IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	Hon. Ronald A. Guzman
	)	
v.	)	Mag. Judge Geraldine Soat Brown
	)	
ALTA COLLEGES, INC., et al.,	)	Case No. 14-cv-3786
	)	
Defendants.	)	
	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO SEVER AND REMAND

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Introduction

After more than two years of litigating a single-count complaint in the Circuit Court of Cook County, the Attorney General ("AG") sought, after the close of discovery, and received, over Defendants' objection, leave to file a Second Amended Complaint ("SAC") that advanced two federal causes of action. The AG concedes that removal to this Court of the federal claims, Counts III and IV, is proper. The AG further concedes that Count II, a state claim, is sufficiently connected to Counts III and IV to warrant this Court's exercise of supplemental jurisdiction, yet the AG nevertheless asks this Court to sever and remand Counts I and II and thus to order that this case occupy the resources of two courts in two jurisdictions as it proceeds through two separate trials.

The crux of the AG's motion is her new-found assertion that Count I does not have even a "loose factual connection" to the federal claims alleged in Counts III and IV. The AG's argument is belied not only by the allegations of the SAC itself, which bases four claims on the same set of factual allegations, but also by the arguments the AG herself made to persuade the state court to grant leave to file the SAC after the close of discovery. The AG further argues that Count II should be remanded with Count I, despite its admitted factual connection to Counts III and IV, because it supposedly presents a novel issue of state law. Count II is the same claim that the AG has advanced many times and is similar to claims routinely decided by federal courts exercising supplemental jurisdiction. The AG's Motion should therefore be denied.

Factual Background

While the AG now contends that the allegations in her newly-filed SAC regarding Defendants' financing program, APEX, are new to this lawsuit, the original complaint filed in state court on January 18, 2012, contained 22 paragraphs related to APEX and alleged similar facts to those the AG now deems "an issue of first impression." (Motion to Remand, p. 14; *see also* Complaint, ¶¶ 66, 177.) Likewise, the AG's first Amended Complaint, filed on September 18, 2012, contained numerous factual allegations about the APEX program—25 paragraphs to be precise. (Amended Complaint, *passim*.)

On December 12, 2012, the state court entered an agreed discovery schedule that included a September 2014 trial date. Defendants have actively sought to bring this case to trial—by, for example, commencing discovery six months before the AG, objecting to the AG's repeated requests to extend discovery, and objecting to the AG's latest amended pleading. In contrast, the AG has resisted Defendants' attempts to move this case forward—by, for example, moving to stay discovery while Defendants' motion to dismiss was pending (an unusual request for a plaintiff), claiming the case management schedule she initially agreed to was not feasible, and twice moving to extend discovery.

On March 20, 2014, after the close of discovery, the AG filed a motion seeking leave to file the SAC. (*See* Motion for Leave, attached hereto as Ex. 1 (without exhibits).) As of that date, the operative pleading, the Amended Complaint, contained only one Count, which alleged that Defendants violated the Illinois Consumer Fraud Act ("ICFA") by making various misrepresentations about Defendants' Criminal Justice program and Defendants' APEX financing program. That count is now pled as Count I in the pending SAC. Count II of the SAC alleges that Defendants' APEX program violated the ICFA because it was offered "without regard to the ability to repay, without sufficient disclosure and discussion, with onerous terms, and with advanced knowledge that a majority will default . . . ." (¶ 467.) Counts III and IV of the SAC allege violations of the federal Consumer Financial Protection Act ("CFPA"), 12 U.S.C. §§ 5531(a), 5536(a)(1)(B). Specifically, Count III alleges that the APEX program was "unfair" for the same reasons given in Count II. (¶ 477.) Count IV alleges that the APEX program was "abusive," again for the same or similar reasons that the program is alleged to have violated the ICFA in Count II and the CFPA in Count III. (¶¶ 491-492.)

In her Motion for Leave to file the SAC, in her Reply brief, and at oral argument on the Motion for Leave, the AG repeatedly represented to the presiding state court judge that the proposed new Counts II-IV were so similar to the existing Count I that: "[t]he 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." (Ex. 1 at ¶ 36; Reply, attached hereto as Exhibit 2 (without exhibits), p. 2;

Excerpts of Transcript May 2, 2014 Hearing on the Motion for Leave, attached hereto as Exhibit 3, p. 63.) The AG consistently and repeatedly represented in briefs and at oral argument that all of the evidence presented at trial to support (or refute) Count I would be the exact same evidence presented to support (or refute) Counts II-IV. (*See, e.g.,* Ex. 1, ¶ 36; Ex. 2, p. 2; Ex. 3, pp. 63-65.)

Based on the AG's repeated assurance that Counts II-IV were based on the same facts developed through discovery on Count I, the state court granted the AG's Motion for Leave. In doing so, the state court ordered that "[f]act and expert discovery remains closed, except to the extent Defendants may amend their discovery responses as necessary in response to Counts 2, 3, and 4 of the Second Amended Complaint." (May 9, 2014 Order, attached hereto as Exhibit 4.)

The AG filed the SAC on May 12, 2014. The first 454 paragraphs of the SAC allege facts that are common to all counts. (*See* SAC, ¶¶ 1-454.) The first paragraphs of each of Counts I, II, III, and IV incorporate all of the common allegations into each Count "as if fully set forth herein." (¶¶ 455, 458, 474, 485.)

On May 22, 2014, Defendants removed this case based upon this Court's federal question jurisdiction over Counts III and IV and supplemental jurisdiction over Counts I and II. On June 18, 2014, the AG filed her Motion to Sever and Remand ("Motion to Remand").

Argument

I. The Court Should Deny the AG's Request to Sever and Remand Count I.

As the AG concedes, "a loose factual connection between the claims is generally sufficient" to warrant the exercise of supplemental jurisdiction. (Motion to Remand, p. 10 (quoting *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995) (affirming exercise of supplemental jurisdiction over assault and battery claims because they were loosely connected to plaintiff's Title VII sexual harassment claims)).)[1]

[1] Courts in this District routinely exercise supplemental jurisdiction over Illinois Consumer Fraud Act claims where similar federal claims are made. *See, e.g., Spiegel v. Judicial Attorney Servs., Inc.,* 09-7163, 2010 WL 5014116, at *3 (N.D. Ill. Dec. 3, 2010) (exercising supplemental jurisdiction over ICFA claim because it was related to FDCPA claim); *Allergy Asthma Tech., Ltd. v. I Can Breathe, Inc.*, 195 F. Supp. 2d 1059, 1070 (N.D. Ill. 2002) (exercising supplemental jurisdiction over ICFA claim because it was similar to Lanham Act claim); *Printing Indus.*

The AG's own words and allegations in the SAC make clear that there is far more than simply a "loose factual connection" between Count I and the federal causes of action alleged in Counts III and IV.

A. The AG's current argument that Counts III and IV are not derived from a common nucleus of operative facts as Count I is belied by her own words.

Even though the AG successfully argued to the state court that the new federal claims alleged in Counts III and IV were so similar to Count I that no additional discovery would be needed, the AG now asks this Court to find that there is not even a "loose factual connection" between Count I and Counts III and IV. Under the doctrine of judicial estoppel, the AG cannot successfully make one argument before the state court and then make the opposite argument before this Court. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.")

Even were she not judicially estopped, the AG's present theory is belied by her own words. In her Motion for Leave, the AG told the state court:

> 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. . . . 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. (Ex. 1, ¶ 1.)

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of Illinois Employment Ben. Trust v. Timely Press, 00-2775, 2001 WL 303546, at *3 (N.D. Ill. Mar. 27, 2001) (denying motion to dismiss and exercising supplemental jurisdiction over ICFA claim because similar facts would be needed to prove the ERISA claim); *Mitchem v. Am. Loan Co., Inc.,* 99-1868, 2000 WL 290276, at * 4 (N.D. Ill. Mar. 17, 2000) (denying motion to dismiss TILA claims and retaining jurisdiction over ICFA claims); *Sharp v. Chartwell Fin. Servs. Ltd.,* No. 99-3828, 2000 WL 283095, at * 5 (N.D. Ill. Mar. 6, 2000) (denying motion to dismiss ICFA claims and exercising supplemental jurisdiction); *Davis v. Cash For Payday, Inc.*, 193 F.R.D. 518, 526 (N.D. Ill. 2000) (denying motion to dismiss to TILA claims and retaining supplemental jurisdiction over ICFA claims despite defendants' argument that state law claims raise novel issues of law); *Donnelly v. Illini Cash Advance, Inc.*, 00-094, 2000 WL 1161076, at *5 (N.D. Ill. Aug. 16, 2000) (same); *Williams v. Ford Motor Co.,* 192 F.R.D. 580, 583 n.4 (N.D. Ill. 2000) (retaining supplemental jurisdiction over ICFA claim); *Pinkett v. Moolah Loan Co.,* 99-2700, 1999 WL 1080596, at *8 (N.D. Ill. Nov. 2, 1999) (exercising supplemental jurisdiction over ICFA claims over Defendant's argument that the state claims raised novel issues); *Cobb v. Monarch Fin. Corp.,* No. 95-1007, 1996 WL 308279, at *3 (N.D. Ill. June 6, 1996) (denying Defendants' motion to decline supplemental jurisdiction over ICFA claim); *Shields v. Lefta, Inc.*, 888 F. Supp. 894, 898 (N.D. Ill. 1995) (exercising supplemental jurisdiction over ICFA claims based on similarities to TILA claims).

The AG also told the state court, "[w]ith 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." (*Id.* at ¶ 35.) The AG reiterated that "[t]he 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." (*Id.* at ¶ 36.) Thus, the AG convinced the state court that Defendants would not be prejudiced by the proposed SAC because the new claims were based on the same set of operative facts that the parties had litigated for two years.

In her Reply, the AG was equally clear that the new claims derived from the same nucleus of operative facts as the original Count I:

> Plaintiff believes that the new counts raise issues of law that can be ruled on based on the existing factual record. Even viewed through Defendants' lens, the new Counts plead in the SAC will not require additional factual or expert discovery that cannot be completed prior to the scheduled September trial date. (Ex. 2, p. 2.)

The AG's argument in support of her Motion for Leave essentially was a two-step process. First, she argued that the state law claims, Counts I and II, were the same: "Defendants' response makes no attempt to argue that new facts are necessary for this Court to render a legal verdict on the question posed by Count II - whether the APEX financial product is structurally unfair in violation of the ICFA." (*Id.*) Then she argued that Count II (state) and Count III (federal) were the same:

> Defendants cite no evidence or testimony necessary to resolve Count III that is not already in the record. Given the similarity of Counts II and Counts III, and the identical facts and legal analysis necessary to support each, it is not surprising that Defendants avoid any express assertion of prejudice regarding Count III. (*Id.* at p. 10.)

The AG also argued before the state court that "[Counts II, III and IV] derive[] from a similar genesis - the assertion that the default rate on the APEX loans issued by Defendants to its criminal justice students was exceptionally high, rendering the financial product structurally unfair and abusive under state and federal law." (Ex. 2, p. 2.) In other words, the AG convinced the state court that Count II was the same as the Count I, and Counts III and IV were the same as Count II, so therefore the state

court should allow leave to add Counts II, III, and IV because they derive from the same facts that the parties have been litigating since 2012.

During oral argument, the AG emphasized that Counts II-IV were so similar to Count I that no additional discovery would be necessary and that "[t]here [was] no reason . . . to delay that trial date." (Ex. 3, pp. 45-46.) Further, argued the AG, "[e]very single [piece of additional evidence Defendants suggested they would need to defend against Counts II-IV] is either irrelevant or already in the record, and they already have an expert opining on it, and that's the unfairness claim, and that's counts 2 and 3." (*Id.* at pp. 52-53.)[2] As to Count IV, the AG said, "we don't believe there is any more evidence from our end." (*Id.* p. 63.) Finally, the AG maintained that "nothing we have asked for would delay the start of the trial." (*Id.* at pp. 64-65.)

The AG repeatedly and successfully argued to the state court that the evidence the parties developed during discovery was the same evidence necessary and sufficient to litigate the federal claims pled in Counts III and IV. Thus, as the AG previously admitted and now denies, Counts III and IV not only have the required "loose factual connection" to Count I, but that they are based on the *exact* same evidence. (*See* AG's Motion to Remand, p. 10 (quoting *Ammerman,* 54 F.3d at 424).)

B. The AG's current argument that Counts III and IV are not derived from a common nucleus of operative facts as Count I is belied by the allegations of the SAC.

It is clear from the face of the SAC that all four Counts are derived from a common nucleus of operative facts. The "[t]wo factors courts generally look at to determine whether the state and federal claims are so related as to form part of the same case or controversy are: (1) whether the state claim re-alleges and incorporates allegations contained in the federal claim and (2) the temporal relationship between the two claims." *Ganan v. Martinez Mfg., Inc.*, 02-50412, 2003 WL 21000385, at *2 (N.D. Ill. May 2, 2003) (finding a common nucleus of operative facts between malicious prosecution and abuse

[2] The expert testimony that the AG was referring to—which she repeatedly said supports Counts II-IV—was obtained during the period for expert discovery, which closed before the AG sought leave to file the SAC.

of process claims). Here, both factors establish far more than the required "loose factual connection." *Ammerman,* 54 F.3d at 424.

First, the federal claims "re-allege[] and incorporate[] allegations" of the state law claims. Indeed, the SAC alleges facts common to all counts and incorporates each fact into each count. (¶¶ 455, 458, 474, 485.)

The AG did not merely rely on general allegations incorporating all facts into each count; she also pleaded specific factual allegations as predicates to multiple counts. For example, Counts II-IV allege that a majority of students who received APEX financing have defaulted or are expected to default. (¶¶ 462, 463, 464.) Counts II and III allege that defendants pressured students into taking out loans they could not afford, did not want, did not understand, or did not know they had. (¶¶ 465, 479.) Those same allegations appear in Count I. (¶ 456(m)-(o), (q).)

Likewise, Counts II and III allege that the APEX program was "unfair" because: (i) Defendants inadequately disclosed the nature of the APEX program, including the costs and payment obligations (¶¶ 460, 467, 477(b)); and (ii) Defendants failed to inform students of the default rates of other students (¶¶ 462, 467, 477(c), 480, 483(d)). Count IV alleges that the APEX program was "abusive" because: (i) Defendants failed to inform students of the nature of the APEX program, including costs and the obligation to repay (¶¶ 491(a)-(b), 492(b)); and (ii) Defendants failed to inform students of the default rates of other students (¶ 492(c)-(e)). The AG alleges that Defendants are liable under Count I for the very same conduct: (i) misrepresenting the nature of APEX, including costs and payment obligations (¶ 456 (m)-(p)); and (ii) failing to disclose the default rates experienced by other students (¶ 456 (q)).

Further, Counts II-IV allege that Defendants engaged in unfair and abusive acts and practices to increase their income. (¶¶ 462-66, 478, 491(c)-(d), 492(c)-(f).) Counts III and IV allege that Defendants' staff rushed students and used high pressure tactics to persuade and entice students. (¶¶ 477; 492(c).) These same allegations all also appear in Count I. ((¶ 456(a)-(s).)

Even the remedies the AG seeks for all of the Counts are the same: rescission, restitution, damages, civil penalties, costs, and other equitable relief such as limits on activities or functions, suspension or termination of the right to do business. (¶¶ 494-97.) In fact, the AG alleged a single prayer for relief applicable to all counts. (Prayer for Relief, SAC pp. 81-93.) "Where, as here, there is a single wrong alleged by a plaintiff arising out of an interlocked series of transactions and giving rise to the relief that is sought, the Court should find that the claims against all of the defendants form part of the 'same case or controversy.'" *Roe v. Little Co. of Mary Hosp.*, 800 F. Supp. 620, 624 (N.D. Ill. 1992).

Second, the exercise of supplemental jurisdiction is warranted because all four claims are temporally related. Indeed, because all four counts re-allege and incorporate all of the same factual allegations, it would be impossible to separate the causes of action temporally. By incorporating all factual allegations, Counts I and II (state claims), and Count III (federal claim) seek to hold Defendants liable for conduct that occurred "[f]rom 2004 to the present." (¶477; *see also* ¶¶ 5-6, 89, 144-161, 191, 205, 255.)[3] The SAC alleges in no uncertain terms that the same acts and practices at issue "violate *both* Illinois and federal law." (¶ 39 (emphasis added).) In sum, this case satisfies both factors for supplemental jurisdiction. *See Ganan,* 2003 WL 21000385, at *2.

In *Printing Indus.*, defendant hired plaintiff to administer group medical expenses for defendant's employees. 2001 WL 303546, at *1. The relationship soured, plaintiff filed suit, and defendant counterclaimed for ERISA violations stemming from plaintiff's denial of certain benefits to defendants' employees. *Id.* Defendant also alleged that plaintiff violated the Illinois Consumer Fraud Act. *Id.* In an attempt to remand the case back to state court, the Plaintiff argued that the district court lacked supplemental jurisdiction over the ICFA claims because the misrepresentations were not related to the

[3] Although both Counts III and IV allege violations of the federal CFPA, the AG alleges Defendants violated Count III from 2004 to the present (¶ 477) while Count IV alleges conduct from 2011 to the present (¶ 488). Count III is likely a mistake, because the CFPA became effective on July 21, 2011 as part of the Dodd-Frank Act and is not retroactive. *See Mart v. Gozdecki, Del Giudice, Americus & Farkas LLP*, 910 F. Supp. 2d 1085, 1095 (N.D. Ill. 2012) ("Dodd–Frank does not have retroactive effect."); *Molosky v. Washington Mut., Inc.*, 664 F.3d 109, 113 n.1 (6th Cir. 2011) ("These provisions came into effect on July 21, 2011, and have no retroactive effect with regard to the issues in this appeal."). Regardless, it is clear that the conduct at issue in all four counts overlaps at least from 2011 to the present.

denial of ERISA benefits, but the district court disagreed, finding that the "counterclaim ha[d] a 'loose connection' with each parties ERISA claims." *Id.* at *4.

In *Shields v. Illinois Dept. of Corrections,* this Court exercised supplemental jurisdiction after finding that "[t]hough the standards of proof for the state and federal claims differ, the claims all arise from the same events and it is likely that much of the evidence that will be offered to prove and rebut them will be the same." 10-3746, 2011 WL 494199, at *2 (N.D. Ill. Feb. 7, 2011) (citations omitted).

In *Angelopoulos v. Keystone Orthopedic Specialists, S.C.*, the federal claim involved filing a fraudulent return with the IRS. 12-5836, 2014 WL 292578, at *3 (N.D. Ill. Jan. 23, 2014). The court held supplemental jurisdiction was proper over various state law claims even as to claims brought against a third party, who was not named in the federal claim because if supplemental jurisdiction was not exercised, "[the plaintiff] would be forced to bring a parallel suit in state court involving a significant amount of evidentiary overlap with his federal case, which would defeat the very purpose that underlies the Court's supplemental jurisdiction." *Id.* at 7. The court found a "loose evidentiary overlap" and concluded that all claims "arise out of the same narrative. At bottom, this case involves the soured business relationship between two men." *Id.*

The cases cited by the AG are inapposite to the facts in this case. For example, in *Eager v. Commonwealth Edison Co.*, the plaintiff alleged Title VII sexual harassment claims against her employer. 187 F. Supp. 2d 1033, 1035 (N.D. Ill. 2002) (Motion to Remand, pp. 6, 10). She also asked the court to exercise supplemental jurisdiction over personal injury claims arising from an incident in which she was electrocuted on the job. *Id.* The district court refused to exercise supplemental jurisdiction because the sexual harassment had nothing whatsoever to do with the electrocution: "[t]here is no suggestion . . . that this unfortunate event is in any way related to [plaintiff's] Title VII claims except by way of temporal coincidence." *Id.* at 1040. Of course, here, by contrast, all of the allegations are intertwined.

In *Riva Technologies, Inc. v. Zack Electronics, Inc.*, the district court found that a fee dispute between the plaintiff and its lawyers did not fall within the scope of the court's supplemental jurisdiction because

the fee dispute had nothing whatsoever to do with the underlying lawsuit.[4] 01-1390, 2002 WL 1559584, at *4 (N.D. Ill. July 15, 2002) (Motion to Remand, p. 10). The court said that there was "no factual connection between those claims at all, much less a 'loose factual connection.'" *Id.*

In *Berg v. BCS Fin. Corp.*, the court dismissed all of plaintiff's federal claims against the lone defendant to the state law breach of contact claim. 372 F. Supp. 2d 1080, 1095 (N.D. Ill. 2005) (Motion to Remand, p. 10). All that remained was a claim against a different defendant seeking a narrow review of an ERISA administrative decision and so the court found that the "narrow operative facts underlying Berg's ERISA claims do not relate to his state law breach of contract claim." *Id.* And because the defendant in the state law breach of contract claim was not a even party to the federal claims the Court found that "trying this claim in state court would be as economical as trying it here." *Id.* at 1096.

In *Salei v. Boardwalk Regency Corp.*, contrary to the AG's description (which misstates the holding), the court declined supplemental jurisdiction because "it is apparent that Plaintiff's state and federal claims do not share any of the same 'operative facts.'" 913 F. Supp. 993, 999 (E.D. Mich. 1996) (Motion to Remand, pp. 10-11).[5] Moreover, courts in this district have held the exact opposite as did the Michigan court. *See Mufwene v. American Credit Exchange,* 10-2591, 2010 WL 4539451, at *1 (N.D. Ill. Nov. 3, 2010) (finding supplemental jurisdiction over breach of contract claim based on violation of the Fair Debt Collection Practices Act even though the "actual validity of the underlying debt is not relevant to [the plaintiff's federal] claim").

The AG quotes from *In re Standard & Poor's Rating Agency Litig.*, for the proposition that there somehow is a "presumption against federal jurisdiction" in case involving the "States seeking to vindicate quasi-sovereign interests in enforcing state laws . . . ." 13-2446, 2014 WL 2481906, at *3

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[4] *Riva* appears to stand in contrast to Seventh Circuit precedent. *See Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1299-300 (7th Cir. 1995) ("supplemental jurisdiction generally has been asserted over attorney's fee disputes when the disagreement arises between the client and the lawyer.")

[5] Courts have been very critical of the *Salei* opinion. *See, e.g., Poteet v. Polk Cnty., Tennessee,* 105-309, 2007 WL 1189625, at * 2-3 (E.D. Tenn. Apr. 19, 2007); *Crucible Materials Corp. v. Coltec Indus., Inc.,* 986 F. Supp. 130, 133 (N.D.N.Y. 1997).

(S.D.N.Y June 3, 2014) (Motion to Remand, p. 5.) But that case has no relevance here because the issue in that case was whether there was federal question jurisdiction in the first instance. *Id. Standard & Poor's* had nothing whatsoever to do with supplemental jurisdiction.

The AG also cites *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011), for the similar proposition that "federal courts should be reluctant to pull [cases brought by states] out of state court, absent some clear rule demanding that it retain jurisdiction." (Motion to Remand, p. 5.) Again, *LG Display,* had nothing whatsoever to do with supplemental jurisdiction and addressed only whether federal question jurisdiction existed. Here, of course, federal question jurisdiction is not at issue and the AG does not seek the remand of Counts III and IV.

The AG quotes *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966), for the proposition that the "state and federal claims must derive from a common nucleus of operative fact," a proposition with which Defendants have no quarrel. Indeed, in *Gibbs,* the Supreme Court explained the justification of supplemental jurisdiction is one of discretion and "lies in considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726. Ultimately, in *Gibbs,* the Supreme Court held a common-law state claim and a federal Labor Management Relations Act claim were both derived from a common nucleus of operative fact and that supplemental jurisdiction was appropriate.

In the lone Seventh Circuit opinion on supplemental jurisdiction cited by the AG, *Ammerman,* the Appellate Court affirmed the exercise of supplemental jurisdiction over assault and battery state law claims because it found a "loose factual connection" to the plaintiff's Title VII claims. 54 F.3d at 424.

In this case, unlike those cited by the AG, all of the claims are pleaded to be derived from a common nucleus of operative facts, so Count I easily meets the standard for supplemental jurisdiction. The Court, therefore, should deny the AG's Motion to sever and remand Count I.

II. The Court Has Supplemental Jurisdiction over Count II.

The AG does not dispute that Counts II-IV are similar enough for the Court to exercise supplemental jurisdiction. Rather, the AG claims that this Court nevertheless should decline to exercise

supplemental jurisdiction because Count II presents a theory of first impression that should be decided by a state court judge. The AG's argument lacks merit.

A. Count II is not one of first impression; indeed, the AG has alleged the same theory many times.

The AG claims that Count II is one of first impression because "[n]o Illinois case has decided whether a financial product can be presumptively unfair because it is offered without regard to a borrower's ability to repay, while the lender knows that a majority of the borrowers will default." (Motion to Remand, p. 14.) While almost any claim can be defined narrowly enough to make it sound novel (as the AG has tried to do here), courts in this district have routinely decided claims based on similar theories. *See, e.g., F.D.I.C. v. Mahajan,* 11-7590, 2012 WL 3061852, at *4-5 (N.D. Ill. July 26, 2012) (reviewing whether bank's failure to consider borrowers' ability to repay violated FIRREA); *Haddad v. Dominican Univ.,* 06-0506, 2007 WL 809685, at * 4 (N.D. Ill. Mar. 15, 2007) (finding university did not violate the Higher Education Act because "the statute does not impose any requirement on an institution of higher education or a loan company to inquire into a student's financial status or ability to repay a loan"); *Cmty. Fed. Sav. v. Reynolds*, 87-4948, 1989 WL 99548, at *3 (N.D. Ill. Aug. 18, 1989) (dismissing ICFA claim and finding that an alleged failure to consider a borrower's ability to repay a loan was not a cognizable claim under the ICFA).

Even accepting the AG's narrow description of Count II, it is hardly novel. Perhaps the Illinois AG's office has never taken a similar claim to trial, but that office has brought this type of allegation many times. (*See, e.g.,* AG's Press Releases, attached hereto as Exhibit 5.) For example, in 2008, the AG alleged that Countrywide violated the ICFA by providing loans that were likely to default (¶¶ 152, 223, 294-296), by failing to ensure borrowers could repay their loans (¶ 294), and by failing to fully inform borrowers of the terms of their loans (¶¶ 294-296). (*See* Excerpts from Countrywide Complaint, attached hereto as Exhibit 6.) In 2009, the AG made similar allegations against Wells Fargo.[6] (*See*

[6] These are examples published on the AG's website. Many similar examples may well abound.

Excerpts from Wells Fargo Complaint, attached hereto as Exhibit 7, ¶¶ 190-191, 196, 234.) In fact, the AG has a "fair lending team," dedicated to prosecuting claims of unfairness in lending. (*See* March 6, 2008 Press Release, Ex. 5, p. 3.) As it happens, three members of the AG's fair lending team have filed appearances in this case. It is difficult to reconcile the AG's past efforts to prosecute unfair lending practices with her theory here that the unfairness allegations in Count II are novel.

Nor is Count II a novel theory outside of the Illinois AG's office. As the AG admits in the Motion to Remand, the Massachusetts Attorney General apparently succeeded on a similar theory. (Motion to Remand, p. 14.) Similar claims have been decided in other courts, as well. *See, e.g., Mendoza v. CitiMortgage, Inc.*, 10-03550, 2011 WL 940336, at *6 (N.D. Cal. Feb. 18, 2011) (dismissing TILA and California Unfair Business Practices claims and finding that loans were not "structurally unfair" despite lack of consideration into buyer's ability to repay); *Weinstein v. Home Am. Mortgage Corp.*, 10-1552, 2010 WL 5463681, at * 3-4 (D. Nev. Dec. 29, 2010) (dismissing RESPA, TILA, and state consumer law claims, including fraud claim, alleging bank had a fiduciary duty to ensure the ability of the debtor to repay); *Sheets v. DHI Mortg. Co.*, 09-1030, 2009 WL 2171085, at *4 (E.D. Cal. July 20, 2009) (reasoning that no duty exists "for a lender 'to determine the borrower's ability to repay the loan. . . . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's.'" (quoting *Renteria v. United States*, 452 F. Supp. 2d 910, 922–23 (D. Ariz.2006) (finding that borrowers "had to rely on their own judgment and risk assessment to determine whether or not to accept the loan").)

This Court routinely interprets state law and is perfectly capable of interpreting the ICFA. The mere fact that a state law claim is purported to be novel by the party advancing it does not suggest that this Court should decline to exercise supplemental jurisdiction; indeed, federal courts in this district have repeatedly rejected such an argument. *See, .e.g., Davis,* 193 F.R.D. at 526 (denying motion to dismiss TILA claims and retaining supplemental jurisdiction over ICFA claims despite defendants' argument that state law ICFA claims raise novel issues of law); *Donnelly,* 2000 WL 1161076, at *5

(same); *Pinkett,* 1999 WL 1080596, at *8 (same). The Court likewise should decline the AG's request to remand Count II, because as even the AG admits, supplemental jurisdiction is appropriate.

B. Having a state court and federal court try what the AG admits are identical claims would be a substantial waste of judicial resources.

The Supreme Court has made clear that supplemental jurisdiction is an exercise of discretion and "lies in considerations of judicial economy, convenience and fairness to litigants." *Gibbs*, 383 U.S. at 726; *see also Hansen v. Bd. of Trustees of Hamilton Se. Sch. Corp.,* 551 F.3d 599, 608-09 (7th Cir. 2008) (retaining supplemental jurisdiction over state law claims based on § 1983 claims because "[t]he claims [were] intertwined and judicial economy [was] served by treating them in one forum.") As the AG readily admitted in her Reply in support of her Motion for Leave, "[e]ach of the three counts newly proposed by Plaintiff [Counts II-IV] derives from a similar genesis - the assertion that the default rate on the APEX loans issued by Defendants to its criminal justice students was exceptionally high, rendering the financial product structurally unfair and abusive under state and federal law." (Reply, p. 2.) Regardless of the outcome of this Motion, this Court will adjudicate Counts III and IV. It would make no sense to have a separate trial in state court on Count II, particularly given the AG's concession that the three counts are of a "similar genesis." And as explained above, the counts are not just similar, but factually identical. Not only would having two trials on the same theories waste judicial resources and be both inconvenient and unfair to the parties, it may result in inconsistent rulings and piecemeal litigation. *See, e.g., Fasco Indus., Inc. v. Mack*, 843 F. Supp. 1252, 1256 (N.D. Ill. 1994) (exercising supplemental jurisdiction because "[t]he purpose of [supplemental jurisdiction] is judicial economy and avoidance of piecemeal litigation."); *U.S. for Use of Chicago Bldg. Restoration, Inc. v. Tazzioli Const. Co.*, 796 F. Supp. 1130, 1132 (N.D. Ill. 1992) (exercising supplemental jurisdiction because "hearing both claims together serves judicial economy by preventing duplicative litigation.") Even if the Court were to accept the AG's protestations that Count II is a theory of first impression, the Court should still exercise

supplemental jurisdiction over Counts 1 and II to conserve judicial resources and avoid overlapping trials and potentially inconsistent rulings in two courts.

Conclusion

Counts III and IV are properly before the this Court under federal question jurisdiction and, because the state law claims pleaded in Counts I and II emanate from a common nucleus of operative facts, this Court should exercise supplemental jurisdiction over Counts I and II. Having two trials on allegations that derive from the same genesis of facts would be an entirely duplicative exercise that would unnecessarily waste state and federal judicial resources. The Court, therefore, should deny the AG's Motion in its entirety.

Date: July 9, 2014

Respectfully Submitted,

Alta Colleges, Inc., Westwood College, Inc., Wesgray Corporation, Elbert, Inc., and El Nell, Inc.

By: */s/ Henry M. Baskerville*
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CERTIFICATE OF SERVICE

I, Henry M. Baskerville, an attorney, hereby certify that the attached *Defendants' Response to Plaintiff's Motion to Sever and Remand* was filed and served on all counsel of record via the Court's ECF/CM system on July 9, 2014.

/s/ Henry M. Baskerville