fact, courts have allowed the amendment of pleadings as late as trial. *See, e.g., Id. at 508; Pry v. Alton & S. Ry. Co.*, 233 Ill. App. 3d 197, 213 (1992) ("a party may amend his complaint at any time, before or after judgment, if the amendment is made to conform the plaintiff's pleadings to the proof at trial.").

38. The fourth *Loyola* factor is whether previous opportunities to amend the pleading could be identified. 146 Ill. 2d at 273. Here, Plaintiff prepared its Second Amended Complaint as early as possible after Defendants' factual production. As referenced above, Defendants did not begin producing APEX data sufficient to establish the default rate until December of 2013, and did not complete their production until February 4, 2014. It was not until February 20, 2014, that Plaintiff was able to depose Mr. Blome concerning the purported error in the original data, and it was not until March 11, 2014, that Plaintiff received the transcript from that deposition. Plaintiff thus files this Motion for Leave only eight days after having received Mr. Blome's transcript. Because of the importance Plaintiff placed on accurately representing the APEX default rate, there was no previous opportunity to amend the pleadings. *See Loyola*, 146 Ill. 2d at 273.

39. Each of the *Loyola* factors, therefore, counsels in favor of granting Plaintiff leave to file its Second Amended Complaint, which conforms Plaintiff's allegations to the evidence developed through discovery.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court enter an order granting leave to file a Second Amended Complaint in this matter along with any other relief as justice and equity require and the Court may deem appropriate.

Respectfully submitted,



Samuel A.A. Levine
Assistant Attorney General
(312) 814-4984

Attorney No. 99000
LISA MADIGAN
Illinois Attorney General

GARY CAPLAN
Assistant Chief Deputy Attorney General

SUSAN ELLIS
Chief, Consumer Fraud Bureau

THOMAS JAMES
Senior Assistant Attorney General

JOHN WOLFSMITH
Assistant Attorney General, Special Litigation Bureau

CECILIA ABUNDIS
SAMUEL A.A. LEVINE
OSCAR PINA
JOSEPH SANDERS
KHARA COLEMAN WASHINGTON
Assistant Attorneys General, Consumer Fraud Bureau


CERTIFICATE OF SERVICE

I, Samuel Levine, an Assistant Attorney General, certify under penalties provided by law that on March 20, 2014, I served this Notice and the attached Motion for Leave by e-mailing the following individual:

Joseph Duffy, Esq.
jduffy@sdrlegal.com

Attorney No. 99000
LISA MADIGAN
Illinois Attorney General

Samuel A.A. Levine
Assistant Attorney General
Consumer Fraud Bureau
100 W. Randolph Street, 12th floor
Chicago, IL 60601
(312) 814-4984


SAMUEL A.A. LEVINE
Assistant Attorney General

2014 MAR 20 AM 5:56
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
CLERK'S OFFICE
CLERK