UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO SEVER COUNT I, DECLINE SUPP. JURISDICTION ON COUNT II, AND REMAND COUNTS I & II

For two years, the parties litigated a single Count complaint in front of Judge Kathleen Kennedy in Illinois state court in which the State of Illinois alleged that Defendants, who operate for-profit career-focused schools in Illinois and other states, had violated the Illinois Consumer Fraud Act ("ICFA") by making misleading statements and omitting to state material facts to prospective and enrolled students in Defendants' criminal justice program touching on nearly every important aspect of the education purportedly offered by Defendants.

On May 6, 2014, the state court granted Plaintiff's motion for leave to file a Second Amended Complaint ("SAC") that added three new Counts. Each new Count asserted that institutional financing offered by Defendants to its students was structurally unfair and/or abusive under Illinois and federal law, owing to a default rate that ensnared a majority of students who used the financing. On May 22, 2014, Defendants removed the action.

Plaintiff now requests that the Court sever Count I of the SAC pursuant to 28 U.S.C. §1442(c)(2), as Count I arises from a separate and distinct nucleus of operative facts and is outside of this Court's supplemental jurisdiction. In addition, Plaintiff requests that the Court decline to exercise supplemental jurisdiction over Count II, which alleges that Defendants'

institutional financing is structurally unfair under ICFA, as that Count presents an issue of first impression under Illinois law that is best resolved in the Illinois court system. Accordingly, Plaintiff requests the Court remand Counts I and II.

BACKGROUND

A. Count I: Misrepresentations and Omissions Under the ICFA

Defendants operate four schools in the Chicago area that purport to provide students with a career-focused education, including a program in criminal justice. On January 18, 2012, Plaintiff filed a single-Count complaint against Defendants in the Circuit Court of Cook County, Chancery Division, alleging a violation of ICFA. The complaint centered on allegations that Defendants engaged in deceptive conduct towards prospective and enrolled criminal justice students in Illinois by making misrepresentations and omitting material facts on topics including post-graduation employment outcomes, the impact of Defendants' accreditation on both employment outcomes and portability of credits earned at Defendants' schools, and the cost of the criminal justice program. This original complaint remains as Count I of the Second Amended Complaint.[1]

B. State Court Litigation of Count I

For more than two years, the parties litigated the ICFA claim, first briefing the propriety of the pleadings and then exchanging written discovery, producing documents, and taking both witness and expert depositions. Judge Kennedy – who presided over the case since July 2012 – became quite familiar with the contours of Count I. On April 5, 2012, Defendants filed a motion to dismiss the original complaint, which was fully briefed and argued. In a twelve-page written opinion, the state court denied the motion and rejected each of Defendants' asserted grounds for

[1] Pursuant to a prior order by the state court, the Second Amended Complaint included redactions for information obtained from documents produced by Defendants and marked "Confidential." Pursuant to 28 U.S.C. § 1450, the state court's order on confidentiality remains in effect.

dismissal on August 17, 2012. (Ex. 1.) Shortly thereafter, on September 17, 2012, Plaintiff amended her complaint, partially revising the single Count. Defendants filed an answer and affirmative defenses on October 15, 2012. The State moved to strike the affirmative defenses on November 5, 2012. On August 30, 2013, Judge Kennedy issued a seven-page order that struck six of Defendants' affirmative defenses, allowed three to stand as objections to a section of the prayer for relief, and allowed two to stand as defenses. (Ex. 2.)

On December 12, 2012, the state court entered an ambitious case management order that required fact discovery to be completed by September 12, 2013, expert discovery to be completed by April 1, 2014, and established a trial date in September 2014. (Ex. 3.) Judge Kennedy continued to oversee the case tightly, allowing two amendments to the case management order that ultimately moved the close of fact discovery to November 15, 2013 but did not alter the September 2014 trial date. (Ex. 4.)

The parties diligently engaged in discovery. Each party served multiple requests for the production of documents and multiple sets of interrogatory requests. By the time fact discovery closed on November 15, 2013, 77 fact witnesses were deposed. Thereafter, the parties identified and deposed 12 testifying experts.

Judge Kennedy managed extensive discovery issues including at least nine discovery motions, including: (1) Defendants' motion to compel consumer complaints; (2) a request by Plaintiff for a protective order responding to Defendants' contention interrogatories; (3) Plaintiff's motion to compel production of certain recorded phone calls between Defendants' employees and prospective students; (4) Plaintiff's motion to compel production of certain employment verification documents; and (5) Defendants' request for a protective order regarding certain information related to Defendants' internet marketing practices. (Ex. 5.) Defendants also

filed a motion to bar one of Plaintiff's experts from opining on transcripts of telephone calls between Defendants and prospective students, which the court denied. (Ex. 5.)

C. The Second Amended Complaint

On March 20, 2014, Plaintiff filed a motion for leave to file the SAC. In addition to amending Count I to conform to the evidence uncovered through discovery, Plaintiff proposed three new Counts developed during litigation.

Each of the new Counts asserted that Defendants offered to students a financial product, known as APEX, for the purpose of financing a portion of the education at Defendants' schools. Data obtained during discovery demonstrated that a super-majority of Illinois criminal justice students defaulted on their APEX financing, which was both known and expected by Defendants. Given the extraordinary rate of failure of the APEX product for Illinois consumers enrolled in Defendants' criminal justice program, Plaintiff alleged that Defendants' APEX financing program was structurally unfair and abusive under state and federal law. In particular, Count II alleged that the APEX program was structurally unfair under the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et. seq.* Count III alleged that the APEX program was structurally unfair under the Consumer Financial Protection Act of 2010, 12 U.S.C. §5481, *et seq.* ("CFPA"); and Count IV alleged that the financial product was abusive under the CFPA.

Defendants vigorously opposed the motion for leave to amend. Defendants raised several arguments in briefing and at oral argument (Transcript at Ex. 6), most notably, that Count I was ready for trial, that Defendants would be prejudiced by any delay, and that the additional Counts would require new discovery. (*Id.*) Plaintiff asserted that little, if any, additional discovery was necessary, as the discovery had already been obtained, and that, if necessary, any discovery could be completed before the scheduled trial date in September 2014. (*Id.*)

On May 6, 2014, the state court granted Plaintiff's motion for leave to file her SAC. (Ex. 7.) On May 9, 2014, the state court entered a revised case management order that allowed for additional discovery but maintained the September 2014 trial date. (Ex. 8.)

On May 12, 2014, Plaintiff filed her SAC. (Dkt. 1, Ex. A.) Defendants filed a notice of removal on May 22, 2014, asserting federal question jurisdiction under 28 U.S.C. §1331 over Counts III and IV and supplemental jurisdiction over Counts I and II under 28 U.S.C. §1367(a). (Dkt. 1). Defendants moved to dismiss the SAC on June 16, 2014.

ARGUMENT

A. Legal Standard

"The federal courts are courts of limited jurisdiction." *Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883, 890 (7th Cir. 2013), as amended (Apr. 29, 2013). Because of those limits, the Supreme Court requires that a federal court "presume[] that a cause lies outside [its] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). "The presumption against federal jurisdiction is especially strong in cases of this sort, involving States seeking to vindicate quasi-sovereign interests in enforcing state laws and protecting their own citizens from deceptive trade practices and the like." *In re Standard & Poor's Rating Agency Litig.*, 13-MD-2446 JMF, 2014 WL 2481906 *3 (S.D.N.Y. 2014). Where a state brings a case in its own courts, federal courts should be reluctant to pull those cases out of state court, absent some clear rule demanding that it retain jurisdiction. *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011).

B. Count I Should be Severed and Remanded

While this Court has jurisdiction over the two counts brought pursuant to federal law, jurisdiction over a purely state law claim is only permissible if the state claim is subject to the court's supplemental jurisdiction. Even then, the Court has discretion to decline to exercise its supplemental jurisdiction. Count I alleges a violation of state law and arises from a set of facts distinct from the counts brought under federal law. Accordingly, Count I is not within this Court's supplemental jurisdiction and should be severed and remanded pursuant to 28 U.S.C. §1441(c). Alternatively, the Court should decline to exercise supplemental jurisdiction because the state court has fully examined the case and is prepared for a prompt resolution of the claim.

1. The Court does not have supplemental jurisdiction over Count I.

Where a removed action contains both federal and state law claims, a district court shall sever and remand any state law claims that are "not within the original or supplemental jurisdiction of the district court." 28 U.S.C. §1441(c). A district court only has supplemental jurisdiction over claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . ." 28 U.S.C. §1367(a).

For a court to exercise its pendent jurisdiction, the "state and federal claims must derive from a common nucleus of operative fact....such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding...." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). The proper approach is to compare the facts alleged in the federal claim with those alleged in the state claim to assess whether they share a common nucleus of operative fact. *See Eager v. Commonwealth Edison Co.,* 187 F. Supp. 2d 1033, 1040 (N.D. Ill. 2002) (finding no common nucleus of operative facts between plaintiff's sexual harassment claims based in federal law and state law tort claims arising from an injury allegedly caused by defendant compelling her to work long hours).

Plaintiff's SAC included two claims brought pursuant to federal law, Counts III and IV. Those two counts, along with an analogous state law unfairness claim in Count II, exclusively concern the structure and impact of Defendants' APEX financing program on criminal justice students in Illinois. (Dkt. 1, Ex. A ¶¶474-493). Each of the three added counts centers on a known and expected outcome for the vast majority of the students – a default on the debt owed to Defendants. (*Id.* ¶¶454-493). Defendants offered the APEX financial product to students – without regard to the student's ability to repay – with knowledge that a vast majority would default and without disclosure to the student. In Count II, for example, Plaintiff alleges that the APEX program offended public policy by creating large numbers of student defaults and by evading the intent behind government policy requiring that a portion of a student's education be paid by private funds in order to access public loan programs. (*Id.* ¶¶466, 469 – 472). In Count III, Plaintiff alleges that students could not avoid the harm caused by the APEX program. Plaintiff claims Defendants' high-pressure sales tactics, obfuscated the true cost of Defendants' program, student's payment obligations, and future earnings capacity (*Id.* ¶477), and hindered students understanding of the financial aid process to the point where many students were unaware that they had even signed up for Defendants' APEX loan. (*Id.* ¶481). Count III also focuses on the fact that students could not avoid the harm caused by the APEX program. (*Id.* ¶481). Finally, Count IV addresses how Defendants took unreasonable advantage of students' trust. Plaintiff alleges that students reasonably relied on Defendants when taking out loans and that such reliance was reasonable because Defendants held themselves out as a school that would help better students' lives and solicited students' trust. (*Id.* ¶490). Defendants took unreasonable advantage of this trust by pushing students into expensive, high-risk loans that Defendants knew were likely to default. (*Id.* ¶ 491). Plaintiff claims that Defendant's high-pressure sales tactics

materially interfered with students' ability to understand the APEX loan program. (Dkt. 1, Ex. A ¶492).

By contrast, the facts alleged in Count I fall substantially outside of the contours of the APEX-related counts. The gravamen of Count I alleges that the Defendants made misrepresentations and material omissions to students about the criminal justice degree and the benefits that students could receive from that degree. (*Id.* ¶456); *see also Defendants' Motion to Dismiss* Dkt. 18 at 5-6 (characterizing Count I as various misrepresentations and omissions regarding accreditation, employment opportunities, effect a criminal background would have on future job opportunities, and "misstatements and omissions about APEX and students' responsibility to repay their loans and the amounts financed").

Plaintiff alleged in Count I that Defendants made misstatements and omissions regarding national (rather than regional) accreditation, which limited students' job prospects (Dkt. 1, Ex. A ¶456 a-d, f, i-j), limited the transferability of credits earned at Defendants' schools, and hindered the ability of students to pursue graduate degrees (*Id.* ¶456 k, l). Plaintiff also alleged that Defendants enrolled students with criminal backgrounds and did not tell them that this precluded them from obtaining jobs as police offices in the vast majority of situations (*Id.* ¶456 e). Additionally, Plaintiff alleged that Defendants: omitted the material fact that the vast majority of students do not graduate from the program (*Id.* ¶456 g); misrepresented prospective salaries upon graduation; misrepresented job placement rates; and made material omissions by failing to tell students that most criminal justice graduates obtained jobs in the private security field, while fewer than five percent obtained jobs in law enforcement. (*Id.* ¶456 h).

As just one example of the misrepresentations alleged in the SAC, Plaintiff has alleged at length that Defendants touted the criminal justice program as offering a path to employment

opportunities in law enforcement, notably as sworn police officers. (Dkt. 1, Ex. A ¶¶192-213). Yet, Defendants failed to inform prospective criminal justice students that the hiring requirements of the Illinois State Police (at all times) and the Chicago Police (until 2010) required college credits from a regionally accredited post-secondary school – and that credits earned at Defendants schools did not satisfy this requirement. (*Id.* ¶¶219-222). Further, Defendants failed to inform prospective or enrolled students that "out of 1,241 Westwood graduates, only 27 were employed in sworn law enforcement positions during the applicable" reporting period. (*Id.* ¶263.)

The core facts relevant to Count I concern the representations made by Defendants to prospective and enrolled students juxtaposed with the actual results of enrolled students upon departure from the school. Such facts are substantially distinct from the facts at the core of the APEX counts. There, the core facts concern the structure of the APEX financing program, the high default rate, and Defendants' tactics in ensuring students are unaware of the structural infirmities of the financing program.

The only potential overlap between Count I and Counts II-IV is that each count contains some discussion of the representations made to students about the nature of APEX financing and the general enrollment process. In Count I, Plaintiff has alleged that Defendants misrepresented the cost associated with Defendants school and misrepresented the nature of the payment structure of the APEX account. (*Id.* ¶¶456m-q). These alleged misrepresentations and omissions address neither the unfairness nor abusive nature of the default rate, nor the very structure of APEX. The facts alleged in Counts II-IV do not form a common nucleus of operative facts with the allegations of Count I.

The Seventh Circuit has stated that a "loose factual connection between the claims is generally sufficient" to meet the common nucleus of operative fact standard. *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995). However, as a court in this district noted: "[T]he Seventh Circuit also has made clear that this does not reflect the broadening of supplemental jurisdiction...." *Riva Tech., Inc. v. Zack Elec., Inc.,* 2002 WL 1559584 at *3 (N.D. Ill. July 15, 2012). The test remains whether the state law claims are factually connected to the federal claims. For example, in *Eager*, the district court held that supplemental jurisdiction did not exist over the plaintiff's state claims because "the facts involving the [state law claim relating to] electrocution had nothing to do with the facts underlying plaintiff's sexual harassment and retaliation claims—that is, the federal and state claims were so unrelated that the federal claim 'would be unaffected if the electrocution claims were dismissed.'" *Eager*, 187 F. Supp.2d at 1040. *See also Eigenbauer v. American Mattress*, 2007 WL 3231426 (N.D. Ill. Oct. 30 2007) (court declined to exercise supplemental jurisdiction over state law privacy claims that arose from different set of facts from federal wage claims).

Merely because claims arise out of the same relationship between the parties does not, by itself, create supplemental jurisdiction. *Berg v. BCS Fin. Corp.*, 372 F. Supp. 2d 1080, 1095 (N.D. Ill. 2005) (finding the existence of an employment relationship insufficient to create supplemental jurisdiction over a state law contract claim where the federal claim with original jurisdiction was an ERISA claim). Similarly, a shared factual background between a state claim and a federal claim does not necessarily create supplemental jurisdiction. *Id. citing General Auto Serv. Station v. City of Chicago*, 2004 WL 442636, *12 (N.D.Ill. Mar. 9, 2004) (state law claim that provided "factual background" for federal constitutional claim was not sufficiently related to give rise to supplemental jurisdiction) *and Salei v. Boardwalk Regency Corp.*, 913 F.Supp. 993,

998–99 (E.D.Mich.1996) (noting that plaintiff's state and federal law claims all arose from defendant's efforts to collect a debt and that when "viewed from this broad perspective" the claims appeared to share a common set of facts, but finding no supplemental jurisdiction because the facts necessary for the state law claim were separate and distinct from the facts necessary for the federal claim).

When examined in detail, the facts alleged in Count I do not form a common nucleus of fact with those alleged in Counts II-IV. Accordingly, the Court lacks supplemental jurisdiction over Count I and therefore must sever and remand it to state court.

2. Even if the Court finds supplemental jurisdiction over Count I, it should not exercise it.

"In weighing whether to exercise supplemental jurisdiction over a state law claim, courts should factor in 'considerations of judicial economy [and] convenience and fairness to litigants.... Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.'" *BCS Fin. Corp.*, 372 F. Supp. 2d at 1095-1096 (citations omitted). When considering the state court's decisions on the pleadings and extensive management of discovery in this case, judicial economy and fairness compel this Court to decline supplemental jurisdiction over Count I.

a. Judicial economy would be promoted if Count I is remanded because substantial litigation has already been completed in state court.

Judicial economy would best be served if Judge Kennedy continued to preside over Count I in state court. The overwhelming majority of claims alleged in Count I have nothing to do with Defendants' APEX financing, the crux of the claims plead in Counts II-IV. Moreover,

Judge Kennedy already has overseen discovery and ruled on the contours of Count I, including whether Count I properly states a claim.

Federal courts have discretion to apply the "law of the case" to lawsuits removed from state court. *See Redfield v. Continental Cas. Corp.*, 818 F.2d 596, 605 (7th Cir. 1987). As detailed above, Defendants previously moved to dismiss Plaintiff's allegations in Count I, and Judge Kennedy issued a detailed written opinion on Defendants' motion to dismiss Count I. (Ex. 1.) Earlier this week, Defendants moved to dismiss again, arguing primarily the same issues that have already been thoroughly vetted and decided by the state court.

Defendants' arguments that Count I should be dismissed as lacking in particularity or, alternatively, that Defendants are exempt, have not changed since Defendants filed their state court motion to dismiss. In fact, Defendants literally cut and pasted arguments they previously made to the state court into their present motion. For example, all five subheadings in Defendants current motion to dismiss alleging a lack of particularity in Count I were briefed in the state court. *Compare* Ex. 9, section II(A)(1) and II(A)(2) pp. 11-12 with section I(A)(1)(a) pp. 7-8 of Defendants' current motion (Dkt. 18); and *compare* Ex. 9, section II(A)(3) pp. 12-13 to section I(A)(1)(b) pp. 8-9 of Defendants' current motion, (Dkt. 18). Similarly, Defendants' argument that their actions are excluded from the purview of the ICFA is the exact same argument that Defendants' asserted before the state court. *Compare* Ex. 9 , section I(A) at 4-5 to Defendants' current motion (Dkt. 18) section III at 26 – 27. Judge Kennedy considered both arguments at length in pages 3-8 of her Order, denying Defendants' motion on both bases. (Ex. 1). To the extent that Defendants take issue with any new facts alleged in count I, Judge Kennedy is best able to parse through those facts given her thorough experience with the facts and relevant state law.

b. Defendants argued they would be severely prejudiced by a delay in the trial date on Count I.

Throughout the state court proceedings in this matter, Defendants claimed that they were ready to go to trial on Count I and would be prejudiced by any delays to the trial date. In their brief in opposition to Plaintiff's motion for leave to file the SAC, Defendants argued:

> As the Court well knows, the Defendants have long awaited the opportunity to address the AG's allegations at trial ..... If the Defendants are to be allowed a fair opportunity to respond to the AG's eleventh hour proposed new claims, the September 2014 trial date would have to be extended to the severe detriment of Defendants, their students, their alumni – all of whom suffer great prejudice the longer this case remains pending.

Similarly, at oral argument on that motion, Defendants continued their claim of "overwhelming prejudice" if the trial was delayed continued: "[t]he bottom line, Judge, is we're ready for trial. We've been at this for over two and a half years." (Ex. 6 at 11). "The prejudice in this case, Judge, is overwhelming. We are ready to go to trial." (Pl's Ex. 6 at 41).

The state court has managed the case for over two years throughout the pleading and discovery phases of Count I. A remand of Count I back to the state court will provide Defendants with the earliest trial, as they consistently have requested.

C. Count II Should Be Severed And Remanded Because It Presents A Novel And Complex Issue Of State Law.

Courts "may decline to exercise supplemental jurisdiction . . . if the claim raises a novel or complex issue of State law." 28 U.S.C.A. § 1367(c). Although the court "may try to determine how the state courts would rule on a unclear area of state law, district courts are encouraged to dismiss actions based on novel state law claims." *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 607 (7th Cir. 2000). The court's discretion to decline to exercise supplemental jurisdiction acknowledges that a federal court may not be the most appropriate judicial forum for

all claims arising from a common nucleus of operative facts. *Ortegon v. Staffing Network Holdings, LLC*, 2007 WL 541911 *2 (N.D. Ill. 2007) *citing Gibbs*, 383 U.S. at 725.

1. Plaintiff's claim that Defendants' APEX loans are structurally unfair under the ICFA is an issue of first impression in Illinois.

In Count II, Plaintiff brings a state law unfairness claim under the ICFA alleging that Defendants' APEX loans are structurally unfair. No 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. A similar claim was raised in *Commonwealth v. Fremont Inv. & Loan*, 2008 WL 517279 (Mass. Super. Feb. 26, 2008), where the Massachusetts Attorney General argued that certain mortgage loans issued by Fremont were "structurally unfair" under that state's deceptive practices statute. *Id.* at 7. The *Fremont* court held that "it is unfair for a lender to issue a home mortgage loan . . . that the lender reasonably expects will fall into default." *Id.* at 10. This is precisely what Plaintiff is seeking in this matter – a finding that it is unfair for Defendants to issue a loan "without regard to the ability to repay" and "with advanced knowledge that a majority will default." (Dkt. 1, Ex. A ¶¶467, 472). This issue of first impression in Illinois and should be decided by an Illinois state court.

2. Federal courts have discretion to sever and remand novel state claims even where federal claims are based on the same facts.

This Court should decline to exercise supplemental jurisdiction on a novel state claim, even when an analogous federal claim has been brought. In *De la Riva v. Houlihan Smith & Co., Inc.*, 848 F. Supp.2d 887 (N.D. Ill 2012), the Court declined to exercise supplemental jurisdiction over a state law claim even though it was virtually identical to a federal claim brought in the same action. *See also Ortegon*, 2007 WL 541911 at *2.

With regard to Count II, Illinois should have the opportunity to develop its own law on this significant and novel state claim. Like *Houlihan,* Plaintiff's claim has not yet been decided by an Illinois court. That Counts III and IV also concentrate on APEX financing should not keep this issue of first impression out of State court. *Houlihan*, 848 F. Supp.2d at 889, 894. *See also Berg* 372 F.Supp.2d at 1096 ("The Court also would decline to exercise supplemental jurisdiction in this case because Berg's theory of breach rests, in part, on a novel theory of state law.")

While judicial economy is a substantial consideration, it should not be the controlling factor when a novel and complex issue is being addressed. *Support Ministries For Persons With AIDS, Inc. v. Waterford*, 799 F. Supp. 272, 280 (N.D.N.Y. 1992) *citing Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556, 564 (2d Cir. 1991) ("The judicial economy factor should not be the controlling factor, and it may be appropriate for a court to relinquish jurisdiction over pendent claims even where the court has invested considerable time in their resolution"). The *Houlihan* court recognized this issue: "handling the [Federal] and [State] claims in a single proceeding would yield some efficiencies. But those efficiencies are far outweighed by the considerations set forth [in § 1367 (c)(1) and (c)(2)]. " *Houlihan*, 848 F. Supp.2d at 894.

For the foregoing reasons, the Court should exercise its discretion to remand the state law unfairness claim under 28 U.S.C.A. § 1367(c)(1).

IV. Conclusion

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter an order severing and remanding Counts I and II to state court, along with any other relief as justice and equity require and the Court may deem appropriate.

Respectfully submitted,

6/18/14
Date: June 18, 2014

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Exhibit 1

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

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff,)
v.) No. 12 CH 1587
)
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.)

Judge Kathleen G Kennedy
AUG 17 2012
Circuit Court – 1718

ORDER

The court heard argument on Defendants' Section 2-619.1 Motion to Dismiss. Plaintiff, the People of the State of Illinois by Lisa Madigan, Attorney General, (hereafter AG), filed on January 18, 2012 a Complaint for Injunctive and Other Relief against Defendants Westwood College, Inc., its parent company Alta Colleges, Inc., and three subsidiaries owned and operated by Westwood (hereafter Defendants), which are higher education businesses operating for profit in a highly regulated industry. The AG brings this action pursuant to Section 7 of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/7 (hereafter CFA), which grants the State, through the AG or a State's Attorney, the exclusive power to obtain from the court broad injunctive relief against businesses whose methods, acts or practices violate the CFA. Under Section 2 of the CFA it is unlawful to misrepresent, conceal, suppress or omit any material fact in the course of any trade or commerce "with intent that others rely upon the concealment, suppression or omission of such material fact." 815 ILCS 505/2. Here the AG seeks a finding that Defendants engage in trade or commerce within the

meaning of Section 2, which Defendants do not dispute. The AG then seeks a finding that Defendants have violated Section 2 by, but not limited to engaging in the unfair or deceptive acts and practices alleged in the complaint. She asks for an order preliminarily and permanently enjoining Defendants from engaging in the deceptive or unfair acts and practices alleged. She also asks the court to declare that all contracts entered into between Defendants and Illinois consumers by the use of methods and practices declared unlawful are rescinded and to require that full restitution be made to said Illinois consumers (Prayer D). In addition, she asks for a court order revoking, forfeiting or suspending Defendants' criminal justice program (Prayer E). She seeks a civil penalty in the amount of $50,000 per violation of the Act if the court finds Defendants have engaged in methods, acts or practices declared unlawful by the Act with the intent to defraud, and if the court finds Defendants have engaged in methods, acts or practices declared unlawful by the Act without the intent to defraud, then a statutory civil penalty of $50,000, pursuant to Section 7 of the CFA. As her final specific request the AG asks the court to require Defendants to pay all costs of prosecution and investigation of this action, pursuant to Section 10 of the CFA.

Defendants filed on March 23, 2012 their section 2-619.1 Motion to Dismiss the AG's complaint and on April 5, 2012 their Memorandum in support of their Motion to Dismiss. The AG filed a response. Defendants filed a reply and, prior to argument, notice of additional authority in support of their Motion to Dismiss. During argument the court granted the AG leave to submit additional authority in response to Defendants' argument. The AG styled her submission "Plaintiff's Supplemental Authority regarding Defendants' Motion to Strike Plaintiff's Prayer for Relief D Pursuant to the Federal Arbitration Act." The court granted Defendants leave to file a response to the AG's submission which they styled "Defendants' Response to Plaintiff's Surreply."

Legal Standard

In deciding both the section 2-615 and the section 2-619 portions of Defendants' Motion to Dismiss the court must construe the pleadings liberally to do substantial

justice between the parties, 735 ILCS 5/2-603, and view the allegations in the light most favorable to the AG. *See Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 85-86 (2002). To grant Defendants relief under section 2-615 the court must assess the legal sufficiency of the complaint considered as a whole and determine whether the well-pled facts state a cause of action upon which relief may be granted. *See Jarvis*. The court may not strike and dismiss for legal insufficiency unless the court concludes that there is no possible set of facts in support of the allegations that would entitle the AG to relief. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994). To grant Defendants relief under section 2-619 the court presumes a valid cause of action exists and must determine whether certain defects, defenses, or other affirmative matter require dismissal or other appropriate relief. *See Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 891-92 (1st Dist. 2005).

2-615

Turning first to Defendants' request for dismissal under section 2-615, Defendants argue that the AG failed to plead with the requisite particularity. Specifically, Defendants contend first that the AG makes no allegations (a) of false statements regarding accreditation, (i) in their advertising about their criminal justice program, and (ii) in their internet advertising, and (b) that statements regarding the criminal justice program were knowingly false when made. Second, Defendants contend that the AG makes insufficient allegations (a) regarding alleged false and misleading statements about students' criminal backgrounds and (b) that any false statement was made in connection with the student loan process. Finally, Defendants contend that even if the allegations are factually sufficient they are not actionable because they are future projections not misstatements of fact.

Defendants emphasize in their 2-615 argument that a higher pleading standard applies in cases alleging fraud, including CFA enforcement actions brought by the AG. However, it is important at the outset to recognize that there are distinctions between actions for common law fraud and actions brought under the CFA, as well as between private CFA actions and "public interest" CFA enforcement actions. These distinctions

are significant because they affect the analysis under both 2-615 and 2-619. It is also important to acknowledge that the CFA must be liberally construed to effectuate its purpose as "a regulatory and remedial statute intended to protect consumers, borrowers and business persons against fraud, unfair methods of competition and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (2002). In *Connick v. Suzuki Motor Co, Ltd.*, 174 Ill. 2d 482, 503 (1996), the court expressly analyzed the legal adequacy of a CFA claim in light of the liberal construction mandate.

The elements of a claim under the CFA are: (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, and (3) the occurrence of the deception during a course of conduct involving trade or commerce. *Robinson*, at 417. The AG posits a two-element cause of action, which is found in the caselaw, *see, e.g. People ex rel. Hartigan v. All American Aluminum and Construction Co.*, 171 Ill. App. 3d 27, 34 (1st Dist. 1988), but is really no different because the intent element missing in the two-element cause is found in the statutory description of deceptive acts or practices at CFA Section 2. *See* 815 ILCS 505/2. Significantly, unlike common law fraud, the CFA does not require actual reliance. *Siegel v. Levy Organization Development Co.*, 153 Ill. 2d 534, 542 (1992). Also, an action filed by the AG under Section 7 "is essentially a law enforcement action designed to protect the public, not to benefit private parties." *People ex rel. Hartigan v. Lann*, 225 Ill. App. 3d 236, 240 (1st Dist. 1992). The AG may bring an action under Section 7 whenever the AG "has reason to believe that any person is using, has used, or is about to use" any method, act or practice declared unlawful by the CFA. Unlike a private party, the AG may prosecute a violation of the CFA without showing that any person has been damaged. *See Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 626-27 (1st Dist. 2008).

The question then becomes what level of specificity is required in order to do substantial justice between the parties in the case of a claim under the public interest section of a statute that must be liberally construed. *All American Aluminum* is instructive:

> a complaint must contain the facts necessary for the plaintiff to recover. The plaintiff, however, need not set out his evidence. He should allege only the ultimate facts to be proved and not the evidentiary facts tending to prove such ultimate facts.
>
> Unfortunately, no clear distinction exists between statements of "evidentiary facts," "ultimate facts," and "conclusions of law." Indeed, a precise definition of what constitutes conclusions of law is impossible. Therefore, when the question arises, a court should simply determine whether the complaint in the particular case reasonably informs the opposing party of the nature of the claim.

171 Ill. App. 3d at 36 (citations omitted).

Here, considering the complaint as a whole, the AG sufficiently alleges the elements of a claim under the CFA. It is not necessary to go over each of the 422 factual allegations. A few examples follow which demonstrate the sufficiency of the complaint, which the AG, as indicated in her response and during argument, will seek to amend. First, regarding accreditation, (i) Defendants' admissions representatives told prospective students Defendants were both nationally and regionally accredited when Defendants were not and (ii) in or about 2008 DuPage campus president Kelly Moore told enrolled students that Defendants would be regionally accredited within two to three years, which could not be known to be true at the time. Second, regarding the significance of a degree from Defendants' criminal justice program, Defendants, including Richard Holloway, Director of Defendants' criminal justice program on or about June 2006, told students including Paul Lindsay, that although they might not be able to get a job as a Chicago police officer they could get a job as a suburban police officer and then transfer to the Chicago Police Department with "no problem." Third, regarding students' criminal backgrounds, Defendants' admissions representatives told students with a criminal background interested in becoming police officers not to be concerned about their criminal backgrounds and once enrolled students with criminal backgrounds began learning from classmates and graduates that many police departments would not hire anyone with a criminal background, these students then asked Defendants' faculty and administrators, including DuPage campus president

Kelly Moore, whether their criminal backgrounds would be a problem and Defendants' faculty and administrators assured these students that they could secure jobs in the criminal justice field despite having criminal backgrounds. Fourth, paragraphs 158-162 and 179,180,182 and 183, as well as 198-200, 203, 206 and 207 constitute sufficient allegations regarding CFA violations with regard to the student loan process, summarized, in part, as follows: (a) when filling out the student budget with a prospective student, Defendants' admissions representative inserted the expected monthly contribution towards the student's educational investment with the approximate wages a prospective student could expect to earn from a part time job, (b) Defendants led prospective students to believe that Defendants were committed to helping students acquire part-time jobs related to the criminal justice field that would become a significant component of the prospective students' budget, and (c) once a student enrolled, Defendants sent job postings cut and pasted from the internet and rarely related to the student's criminal justice field of study. Fifth, with regard to false and deceptive internet advertising, the manipulation alleged in paragraph is the key to the CFA claim set forth in the detailed allegations about Defendants' internet advertising practices.

Defendants also argue that the alleged misrepresentations must be statements of fact and not expressions of opinion, but the AG alleges mere statements of opinion or future conduct, such as statements about future accreditation, job placement, and credit transferability. However, the allegations do not all fall into this category. If they did, the complaint as a whole sufficiently alleges a pattern which may make statements of opinion or future conduct exceptions to the general rule. *See Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 309 (1st Dist. 2002). Also, the absence of an actual reliance element in a CFA action may affect the analysis of statements of this nature.

2-619(9)

Section 10b(1) Exclusion

Defendants argue that the AG's claims are excluded from the CFA because Westwood is in compliance with state and federal law. Section 10b states:

"Nothing in this Act shall apply to any of the following:

(1) Actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b. Defendants contend that because their disclosures to students and the public are specifically authorized by and the action and conduct at issue here are administered by the United States Department of Education (USDOE) and other federal and state regulatory bodies, the AG's claims are outside the purview of the CFA. Both sides rely on *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 241 (2005), which involved allegedly deceptive terms in the name and description of a consumer product. The court in *Price* ultimately concluded that the FTC specifically authorized the use of the terms at issue so as to bar the CFA claims in that case. However, in so doing the court set forth the analysis which, applied here, leads to the opposite result. To begin, the plain language of section 10b requires that two separate conditions be present before a claim is barred. *See Price* at 240. First, a regulatory body or officer must be operating under statutory authority. In this case, the first condition is met. There is no dispute that the USDOE, the Illinois Board of Higher Education, and USDOE-recognized accrediting bodies administer laws regulating Defendants' industry. Second, liability under the CFA is barred by section 10b(1) only if the action or transaction at issue is "specifically authorized by laws administered" by the regulatory body. However, "mere compliance with the rules" applicable, for example, to advertising and to making information available regarding student loans and job placement is not sufficient to trigger the exemption created by section 10b(1). *See Price*, at 241. The AG argues, as did the plaintiffs in *Price*, that administering bodies have never specifically authorized fraudulent conduct. In *Price* the court explained that the Plaintiffs' argument that the [regulatory body] "has never 'specifically authorized' the fraudulent use of *any* descriptor, and it would lack the legal authority to do so in any event" (emphasis in original) is overstated." *Price*, at 241. "Whether these terms are deceptive goes to the merits of the fraud claim, not to the threshold question of exemption under section 10b(1), under which the real issue is whether the [regulatory

body] has specifically authorized [the defendant and other manufacturers] to use" the allegedly deceptive terms "on their packaging and in their advertising, no matter how vague or unhelpful these terms might be to consumers." The court in *Price* formulated the dispositive question there as "Unless the use of these terms has been specifically authorized by the [regulatory body], section 10b(1) of the [CFA] does not exempt [the defendant] from liability." In *Price*, the court noted that the plaintiffs' claim was not based on an alleged failure to disclose, so compliance with disclosure requirements could not constitute a defense. Defendants here focus on disclosure, but they point to no disclosure or other requirements specifically authorizing the conduct alleged by the AG which would exempt them from liability pursuant to section 10b(1). Therefore, the complaint cannot be dismissed based on a 10b(1) exemption.

Federal Preemption of Certain Remedies

Defendants assert federal preemption as an affirmative matter barring certain remedies and requiring, not dismissal under 2-619(9), but the striking of two prayers for relief. Specifically, they contend that the AG cannot obtain the relief requested in Prayer D and Prayer E (set forth above) for two reasons. First, Defendants contend that the relief is unavailable to the AG because the United States Secretary of Education has the sole power to ensure compliance with the extensive regulatory scheme on accreditation, the student loan process, advertisements and student recruitments, and disclosures. Defendants argue that if the AG's claim proceeds with these prayers the court would be in the inappropriate position of essentially usurping the authority of regulatory bodies to determine whether Defendants violated regulations and requirements. However, under the complaint here the question is whether Defendants are using, have used or are about to use any method, act or practice declared unlawful under the Act. This determination is not preempted by federal law. In *Wilson v. Chism*, 279 Ill. App. 3d 934 (1st Dist. 1996), the case on which Defendants primarily rely, the court found federal preemption in a private CFA class action for false certification in conjunction with federally guaranteed loans. In so doing the court explained that it found no language in the Higher Education Act that expressly preempts state consumer protection claims.

The plaintiffs in *Wilson* acknowledged that they had a federal remedy, and the court thoroughly analyzed specific regulations before concluding that preemption was implied because the state law claim conflicted with federal law. Defendants have not demonstrated a conflict between the AG's CFA claims and federal law like the conflict found in *Wilson*. After finding federal preemption of the specific claim before it the court in *Wilson* noted that Congress expressly saved from federal preemption some matters by not foreclosing, as stated in a regulation, the student's right to pursue legal and equitable relief regarding disputes arising from matters unrelated to the discharged loan. 279 Ill. App. 3d at 939. In addition, as discussed below, it is not appropriate at this time to strike two of the AG's prayers for relief.

Defendants base their second federal preemption argument on arbitration agreements under the Federal Arbitration Act, 9 U.S.C. section 1, *et seq.* (hereafter FAA). They contend in their reply brief, after stating that the AG entirely misconstrues the argument in their initial memorandum, that the AG does not have the power to vitiate contracts between Defendants and their students as requested in Prayer D because each student agreed to arbitrate any dispute as to the terms of his or her enrollment and the FAA protects those arbitration agreements from state interference. Based on the phrasing of Defendants' reply the AG's post-argument submission of supplemental authority is not improper as Defendants contend in their response to the AG's submission, and the court considered the additional authority presented by each side. However, a careful reading of section seven makes it clear that it is the court, in the exercise of its discretion, not the AG, that determines the scope of relief. The legislature gives the court broad powers to address consumer fraud in a public interest enforcement proceeding, in fact, "all powers necessary, including but not limited to: injunction; revocation, forfeiture or suspension of any license, charter, franchise, certificate or other evidence of authority of any person to do business in this State; appointment of a receiver; dissolution of domestic corporations or association suspension or termination of the right of foreign corporations or associations to do business in this State; and restitution. " 815 ILCS 505/7. The AG may ask for the relief

she believes to be warranted by the consumer fraud she expects to prove. Assuming the AG is successful in her proof, the court, certainly after giving the parties the opportunity to be heard, will determine the appropriate relief. It goes without saying that the court's power, though broad, is not unlimited. The Seventh Circuit made this clear in *People of the State of Illinois, ex rel. Hartigan v. Peters*, 871 F.2d 1336 (7th Cir. 1989), a CFA action remanded for the district court to modify the scope of an injunction and receivership. There is no basis to strike Prayer D and Prayer E pursuant to section 2-619.

Bespeaks Caution

As part of their 2-619(9) argument Defendants contend that the AG cannot establish any material alleged misrepresentations because they repeatedly provided each student with written disclosures of the very facts the AG claims were withheld or misrepresented. Specifically, in the course of the admissions and registration process, (a) Defendants disclosed in writing every fact that the AG now claims was withheld or misrepresented, such as: units earned might not transfer; those with convictions should not enroll in the criminal justice program; (b) all students signed acknowledgements that they received and understood the disclosures; and (c) every student who borrowed funds received numerous disclosures about the terms and obligations of the loan. According to Defendants, these disclosures, and the students' acknowledgement of them, mean that the alleged misstatements or omissions cannot be reasonably relied upon or material.

Under the "bespeaks caution" doctrine, any alleged misrepresentation or omission that forms the basis of a fraud claim must be analyzed in context, and cautionary language, if sufficiently substantive and specifically tailored to projections, estimates and opinions, can render alleged misrepresentations and omissions immaterial as a matter of law. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 18-19 (2d Dist. 1995). In *Lagen*, the court explained that "meaningful cautionary language...can negate the materiality of any alleged misrepresentation or omission and may thus form the basis for granting a motion to dismiss for failure to state a cause of action." *Id.* at 18. The court in *Lagen* found that although it was not presented with a Federal securities-

fraud claim, the context in which the doctrine is generally invoked, the case before it bore a close resemblance to such claims, and concluded that it could be invoked because the bespeaks caution doctrine mirrors the requirements of materiality and reliance in a common-law fraud claim.

Whether considered as an affirmative matter or as part of the 2-615 inquiry, the bespeaks caution doctrine is not applicable in this case. That doctrine applies to common law fraud and Defendants have offered no cases where the doctrine has been used to dismiss a claim under the CFA. The analysis in *Lagen* shows, going back to the distinction between a CFA action and common law fraud, that there could be no such cases under the CFA because the applicability of the bespeaks caution doctrine turns on reliance and reliance is not an element of a CFA action.

2-619(5)

Defendants argue that the complaint should be dismissed as to any statements made prior to January 18, 2009 based on the three-year time limitation in the CFA. Section 10a(e) provides: Any action for damages under this Section shall be forever barred unless commenced within 3 years after the cause of action accrued; provided that, whenever any action is brought by the Attorney General or a State's Attorney for a violation of this Act, the running of the foregoing statute of limitations, with respect to every private right of action for damages which is based in whole or in part on any matter complained of in said action by the Attorney General or State's Attorney, shall be suspended during the pendency thereof, and for one year thereafter. 815 ILCS 505/10a(e). However, this is a Section 7 "public interest" action, not a private right of action for damages. Section 7 is broadly phrased to authorize an action for injunctive relief, restitution and civil penalties "whenever" the AG "has reason to believe that any person is using, has used, or is about to use," and the legislature expressed no time limitation for a Section 7 action. Defendants argue that none of the cases holding that a three-year statute of limitations applies to CFA claims restrict the limitation to private litigants. However, they cite no case applying the 10a(e) time limitation to a Section 7 action. The issue is not governed by caselaw but by the statute itself which plainly

reflects the legislature's intent. Subsection (e) of Section 10a, which is entitled "Action for actual damages" expressly applies to "any action for damages under this section [10a]." The legislature intended no such limitation in Section 7, which is entitled "Injunctive relief; restitution; and civil penalties." 815 ILCS 505/7. This is not an action for damages, but rather, a "public interest" action for injunctive relief, restitution and civil penalties invoking the court's powers under the statute. The request for rescission and for restitution to certain Illinois consumers, which Defendants' characterize as victim-specific relief, does not make this a private cause of action as the court found in *People ex rel. Hartigan v. Agri-Chain Products, Inc.*, 224 Ill. App. 3d 298 (1st Dist. 1991). Because the language of the statute is clear it is not necessary to address the AG's additional argument that absent an express statutory directive to the contrary, the state is not bound by any statute of limitations when it sues in its sovereign capacity to enforce public rights.

To summarize, there is no basis for dismissing the complaint as requested. Because the AG indicated in her response and during argument that she will seek leave to file an amended complaint it is in the interest of judicial economy to grant her leave to do so by a date certain in this order, with Defendants granted 28 days to answer. WHEREFORE, IT IS HEREBY ORDERED:

1. Defendants' Section 2-619.1 Motion to Dismiss is denied.
2. The AG is granted leave to file an amended complaint by September 17, 2012 and Defendants are granted leave to answer the amended complaint by October 15, 2012.
3. The case is continued to October 23, 2012 at 10:15 a.m. for status.

ENTER:
Judge Kathleen G. Kennedy

AUG 17 2012

Circuit Court – 1718

Exhibit 2

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

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. 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.	)	No. 12 CH 1587

ORDER

The court heard argument and took under advisement Plaintiff's Motion to Strike Defendants' Affirmative Defenses. The court, having jurisdiction of the parties and the subject matter, FINDS:

1. On October 15, 2012 Defendants filed their Answer, Affirmative Defenses and Defenses to the Amended Complaint for Injunctive and Other Relief filed by Plaintiff (the AG). "Defendants' Defenses and Affirmative Defenses" begin at page 100. They are (1) the AG's claim for rescission is barred by the Federal Arbitration Act, (2) the AG's claim for restitution is barred because students failed to mitigate damages and/or because of the students' contributory and/or comparative fault or that of a third party, (3) the AG's claim for restitution on behalf of certain students is barred by *res judicata*, collateral estoppel, satisfaction and release, and/or off-set, (4) the AG's claims are

barred by the statute of limitations, (5) the alleged misstatements are not violative of the Consumer Fraud Act (CFA), and (6) the AG's claims fail because students received and signed disclosures regarding the alleged misrepresentations.

3. The AG filed a "Motion to Strike Defendants' Affirmative Defenses" asserting that they are insufficient as a matter of law.

4. Defendants did not designate which defenses are affirmative. In the headings of their response to the AG's motion Defendants refer to all six as affirmative. However, they apparently concede that all are not affirmative defenses. (Defendants' Response at 14, n. 6). In her motion to strike the AG characterizes all six defenses as affirmative. The court will refer to them in this order as "Defense" or "Defenses."

DISCUSSION

The AG asserts that Defenses 1, 4, 5, and 6 are arguments presented in Defendants' motion to dismiss which the court rejected in ruling on that motion. She further asserts that Defenses 1, 2, 3, 4, and 6 are improper defenses to the pending action, which is not a contracts case brought by a private party, but rather, the AG's case brought pursuant to her law enforcement powers under the CFA.

Defendants respond that because the court did not decide the merits of the defenses raised in their motion to dismiss they are not precluded from raising them in their answer. They further respond, "a defendant in a law enforcement action can focus its defenses on the alleged victims." (Defendants' Response at 2).

The AG replies that the court's denial of Defendants' section 2-619 motion to dismiss must be considered to be on the merits of Defendants' asserted grounds for

dismissal. Therefore, the AG contends that the court must strike all the defenses because the court already found that Defendants' alleged misstatements are actionable (Defense 5), and the court rejected Defendants' arguments that (a) arbitration clauses (Defense 1) and the statute of limitations (Defense 4) bar the AG's claims, (b) prayer for relief D (rescission and restitution) (Defenses 2 and 3) is barred, and (c) the bespeaks caution doctrine applies (Defense 6). The AG also contends that neither contributory negligence nor failure to mitigate damages is an affirmative defense to a section 7 CFA claim.

A motion to strike an affirmative defense admits all well-pleaded facts constituting the defense, together with all reasonable inferences which may be drawn therefrom, and raises only a question of law as to the sufficiency of the pleading. *Raprager v. Allstate Insurance Company*, 183 Ill. App. 3d 847, 854 (2d Dist. 1989) (citations omitted). Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting the defense will prevail, the defense should not be stricken. *Id.* The test for whether a defense is an affirmative defense which must be pleaded is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *Condon v. American Telephone and Telegraph Company*, 210 Ill. App. 3d 701, 709 (2d Dist. 1991). A defense that attacks the legal sufficiency of the plaintiff's claim or negates one of the elements of the cause of action is not affirmative because it does not "give color" to the plaintiff's claim. *See Vroegh v. J&M Forklift*, 165 Ill. 2d 523, 530-31 (1995).

The parties dispute whether the court's denial of Defendants' motion to dismiss adjudicated the merits of the pending defenses. The denial of a motion to dismiss is not, of itself, a final determination or adjudication of the controversy, but is interlocutory in nature. *Catlett v. Novak*, 116 Ill. 2d 63, 68 (1987). An interlocutory order can be reviewed, modified, or vacated at any time before final judgment. *Id.* Section 2-619 makes it clear that a defendant may raise an affirmative defense by answer after raising the same defense by motion. *See* 735 ILCS 5/2-619(d). However, an exception is evident in the statutory language, which provides: "(d) The raising of any of the foregoing matters by motion under this Section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits; and a failure to raise any of them by motion does not preclude raising them by answer." 735 ILCS 5/2-619(d) (emphasis added). Thus, a court may deny a 2-619 motion to dismiss on the merits or without reaching the merits. *See Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 118 (2d Dist. 1993). In *Makowski*, the court gave examples of a court not reaching the merits, such as when a court cannot determine with reasonable certainty that the alleged defense exists or because a court concludes the motion may involve disputed factual issues. *Id.* Where the record does not indicate whether the disposition was on the merits, the court may deny preclusive effect to the denial of a motion to dismiss. *Id.*

As discussed below, Defenses 1, 2, 3, 5, and 6 are not affirmative defenses, so the issue of reaching the merits does not apply. Here, Defense 4 is the only defense that is truly affirmative.

In Defense 4 Defendants assert the statute of limitations defense that presents the same question of law the court decided when it ruled on Defendants' motion to dismiss. Specifically, the statute of limitations applies when the AG asserts a private claim, but here it is indisputable that the AG asserts a public claim, as expressly provided in section 7 of the CFA, which has no time limitation. This case is not like *People ex rel. Hartigan v. Agri-Chain Products, Inc.*, 224 Ill. App. 3d 298 (1st Dist. 1991), a Wage Payment and Collection Act case which presented the issue of whether the AG's claim was public or private.

Defendants recognize that they may be bound by the ruling on this issue and suggest that they withdraw Defense 4 to leave open the possibility of repleading the defense should discovery establish it is warranted. The better approach is to strike Defense 4. If the AG were to amend the complaint to assert a private claim, then the court would certainly give Defendants the opportunity to answer and assert affirmative defenses.

Defenses 1, 2, and 3 are not defenses or affirmative defenses, but rather, objections to the AG's prayer for relief. The court denied Defendants' request to strike them. They may stand as objections to the prayer, but they must be stricken as defenses or affirmative defenses.

Defense 5 attacks the sufficiency of the AG's claims; it is not an affirmative defense subject to waiver if not pled. Defense 5 may stand as a defense, not an affirmative defense.

In Defense 6, Defendants allege that they made written and oral disclosures regarding accreditation, credit transfer, employment with the City of Chicago, job placement, criminal background impact on employment, and student finance, and each student acknowledged receipt and understanding by signing each written disclosure. Defendants assert that they should be entitled to present evidence as to the effect of their disclosures.

The AG argues that in ruling on the motion to dismiss the court disposed of Defendants' claims arising from these factual allegations. However, Defense 6, as Defendants apparently concede, is not an affirmative defense subjective to a dispositive ruling on a motion to dismiss. Even if it were, Defendants accurately point out that the ruling does not address how the disclosures set forth in Defense 6 affect the materiality of alleged misstatements. The ruling on the motion to dismiss reflects that the court, citing *Lagen v. Balcor Company*, 274 Ill. App. 3d 11, 18-19 (2d Dist. 1995), considered the proposition that cautionary language may render alleged misstatements immaterial as a matter of law. However, the court incorrectly concluded that the Defendants offered no cases where the bespeaks caution doctrine has been used to dismiss a claim under the CFA. In *Lagen*, the court found that the complaint failed to allege any deceptive practice violative of the CFA where the defendants' disclosures "set forth in great detail the nature and risks of investing in real estate limited partnerships." *Id.* at 23. Thus, caselaw reflects that the use of detailed disclosures may be relevant on the issue of whether the alleged acts or practices are deceptive. Defense 6 may stand as a defense, not an affirmative defense.

WHEREFORE, IT IS HEREBY ORDERED:

1. The AG's Motion to Strike Defendants' Affirmative Defenses is granted and Defenses 1, 2, 3, 4, 5, and 6 are stricken as affirmative defenses.
2. Defenses 1, 2, and 3 shall stand as objections to Plaintiff's Prayer for Relief D.
3. Defenses 5 and 6 shall stand as defenses.

ENTER:

Judge Kathleen G. Kennedy

AUG 30 2013

Circuit Court – 1718

Exhibit 3

Attorney No. 99000

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

Judge Kathleen G. Kennedy

DEC 12 2012

Circuit Court – 1718

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	**No. 12 CH 01587**
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;	)	**Hon. Kathleen G. Kennedy**
	)	
Defendants.	)	

AGREED CASE MANAGEMENT ORDER

THIS CAUSE coming before the Court for a Status hearing, all parties being present and submitting an agreed upon Stipulated Case Management Order, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

1. All written and fact discovery shall be completed on or before **Sept 12, 2013.**
2. Plaintiff's expert disclosures shall be completed on or before **October 31, 2013.**
3. Defendants' expert disclosures shall be completed on or before **December 17, 2013.**
4. Parties' supplemental expert reports shall be completed on or before **January 24, 2014.**
5. All expert discovery shall be completed on or before **April 1, 2014.**
6. All dispositive motions shall be filed on or before **May 28, 2014.**
7. Responses to dispositive motions shall be filed on or before **June 25, 2014.**

8. Replies to dispositive motions shall be filed on or before **July 10, 2014.**

9. Trial is set for **September 2014.**

Judge Kathleen G. Kennedy

DATE: DEC 12 2012

ENTER: Circuit Court – 1718

Judge Kathleen G. Kennedy

Thomas James
Consumer Counsel, Consumer Fraud Bureau

Cecilia Abundis
Akeela White
Colleen Bisher
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Attorneys for the Defendants
ALTA COLLEGES, INC.

Exhibit 4

Attorney No. 99000

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

Judge Kathleen G. Kennedy

SEP 05 2013

Circuit Court – 1718

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	**No. 12 CH 01587**
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;	)	**Hon. Kathleen G. Kennedy**
	)	
Defendants.	)	

REVISED CASE MANAGEMENT ORDER

THIS CAUSE coming before the Court on Plaintiff's Unopposed Motion for Revision of Case Management Order, all parties being present and the Court being fully advised;

IT IS HEREBY ORDERED:

1. All written discovery shall be served on or before September 15, 2013.

2. All responses to written discovery shall be served on or before October 16, 2013.

3. All amendments to pending discovery responses shall be served on or before October 16, 2013.

4. All depositions shall be noticed on or before November 1, 2013.

5. All written and fact discovery shall be completed on or before November 15, 2013.

6. Plaintiff's expert disclosures shall be completed on or before November 27, 2013.

7. Defendants' expert disclosures shall be completed on or before January 10, 2014.

8. Parties' supplemental expert reports shall be completed on or before February 7, 2014.

9. All expert discovery shall be completed on or before April 11, 2014.

10. All dispositive motions shall be completed on or before May 28, 2014.

11. Responses to dispositive motions shall be completed on or before June 25, 2014.

12. Replies to dispositive motions shall be completed on or before July 10, 2014.

13. Trial is set for September 2014.

Judge Kathleen G. Kennedy

DATE: SEP 05 2013
Circuit Court – 1718

ENTER:
Judge Kathleen Kennedy

Thomas James
Senior Assistant Attorney General
John Wolfsmith
Cecilia Abundis
Assistant Attorneys General

Attorneys for the Plaintiff
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(312) 314-3000

Order **(2/24/05) CCG N002**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE

v.

No. 12 CH 01587

ALTH et al

ORDER

This matter coming to be heard on Defendant Alt's contested Motion to Compel Lith parties in Court through counsel the Court being fully advised. IT IS HEREBY ORDERED THAT:

1) Defendant Alt's Motion to Compel is withdrawn as moot;
2) By Plaintiff's Oral motion the Fact Discovery cut off is hereby extended to October 1, 2013;
3) All remaining dates in the December 12, 2012 Case Management Order shall stand.

Atty. No.: 35853

Name: Schiff Daly + Robert, LLP / HMS

Atty. for: Defendants

Address: 10 S. LaSalle Suite 2500

City/State/Zip: Chicago, IL 60603

Telephone: 312 338 0200

ENTERED:

Dated: JUL 11 2013

Judge Kathleen G. Kennedy

Circuit Court – 1713

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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Exhibit 5

Order (2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

People of the State of Illinois

v.

Alta colleges, et al

No. 12 CH 1587

ORDER

This cause coming before the court for Defendants Motion to Compel, all parties being present and the Court being fully advised in the premises.

It is hereby ORDERED:

Defendants withdraw their Motion to Compel without prejudice.

Atty. No.: 35853

Name: Stetler Duffy Ruttet

Atty. for: Ds

Address: 10 S. LaSalle St.

City/State/Zip: Chicago, IL 60603

Telephone: 312/332-0200

ENTERED:

Judge Kathleen G. Kennedy

DEC 12 2012

Circuit Court – 1718

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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Order **(2/24/05) CCG N002**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

People

v.

No. 12 CH 15877

Alta Colleges, Inc. et. al

ORDER

This cause coming to be heard on Plaintiff's Motion for a protective order, parties' counsel present & the Court being fully advised; IT IS HEREBY ORDERED: Plaintiff's Motion for a Protective Order is denied.

Atty. No.: 99000
Name: Attorney General's Office
Atty. for: Plaintiff
Address: 100 W. Randolph, 12th fl.
City/State/Zip: Chicago, IL 60601
Telephone: 312/814-3000

ENTERED:

Dated: SEP 13 2013

Judge Kathleen G. Kennedy

Circuit Court – 1718

Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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Order **(2/24/05) CCG N002**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

v.

ALTA COLLEGES, INC., et al.

No. No. 2012-CH-1587

ORDER

This Court, having heard arguments on Plaintiff's Motion to Compel Recorded Phone Calls & Plaintiff's Motion to Compel Production of Documents, & having been duly informed, hereby ~~f~~ orders & rules as follows:

- Plaintiff's Motion to Compel Recorded Phone calls is GRANTED
- Plaintiff's Motion to Compel Production of Documents is DENIED.
- Plaintiff Represents that plaintiff believes the Motion to Compel a Rule 206(a)(2) deposition has been resolved & is not presented today.
- Trial is set to begin on Monday, Sept 29, 2014 and set to last 3 weeks.
- Status hearing set for Feb. 25, 2014 at 10:15am.

Atty. No.: 99500

Name: Illinois Attorney General's Office

Atty. for: Plaintiff, People of the State of IL

Address: 100 W. Randolph St, 13th FL

City/State/Zip: Chicago, IL 60601

Telephone: 312-814-3786

ENTERED:

Dated: JAN 24 2014

Judge Kathleen G. Kennedy

Circuit Court – 1718

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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Order (2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

People of the State of Illinois

v.

Atta Colleges, Inc. et al

No. 12 CH 1587

ORDER

This matter coming before the Court on Defendants' Motion for Protective Order, all parties being heard and the Court being fully advised, IT IS HEREBY ORDERED:

Defendants' Motion for Protective Order is GRANTED. Plaintiff shall not pursue any further attempt to gain access, ~~to~~ indirectly or directly, to Defendants' Google AdWords account.

This matter is set for status on April 24, 2014 at 10:15 a.M.

Atty. No.: 35853

Name: Stetler, Duffy + Rotert, Ltd.

Atty. for: AS

Address: 10 S. LaSalle St, 2800-

City/State/Zip: Chicago, IL 60610

Telephone: 312-338-0200

ENTERED:

Dated: MAR 05 2014

Judge Kathleen G. Kennedy

Circuit Court – 1718

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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(Rev. 1/17/01) CCG 0002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

People of State of IL

v.

Alta Colleges, Inc.

No. 12 CH 1587

ORDER

This matter coming to be heard on Defendants' motion to Bar any Opinion or Information not Disclosed in Dr. Vladeck's Expert Report, the Court being fully advised in the premises, it is hereby Ordered:

1) Defendants' motion is Denied.
2) Plaintiff shall produce any supplemental expert disclosure from Dr. Vladeck, and transcripts of any calls he relied upon, within 21 days of Defendants' completion of their production of recorded phone calls in compliance with the Court's prior order. Defendants may thereafter depose Dr. Vladeck on matters related to his opinions and reliance on recorded calls.
3) Defendants may amend their disclosure of Dr. Beales' opinion to respond to Dr. Vladeck's supplemental disclosures of opinions related to recorded phone calls without producing Dr. Beales for further deposition.

Atty. No.: 35853
Name: William Ziegelmueller
Atty. for: Defendants
Address: 10 S. LaSalle, Ste 2800
City/State/Zip: Chicago, IL 60603
Telephone: 312/338-0200

Judge Kathleen G. Kennedy

ENTER: MAY 08 2014

Circuit Court – 1718

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Exhibit 6

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)
IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, -vs-) No. 12 CH 01587) Hon. Kathleen G. Kennedy
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.

REPORT OF PROCEEDINGS of the above-entitled cause held at the Daley Center, Courtroom 2502, Chicago, Illinois, before the HONORABLE KATHLEEN G. KENNEDY, Judge of said Court, reported stenographically by CYNTHIA A. SPLAYT, CSR, commencing at the hour of 11:30 o'clock a.m. on the 2nd day of May, A.D. 2014.

APPEARANCES:
PRESENT:
OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS
By: MR. JOHN WOLFSMITH
MR. GARY S. CAPLAN
MR. JOSEPH SANDERS
100 West Randolph Street
Chicago, IL 60601
(312) 814-8309, (312) 814-4452 (Fax)
jwolfsmith@atg.state.il.us
jsanders@atg.state.il.us

appeared on behalf of plaintiff;

STETLER, DUFFY & ROTERT, LTD.
By: MR. JOSEPH J. DUFFY
MS. MARIAH MORAN
MR. WILLIAM P. ZIEGELMUELLER
MR. BRENDAN B. BRASSIL
10 South LaSalle Street, Suite 2800
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jduffy@sdrlegal.com
mmoran@sdrlegal.com
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appeared on behalf of defendants.

Also present: Mr. William Ojile, Jr.

THE COURT: Does everyone want to state their names?
MR. WOLFSMITH: John Wolfsmith.
MR. CAPLAN: Gary Caplan.
MR. SANDERS: Joe Sanders.
MR. DUFFY: Good morning, Your Honor. Joe Duffy, Mariah Moran. Mr. Ojile is present, and Mr. Ziegelmueller is present, and that's it, Your Honor, for us.
THE COURT: Okay. All right. I believe we have two matters. You can have a seat. I believe we have two matters scheduled for hearing this morning. The plaintiff's motion for leave to file a second amended complaint and defendant's motion with regard to Dr. Vladeck's expert report. Is that your understanding as well?
MR. WOLFSMITH: Yes.
THE COURT: Okay. I thought we should start with the motion for leave to file the second amended complaint, so go ahead, counsel.
MR. WOLFSMITH: You want us to approach?
THE COURT: It's up to you. I can hear you fine. If you want to sit or if you'd just like to stand, that's fine, too.

MR. WOLFSMITH: I'll stand.
THE COURT: Okay. That's good.
MR. WOLFSMITH: Your Honor, we're here on the motion to amend. As you know in Illinois, the rules allow for liberal amendment of the pleadings prior to final judgment. We filed this motion approximately six months prior to trial.
Just as we put in the briefing, and I'm sure you've read it, there is no objection to the entirety of the motion to amend. There's no objection as to the factual allegations being amended or to count 1. The objections of defendants solely concerned three proposed causes of action, counts 2, 3 and 4. Each of those three counts concerns a financial product called APEX that was offered to students at defendant's school. This financial product was a retail installment contract or something like a loan provided to the students. Our complaint focuses on the criminal justice program.
Counsel 2 alleges that the APEX program was structurally unfair owing to a poor outcome, particularly a high default rate, amongst criminal justice students who obtained the financing from the APEX program, and it violates the Illinois Consumer

about why it was fair and gave a detailed answer; so the idea that there is a prejudice or a harm when it comes to unfairness, there's not a basis for that in the record.

The count 4 is the abusiveness count, and I think it's fair to point out our prior responses didn't use the word abusive, but it is a direct corollary to the unfairness claim that we disclosed in 2013 as we were developing it. It was -- count 4 was still produced within 28 days of learning of the default rate, and it's our position when it comes to prejudice that there is no additional evidence that is needed, but to the extent they believe additional evidence is needed, there's no reason it can't be identified and handled in the nearly five months we have until our trial date at the end of September.

Given the general rules of liberal pleading and in the absence of prejudice, surprise and delay, we believe the second amended complaint should be permitted in its entirety. I believe the briefing gets into the details of timing. If the Court has questions, I can respond to them or if the defendants have, I can reply to that without walking the Court through the entire briefing, but for those reasons,

we believe the motion should be granted.

THE COURT: Okay. Thank you, counsel.

MR. DUFFY: Thank you, Judge. I'll respond. And, Your Honor, I have a little bit of an ear infection, so if you say something to me and I have a blank stare, I'm not offending the Court. I may have to have a translator help us out.

THE COURT: Okay. Thank you.

MR. DUFFY: Your Honor, I'm confident that I'll be able to show the Court today that there is this, I'll call it, the smoke screen about this newly discovered evidence does not exist nor were the -- nor was the State delayed access to records regarding APEX. In fact, I'm going to show Your Honor in a few minutes what we provided to the State pursuant to a civil investigative demand in October of 2011, and I'll have a copy for Your Honor in a moment, and I'll also show you that the calculations that their expert did in 2014, he could have done those same calculations in October of 2011.

THE COURT: Okay. Well, that is kind of why I was asking counsel the question about the availability of this information, so I will listen to what you have to say, and I'll probably hear more

from him on that, and are you referring to the spreadsheet that you referenced in your response?

MR. DUFFY: Yes, Your Honor, and I have a spreadsheet, and I'll show you, and I'll show you the expert's calculations, and I've got some documents for Your Honor that will explain it as best I can.

THE COURT: Okay. Thank you.

MR. DUFFY: Sure.

As Your Honor well knows, it's the plaintiff's burden to prove the factors that are spelled out in Loyola. Loyola talks about four factors. Prejudice being the most important. Judge, they fail on all four factors.

The bottom line, Judge, is we're ready for trial. We've been at this for over two and a half years, and we have summary judgment motions that we're working on, a motion that's due in three weeks or four weeks, and, Judge, in reality, what this motion is -- and I'll explain it to the Court -- is just another attempt to avoid trial. That's what it is.

The defendant has asked this Court from day one for on opportunity to try this matter. Your Honor is well aware of it. I'm not going to repeat

it. I told the Court when you first got assigned to this courtroom and first got assigned to this case, I told Your Honor -- it hasn't changed -- you know, we're an academic university. We're a living, breathing organization. We're not trying historical events. We have a school. We have students that come in every day. We only have 1 of 17 curriculum at issue in this trial; yet, we suffered this tremendous prejudice and publicity over this litigation, and all we want to do is try it. We have thousands of students. We have graduates. We have the parents of students who pay their tuition, and like any parent, want them to graduate, so that we all suffer from this prejudice, and the only reason that we're going to trial hopefully in September of 2014 is due to the complexity of the case. If I thought we could have gotten ready in this case in six months, I would have asked you for a trial date in six months, but Your Honor is well aware of the complexity, and Your Honor was extremely, extremely generous to the State in letting them to amend in September of 2012, and Your Honor has been most respectful of the trial date. Every time we appear before Your Honor, we talk about a pleading. We talk

motion you got several weeks ago.
The prejudice in this case, Judge, is overwhelming. We are ready to go to trial. We're weeks away from summary judgment. I have nine lawyers in my office. Five are dedicated to this case. Those are five personal and professional schedules that I have to maintain to get through this trial. I have had judges on hold for trial commitments for late 2014, late 2015, so if Your Honor says I'm going to grant the amendment but I'm going to give you latitude to get discovery, when do we go to trial? How do I go back to a series of judges who I told them to leave open late November, leave open December, leave open January, February, but I'm committed before Judge Kennedy for September and October. That's the problem, Judge. It isn't a question of pushing the trial back for a few weeks and doing some discovery. There's no way if Your Honor is going to be -- and I know Your Honor will be thoughtful, and I know Your Honor will do what the law requires Your Honor to do. The issues, the legal issues that Your Honor is going to have to address on these three counts and the discovery that's going to be done, I can't imagine -- Judge, it

just can't be done. That's the problem we have, and that's the prejudice, and, Judge, it's very simple. At the end of the day, even though Loyola doesn't say -- what are we balancing here? Okay. But balance the prejudice. What does Westwood lose if you grant this motion? We lose a trial date that we've been told for two and a half years we have. What does the Attorney General lose, Judge, if you deny this motion? Nothing. Because neither you nor I can stop the Attorney General from filing another lawsuit a day or a week or a month from now. They are not prejudiced at all, and that's the harm here. There is no harm to the AG, and, quite frankly, Judge, they shouldn't be rewarded for waiting, and if all this was being done in good faith, we're all officers of the Court -- and I don't ascribe evil motives to them. They had a lot of change over in staff, but pick up the phone. We've had many statuses. Tell Your Honor at some point in time between 2012 and now, we're thinking about amending. This all could have been addressed in a logical, reasonable manner, and, now, we're in a situation, Judge, where we're prejudiced beyond belief.
I have nothing further, Judge.

THE COURT: Okay. Thank you.
Counsel.
MR. WOLFSMITH: Your Honor, I would like the opportunity to respond.
THE COURT: Yes. I would like you to respond.
MR. WOLFSMITH: Thank you, and I'll try to work through the notes I had about the various, what I call, blatant mischaracterizes of the record.
THE COURT: Before you go further, though, I do want to let you know that I do have a commitment at about 1:00 o'clock, so we may not get to the other motion today, and I just need to let you know that. Okay.
MR. WOLFSMITH: Understood, Your Honor.
THE COURT: Go ahead. Take as much time as you need, and I could perhaps make a phone call if necessary.
MR. WOLFSMITH: Thank you, Your Honor.
The first point is actually to echo counsel's last statement about the factors in Loyola. I agree. There are balancing. So the Court should examine and weigh whether there's prejudice, whether there is delay, whether there is surprise. It's not that if they even established one of them, that it

necessarily defeats the amendment. That's just my first comment.
The second one deals with scope. There is this assertion that somehow counts 3 and 4 of the proposed complaint involve nationwide or they involve other campuses or they involve criminal justice, and that's wrong, and so I actually started flipping through, and counsel was speaking. Count 3, for example, paragraph 477 of count 3 of the proposed second amended complaint. These acts and practices have caused substantial injury --
THE COURT: Slow down just a little bit, please, counsel, for the Court Reporter.
MR. WOLFSMITH: Sure. That's acts and practices have caused substantial injury to Illinois consumers. Paragraph 478 refers to a majority of Westwood College criminal justice students. Skipping to paragraph 481, defendants have engaged in unfair practices under Dodd-Frank. Gives a citation. Based on the following: A, as structured and administered, defendant's institutional financing programs, including the present iteration called the APEX program, is a recipe for student default and is unfair to Illinois consumers. Counts 2 and 4 follow

Exhibit 7

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)
IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CHANCERY DIVISION

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.

) No. 12 CH 01587
) Hon. Kathleen G. Kennedy

REPORT OF PROCEEDINGS of the above-entitled cause held at the Daley Center, Courtroom 2502, Chicago, Illinois, before the HONORABLE KATHLEEN G. KENNEDY, Judge of said Court, reported stenographically by CYNTHIA A. SPLAYT, CSR, commencing at the hour of 11:02 o'clock a.m. on the 6th day of May, A.D. 2014

APPEARANCES:
PRESENT:
OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS
By: MR. JOHN WOLFSMITH
MR. GARY S. CAPLAN
MR. JOSEPH SANDERS
MR. SAMUEL A.A. LEVINE
MR. OSCAR PINA
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Chicago, IL 60601
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jwolfsmith@atg.state.il.us
jsanders@atg.state.il.us

appeared on behalf of plaintiff;

STETLER, DUFFY & ROTERT, LTD.
By: MR. JOSEPH J. DUFFY
MS. MARIAH E. MORAN
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jduffy@sdrlegal.com
mmoran@sdrlegal.com
bziegel@sdrlegal.com
bbrassil@sdrlegal.com
appeared on behalf of defendants.

Also present: Mr. William Ojile, Jr.

THE COURT: Good morning. I was just going to first address the plaintiff's motion for leave to file the second amended complaint, make a few statements for the record, and then we'll turn to the argument on the motion that we weren't able to complete last week.

Okay. On the plaintiff's motion for leave to file a second amended complaint, the Court notes that defendants object to the addition of three counts. They do not object to other proposed modifications. The Court considered the briefs and arguments of the parties. The parties agree that the Loyola factors apply and essentially agree, first, that the Loyola factor of curing a defective pleading isn't applicable here, and, second, that prejudice to the opposing party is the most important of the Loyola factors.

The main issue here on the prejudice question is delay. To assess delay, the Court considered delay on the part of the plaintiff before seeking amendment, which, essentially, is the timeliness factor, and delay if amendment is allowed. The Court finds that the plaintiff adequately explained why she seeks leave to file a second

amended complaint now when, according to defendants, she had some evidence much earlier. Specifically, the Court accepts the plaintiff's explanation of the need to obtain appropriate confirmatory data, data she believed sufficient -- that she believes sufficient to proceed as opposed to data that defendant believes sufficient. The Court also finds no unwarranted or unreasonable delay by plaintiff and no intent by plaintiff to delay the resolution of this case.

Nevertheless, the Court is sensitive to the defendant's concerns and their representations about the negative impact on them while this case pends unresolved. The Court is also aware of the firm trial dates with an end in sight and what that means for the defendants; however -- and, also, the Court is not persuaded that the trial will occur as scheduled if plaintiff's motion is granted; however, the prejudice to be assessed relates primarily to the ability of the opposing party to present its case on the merits, not to present its case on the scheduled plan hoped for, and consideration of all the factors along with the principle of liberally allowing amendment of pleadings leads to the conclusion that

granting plaintiff's motion for leave to file a second amended complaint will further the interest of justice, and the Court will grant the motion. Plans to make every effort to hold the parties to a tight schedule. The Court has not given up on keeping the trial dates and expects the parties to confer and set a case management order on the three new counts by Thursday, the day after tomorrow.

Also, based on the defendant's argument, it is important to clarify that the three new counts, the APEX claims as pled, relate to the criminal justice program.

That said, that's the ruling on that motion, and we'll turn now to the defendant's motion to bar any opinion based on information not disclosed in Dr. David Vladeck's, V-l-a-d-e-c-k, expert report. Who is going to argue that motion? Mr. Duffy?

MR. DUFFY: No, I'm not, Your Honor. Mr. Ziegelmueller is, but could I ask one question on Your Honor's ruling?

THE COURT: Yes. Do you need some clarification?

MR. DUFFY: Just one clarification. I think you said this, but, Your Honor, as noted by government's -- the state's arguments on Friday,

they're limiting these new causes of action to the Illinois CJ program?

THE COURT: Yes.

MR. DUFFY: That's my understanding.

THE COURT: That's what I intended to clarify by that last statement, and there is no question about that from the Attorney General's office, correct?

MR. WOLFSMITH: No. I think you're questioning it because she referred --

MR. DUFFY: And also the claim for relief asked for rescission of all APEX claims -- all APEX contracts within Westwood.

MR. WOLFSMITH: We'll make sure the complaint clarifies that issue, that it's limited to criminal justice in Illinois.

THE COURT: My intent in ruling, my understanding as well as my intent was that it's limited to Illinois criminal justice program students. Okay.

MR. ZIEGELMUELLER: I guess I'll approach, Judge, since I don't have a table spot.

THE COURT: Yes. I'm going to have to limit your time somewhat on this motion as we talked about the other day, so just give me one second here. Okay.

MR. ZIEGELMUELLER: My intent is that you won't

have any cause to limit me, Judge.

THE COURT: Okay. Thank you.

MR. ZIEGELMUELLER: So, Judge, this is our motion to bar any further opinion by Dr. David Vladeck, who is one of the AG's experts, based on the recorded phone calls of which close to 400 were produced during discovery. As we said before, I'm not going to belabor the point. Obviously, there was years of discovery, 90 some depositions, tons of phone calls. You know, the fact of the matter is the first time we ever heard any of their experts would opine about or rely upon any of those phone conversations was about two weeks before the depositions of all of the experts were scheduled to occur in a one week period in Washington D.C., so -- and I want to emphasize the obvious, Judge. This is a discovery issue. Had there been a proper disclosure pursuant to 213(f), we would have no problem at all with 213(g)'s governance of what's admissible in trial. Certainly, an expert is entitled to testify at trial about things that are properly disclosed in discovery. That's the whole point of having fair discovery, but the purpose of the discovery rules is to give notice during the expert disclosures in a timely fashion so that the

other side's experts can have fair chance to rebut any kind of expert opinions and so that there aren't any last minute surprises before a deposition.

As the Court is aware, the Court imposed a deadline on the AG to disclose its experts in a timely fashion. That was back in November of 2013. The AG disclosed five experts, I believe. None of them disclosed any opinion based on any of the phone calls, and none of them relied upon any of the phone calls.

The Court imposed a deadline on us to disclose our experts in a timely fashion. That was in January of 2014. We had an expert. His name was Dr. Beales, who was tendered as an expert. He's a former FTC official, former Federal Trade Commission official. He handles all sorts of truth-in-disclosure type issues in his capacity both as a private sector expert now and at the FTC, and we had him review various of the written disclosures that Westwood provides to its students. He did not base any portion of his opinion on any of the telephone conversations or on transcripts thereof that were produced in discovery and nor did any of our other experts, Judge. None of our experts had

Exhibit 8

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	Hon. Kathleen G. Kennedy
	)	
v.	)	No. 12 CH 01587
	)	
ALTA COLLEGES, INC., *et al.*,	)	
	)	
Defendants.	)	

AGREED REVISED CASE MANAGEMENT ORDER

THIS CAUSE coming before the Court for a Status hearing, all parties being present and submitting an agreed upon Agreed Revised Case Management Order, and the Court being fully advised in the premises; IT IS HEREBY ORDERED:

1. Plaintiff shall file Second Amended Complaint on or before **May 12, 2014**.
2. Defendants shall file their Motions to Dismiss the Second Amended Complaint on or before **May 28, 2014**.
3. Plaintiff's Response to Motions to Dismiss shall be filed on or before **June 11, 2014**.
4. Defendants' Reply in Support of Motions to Dismiss shall be filed on or before **June 18, 2014.**
5. Oral Argument on Defendants' Motion to Dismiss on **July 2, 2014 at 2:00 p.m.**
6. Status on Court's ruling on Defendants' Motions to Dismiss on **July 11, 2014 at 10:15 a.m.**
7. Defendants' Answer to any remaining counts of the Second Amended Complaint to be filed on or before **July 18, 2014.**
8. Fact 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 on or before **July 18, 2014**.
9. Court status hearing on **July 22, 2014 at 11:00 a.m.**

10. All dispositive motions shall be filed on or before **July 30, 2014.**

11. Responses to dispositive motions shall be filed on or before **August 22, 2014.**

12. Replies to dispositive motions shall be filed on or before **September 5, 2014.**

13. Trial is set to begin on **September 29, 2014.**

By: _____
Attorneys for the Defendants
ALTA COLLEGES, INC., et al.

DATE: _____

Judge Kathleen G. Kennedy

MAY 09 2014

Circuit Court – 1718

ENTER: _____
Judge Kathleen G. Kennedy

Joseph J. Duffy
William P. Ziegelmueller
Mariah E. Moran
Henry M. Baskerville
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By: _____
Attorneys for the Plaintiff
PEOPLE OF THE STATE OF ILLINOIS,
BY LISA MADIGAN
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Gary S. Caplan
Thomas James
John Wolfsmith
Cecilia Abundis
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Oscar Pina
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Attorney No. 99000

Exhibit 9

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

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff,	)	No. 12 CH 01587
	)	
v.	)	Honorable Judge Nancy J. Arnold
	)	
ALTA COLLEGES, INC., *et al.*	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR SECTION 2-619.1 MOTION TO DISMISS

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William P. Ziegelmueller
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INTRODUCTION

The Attorney General's ("AG") Complaint against Defendants fails for at least five reasons. *First*, the AG's cause of action is excluded from the Consumer Fraud Act because Defendants' businesses are administered by state and federal regulatory bodies. *Second*, certain of the relief the AG seeks is preempted by federal law. *Third*, because Westwood provided repeated written disclosures to its students regarding the very subjects at issue, as a matter of law, any supposed misstatements cannot support a claim. *Fourth*, the Complaint does not allege a Consumer Fraud Act claim with requisite particularity. *Finally*, the AG does not allege that any Defendant made a misstatement or omission within the statute of limitations. Consequently, for the reasons set forth below, the Complaint should be dismissed with prejudice in its entirety.

FACTUAL BACKGROUND[1]

Westwood College is an institution of higher education that has been providing quality, career-focused undergraduate and graduate programs since 1953. (¶¶ 32-33.) Westwood's Illinois campuses offer fourteen different degrees, but the Complaint focuses solely on the criminal justice program. Westwood's criminal justice program is designed to prepare students for careers in various fields related to criminal justice, including "corrections officers, children's advocates, youth care counselors, police officers, federal agents, crime scene investigators, forensic scientists, and coroners." (¶ 117.)

In 2004, Westwood began the process of becoming regionally accredited through the Higher Learning Commission ("HLC"), the regional accreditation body located in Chicago.[2] (¶¶ 54, 60-65.)

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[1] The following facts are taken from the AG's Complaint, which, if well-pled, must be taken as true for purposes of a motion to dismiss. Their inclusion herein is not an admission by Defendants as to their veracity. References to the Complaint are cited as "(¶ _)".

[2] College institutional accreditation is a voluntary system of peer review conducted by non-governmental accrediting bodies to ensure uniform and quality education. (¶¶ 51-52.) For schools whose students receive funding under Title IV of the Higher Education Act ("HEA"), 20 U.S.C. § 1070, institutional accreditation is provided by regional and national associations. (¶ 52.) While the U.S. Department of Education makes no distinction between the national and regional accreditors it recognizes, the AG claims that certain employers prefer regional accreditation. (¶ 53.)

That process involves a mandatory multi-year candidacy period during which the accreditation body reviews the institution to ensure that it meets that accreditor's particular standards. (¶ 59.) Thus, the earliest Westwood could have gained regional accreditation was October 2009. (¶ 69.)

From 2007 through 2009, HLC evaluated Westwood on a regular basis, and Westwood's candidacy proceeded toward regional accreditation. (¶¶ 69-73.) In November 2009, HLC issued a "Report of a Comprehensive Evaluation Visit for Initial Accreditation to Westwood College" (the "HLC Report") that commended the accuracy, openness and completeness of Westwood's admissions practices and processes. (¶ 73; the HLC Report is attached hereto as Exhibit 1.)[3] After an extensive review of each campus, central administrative offices, and numerous interviews with staff and students, HLC concluded that Westwood's admissions practices met HLC's accreditation requirements. (Ex. 1 at 10-11.) With respect to the issues of integrity and accuracy of information, HLC found that:

- Westwood "fairly and accurately informs students, prospective students and the public with up-to-date information about admissions, credit transfer, costs, refunds, financial aid and accreditation status of the organization and programs." (*Id.* at 11.)
- Westwood's admission enrollment agreements "provide great clarity to students on their acceptance to the college, their area of study at the time of acceptance, the required curriculum, their charges for the term, and estimated charges for the entire program. The agreement and its use was strong evidence of Westwood College's interest and ability to deal fairly and honestly with its constituents." (*Id.* at 15, 17.)
- "Students . . . reported that they were comfortable with the ways in which Westwood College approached them during the admissions process and kept them informed of their financial responsibilities." (*Id.* at 15.)
- "Tuition and fees are published on the web and as a hard copy addendum to the catalog. . . . The team's review of the institution's advertising and marketing materials confirmed the accuracy and fairness in their statements and process." (*Id.* at 17.)

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[3] The AG cites to and references the HLC Report in the Complaint, but only attached the first four pages. (*See* Complaint Ex. 2.) For completeness, it is appropriate for Defendants to attach the entire document to this Memorandum, and the HLC Report may be considered part of the pleadings. *See, e.g., Bryson v. News Am. Publications, Inc.*, 174 Ill. 2d 77, 92 (Ill. 1996) (finding that magazine article referenced in but not attached to complaint was properly attached to motion to dismiss and properly relied upon by trial court in ruling on motion to dismiss).

HLC also reported that it reviewed Westwood's Title IV program material and "found no cause for concern regarding the institution's administration and oversight of its Title IV responsibilities." (*Id.* at 10.) HLC interviewed students and noted that students were "unanimously incredulous that students would complain that they were uninformed, that loans were secured on their behalf, or that they were not aware of the tuition cost for which they were responsible." (*Id.* at 15.)

During the admission process and in the course of enrollment at Westwood, all students are required to sign multiple detailed disclosure statements regarding accreditation, credit transfer, employment opportunities with the City of Chicago, criminal background, and student financing. (*See* Declaration of Louis J. Pagano, attached hereto as Exhibit 2, ¶ 5.)[4]

The Enrollment Agreement, which each student is required to sign before attending Westwood, provides a number of disclosures, including the tuition and fees for each Westwood program. (*Id.*, ¶ 6.) The Enrollment Agreement also advises students that: "**Westwood College makes no guarantee of credit transfer. The decision regarding the transferability of credits is always at the discretion of the receiving school.**" (*Id.*, ¶ 7 (emphasis original).) By signing the Enrollment Agreement, each student agrees that any dispute arising from their enrollment at Westwood must be submitted to binding arbitration. (*Id.*, ¶ 6.) In addition, each student signs a separate Agreement to Binding Arbitration and Waiver of Jury Trial. (*Id.*, ¶ 11.)

The Enrollment Agreement incorporates the terms of the Academic Catalog, which contains information for each program, including the criminal justice program, and also provides an entire section on transferability of credits. (*Id.*, ¶ 9.) Likewise, Westwood provides each student that takes out a student loan a series of disclosures concerning the student's loan obligations. Westwood also makes numerous disclosures specific to criminal justice students, including ones concerning employment with the Chicago Police Department and the effect a student's criminal

[4] Exhibit 2 is submitted solely for the arguments made under 735 ILCS 5/2-619.

background may have on employment opportunities. (*Id.*, ¶¶ 12-17.)

ARGUMENT

I. The Complaint Should Be Dismissed Under 735 ILCS 5/2-619(9) Because It Is Barred By Other Affirmative Matters.

A. The AG's Claims Are Excluded From the Consumer Fraud Act Because Westwood is in Compliance with State and Federal Law.

Section 10b(1) of the Consumer Fraud Act (the "Act") excludes from liability "[a]ctions or transactions specifically authorized by laws administered by any regulatory body . . . acting under statutory authority of th[e] State or the United States." 815 ILCS 505/10b(1). Here, because the actions and conduct at issue are administered by the U.S. Department of Education and other federal and state regulatory bodies, the AG's claims are excluded from the purview of the Act.

Section 10b(1) provides that the Act "will not impose higher disclosure requirements on parties than those that are sufficient to satisfy federal regulations." *Bober v. Glaxo Wellcome PLC,* 246 F.3d 934, 940 (7th Cir. 2001) (consumer fraud claim excluded by federal law because the Act "protects companies from liability if their actions are authorized by federal law"); *see also Price v. Philip Morris, Inc.*, 219 Ill. 2d 182 (Ill. 2005) (consumer fraud claim against tobacco company was barred where company's manufacturing, distribution and marketing were authorized by federal law); *Weatherman v. Gary-Wheaton Bank of Fox Valley*, 186 Ill. 2d 472, 488-89 (Ill. 1999) (defendant's compliance with federal real estate regulations rendered it exempt from liability under the Act). If a party is "doing something specifically authorized by federal law," Section 10b(1) protects the party from liability under the Act. *Bober*, 246 F.3d at 941.

Here, Section 10b(1) bars the AG's attempt to hold Westwood to higher disclosure requirements than those imposed by applicable federal and state regulations. Westwood is part of a highly-regulated industry and must comply with layers of state and federal regulations to remain an

authorized institution of higher education.[5] The U.S. Department of Education, the Illinois Board of Higher Education, and the Accrediting Council for Independent Colleges and Schools (Westwood's USDOE-recognized accrediting body), collectively regulate each area about which the AG complains. Westwood's accreditation and continuing eligibility to participate in the Title IV program are contingent on its compliance with regulations established by the U.S. Secretary of Education and its accrediting agencies. These regulations include requirements regarding the administration of the student loan program, recruitment, admission and enrollment of students and disclosures that must be made at each step, including those regarding employment and graduation statistics, as well as disclosure of "any other information necessary to substantiate the truthfulness of the [school's] advertisements." *See, e.g.*, 20 U.S.C. §1094 (a)(3) and (8); 34 C.F.R. part 668, subparts B and L; (*see also* Ex. 2 ¶ 3). Yet what is notably absent from the Complaint is a single allegation that Westwood violated of any federal, state, or accrediting regulation applicable to institutions of higher learning. As a result, Section 10b(1) excludes the AG's claims from the purview of the Act.

B. Certain of the Remedies the AG Seeks are Preempted by Federal Law.

1. The Higher Education Act Vests the Power to Ensure Compliance with Educational Guidelines Solely with the U.S. Secretary of Education.

Prayer for relief D seeks to rescind the student Enrollment Agreements and obtain the full restitution of students' tuition, and prayer for relief E seeks to revoke, forfeit, or suspend Westwood's authority to offer its entire criminal justice program. But the AG lacks authority to obtain that relief because the power to determine whether Westwood's programs comply with the Higher Education Act, 20 U.S.C. § 1001, *et seq* (the "HEA") and other federal educational guidelines is vested solely with the U.S. Secretary of Education. *Wilson v. Chism*, 279 Ill. App. 3d

[5] *See, e.g.*, 20 U.S.C. §1094 (eligibility requirements for educational institutions to participate in Title IV); 34 C.F.R. §668.11 (noncompliance with standards established by HEA may lead to suspension or termination of eligibility to participate in Title IV or any other HEA program); *see also* 34 C.F.R. §§ 600.10, 600.20, 668.23, 668.171.

934, 937 (Ill. Ct. App. 1996) (dismissing students' consumer fraud claims as preempted by the federal regulatory scheme provided by the HEA and vested with the Secretary of Education); *see also Mornar v. Pfizer*, No. 4 CH 21866, 2005 WL 5512991 (Cir. Ct. Cook Cty. Sept. 15, 2005) (finding plaintiffs' consumer fraud claims against maker of whitening gum were preempted by Federal Food, Drug and Cosmetic Act where claim amounted to a private cause of action challenging the labeling of the product). Consequently, the AG's claims are preempted.

In *Wilson*, students alleged that their school violated the Consumer Fraud Act by making false certifications to the federal government relating to the students' eligibility for federal student loans. *Wilson*, 279 Ill. App. 3d at 937-38. The appellate court held that the HEA preempted their claims because the statutory language "supported the conclusion that a state claim is barred if it involve[s] a dispute related to discharge of a loan." *Id.* (*citing Gade v. National Solid Wastes Mgt. Assn.*, 505 U.S. 88, 100 (1992) and 20 U.S.C. 1087(c)(1) (1994)). The court explained that if the plaintiffs' case were allowed to proceed, it would be "an obstacle" that would impede "Congress' goals and objectives because it would . . . lead to increased and prolonged litigation and could result in inconsistent findings of facts." *Wilson*, 279 Ill. App. 3d at 939.

Here, the AG seeks to circumvent the extensive regulatory scheme provided by the HEA and the authority vested in the U.S. Secretary of Education. Westwood's initial and continuing eligibility to participate in the Title IV program is contingent on its compliance with the Secretary's requirements in several areas, including: (1) maintaining accreditation in good standing and authorization by a state regulatory body; (2) requirements governing the administration of the student loan process; (3) requirements regulating how Westwood advertises to and recruits students; (4) disclosures that must be made regarding employment and graduation statistics; and (5) the required disclosure of "any other information necessary to substantiate the truthfulness of the [school's] advertisements." *See, e.g.*, 20 U.S.C. §1094 (a)(3) and (8). The HEA's regulatory scheme requires Westwood to "meet the requirements established by the Secretary and accrediting

agencies" in order to be eligible for Title IV funds. 20 U.S.C. § 1094 (a)(21).

Were the AG's claim allowed to proceed, this Court would be required to determine whether Westwood violated federal and state regulations, and whether it violated accrediting requirements, findings that would substitute the Court's judgment for that of the federal and state regulators and accrediting bodies charged with approval and oversight of Westwood's programs. In addition, because the decision to revoke Westwood's criminal justice program rests with the U.S. Secretary of Education, the AG lacks authority to obtain the relief it seeks. In sum, prayers for relief D and E are preempted and should be stricken.

2. *The Federal Arbitration Act Preempts the AG From Rescinding Westwood's Arbitration Agreements.*

Because Westwood's arbitration agreements require the arbitration of "any disputes relative to [the] contract or the education and training received by [the student], no matter how described pleaded or styled," (Ex. 2, ¶¶ 6, 7, 11), the AG's attempt, in prayer for relief D, to invalidate the agreements – including the arbitration agreements – between Westwood and its students is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C § 1, *et seq*. The FAA reflects a strong federal policy to enforce arbitration agreements. *See* 9 U.S.C. §§ 2, 4 (making arbitration agreements "valid, enforceable, and irrevocable," and mandating that courts enforce the agreements according to the agreement's terms); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 133 F.3d 225, 231 (3d Cir. 1998) ("any inquiry into the scope of an arbitration clause must necessarily begin with the presumption that arbitration applies"); *Hutcherson v. Sears Roebuch & Co.*, 342 Ill. App. 3d 109, 131 (Ill. App. Ct. 2003) (same). Any state law that prohibits, impedes, or interferes with enforcement of an arbitration agreement is preempted. *See, e.g., Marmet Health Care Center, Inc., v. Brown*, 132 S. Ct. 1201, 1203 (2012) (holding that the FAA "displace[s]" a state law that "prohibits outright the arbitration of a particular type of claim") (*quoting AT&T Mobility LLC v. Concepción*, 131 S. Ct. 1740, 1748 (2011) (finding that "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" of enforcing arbitration agreements are preempted)).

In cases with virtually identical facts, courts have found similar arbitration agreements to be valid and held that students' claims must be arbitrated. *See, e.g., Jones v. Chubb Institute*, No. 06-4937, 2007 WL 2892683, at *3 (D.N.J. Sept. 28, 2007). In *Jones*, students claimed that their school violated New Jersey's Consumer Fraud Act by utilizing deceptive marketing practices and by making misrepresentations about job placement rates and job eligibility requirements. *Id.* The court, however, found that the students' claims had to be arbitrated and emphasized that "the public interest is not affected by the [arbitration agreement] because the plaintiffs can still vindicate all of their rights through arbitration . . . ." *Id.* at *3.

Similarly, in this case the AG seeks rescission of all student contracts and the restitution of all student funds while avoiding arbitration of claims within the scope of the arbitration agreements between Westwood and its students. The AG, however, has no authority to preempt the FAA. Instead, the FAA precludes the AG's attempt to invalidate hundreds of arbitration agreements, and preempts the AG's claim for rescission and restitution.

C. The Detailed Disclosures Provided to Students Preclude a Finding That Westwood Failed to Disclose or Misrepresented Material Facts.

Even if the AG's claims were not excluded from the Act and preempted by federal law, the alleged misrepresentations are immaterial as a matter of law because Westwood provided each student with written disclosures of the very facts the AG claims were withheld or misrepresented. Under the "bespeaks caution" doctrine any alleged misrepresentation or omission that forms the basis of a fraud claim must be analyzed in context, and cautionary language can render alleged misrepresentations and omissions immaterial as a matter of law. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 15 (Ill. App. Ct. 1995) ("bespeaks caution doctrine merely represents the pragmatic application of two fundamental concepts: materiality and reliance.") (internal citations omitted); *Weatherman v. Gary-Wheaton Bank of Fox Valley*, 186 Ill. 2d 472, 478 (Ill. 1999) (dismissing portion of complaint where plaintiffs had been notified and agreed in advance to a fee they claimed was imposed in violation of Consumer Fraud Act). While the bespeaks caution doctrine is often

invoked in the context of federal securities fraud claims, the doctrine also applies to common law fraud and consumer fraud claims because those claims "mirror the requirements of materiality and reliance." *Lagen*, 274 Ill. App. 3d at 19-20 (affirming dismissal of consumer fraud act claims because the allegedly false statements were "accompanied by meaningful cautionary statements which render[ed] reliance on those facts immaterial as a matter of law"); *see also Harden v Raffensperfer, Hughes & Co.*, 65 F.3d 1392, 1404 (7th Cir. 1995) (the "'bespeaks caution' doctrine provides that forward-looking statements may not be misleading where they are accompanied by meaningful warnings and cautionary statements"); *Bober*, 246 F.3d at 939 (finding alleged misrepresentations were not deceptive because information made available to consumer by defendant "dispel[led] any tendency to deceive that the statements at issue might otherwise have had.")

Here, the same information the AG claims was fraudulently misrepresented or withheld was repeatedly disclosed to each student in writing, and each student acknowledged receiving and understanding that information. (Ex. 2, ¶¶ 6-17.) Westwood told each student through numerous disclosures that credits earned at Westwood in most cases may not be transferable to any other college or university. (*Id.*, ¶¶ 6-10.) Westwood also made disclosures specific to criminal justice students, including the following disclosure regarding employment with the Chicago Police Department:

> *At this time the Chicago Police Department may not recognize course credit or degrees from the college for the purposes of tuition reimbursement, employment, advancement, or compensation.* (*Id.*, ¶ 16 (emphasis original).)

In addition, criminal justice students must sign a disclosure relating to the student's past, including traffic violations, criminal record, and whether the student was dishonorably discharged from the military. Examples of the disclosures contained in this form include:

> Students who have been convicted of a felony, violent or drug-related crime are strongly discouraged from enrolling in Westwood's Criminal Justice program.
>
> * * *
>
> I understand that Westwood College is nationally accredited, not regionally

> accredited, which could have an impact with some Chicago and surrounding area employers, including the City of Chicago. (*Id.*)

Westwood also advised students about their obligations relating to student loans. Each student who applies for a student loan is required to sign a Loan Counseling Form, which states in part:

> When you accept a loan, you accept legal and financial responsibilities that lasts [sic] until the loan is repaid . . . . When you accept a student loan, you are agreeing to repay your loan(s), including accrued interest and fees, whether or not you complete you education, obtain employment or are satisfied with your education. (*Id.* at ¶¶ 12-15.)

Each student borrower also executes a Federal Stafford Loan Master Promissory Note and that form contains similar disclosures related to the loan obligations, interest and fees. (*Id.*)

All criminal justice students signed acknowledgements that they received and understood each disclosure made concerning the student's loan obligations, credit transferability, employment with the Chicago Police Department, and the effect a criminal record may have on employment opportunities. (*Id.*,¶¶ 6-17.) These disclosures, and the students' acknowledgement of them, mean that the alleged misstatements or omissions cannot be reasonably relied upon or material. Therefore, any supposed misstatements cannot form the basis of a consumer fraud claim.

Therefore, for all of these reasons, the Complaint should be dismissed with prejudice pursuant 735 ILCS 5/2-619.

II. The Complaint Should Be Dismissed Under 735 ILCS 5/2-615 Because it is Insufficiently Pled.

A. The AG's Claims Are Not Pled With Particularity.

The Complaint should be dismissed because it does not allege the elements of a cause of action under the Act with particularity. "The elements of a claim under the Act are: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417 (Ill. 2002) (affirming dismissal of

claims under the Act as insufficiently pled) (citation omitted). "The complaint must state with particularity and specificity the deceptive manner of defendant's acts or practices, and the failure to make such averments requires the dismissal of the complaint." *Id.* at 419. The "facts which constitute an alleged fraud must be pleaded with specificity and particularity, including 'what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made.'" *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 309 (Ill. App. Ct. 2002) (affirming dismissal of fraud claims as insufficiently pled) (citations omitted).

Here, the Complaint fails to allege necessary facts surrounding the alleged misstatements: when, by whom, and to whom the supposed misstatements were made. Indeed, in many instances the Complaint fails even to allege that supposed statements were actually false.

1. The AG Does Not Allege Any False Statements Regarding Accreditation.

The Complaint alleges, for example, that "[i]n 2008, Ms. Moore and several other instructors and administrators went to different classrooms to inform students that Defendants were in candidacy to be regionally accredited and should be regionally accredited by the end of 2009." (¶ 108.) The Complaint does not allege who the "several other instructors and administrators" were. Further, there is no allegation regarding to which of Westwood's "students" these statements were made, when in 2008 they were made, or even that Ms. Moore or the other unnamed speakers believed their statements were false when they made them. And according to the Complaint, in 2008 Defendants *were in fact* in candidacy to be regionally accredited and accreditation *was in fact* expected by the end of 2009. (¶¶ 66-73.) As the AG concedes, it was not until November 2010 that Defendants had reason to believe that regional accreditation would not be forthcoming. (¶ 86.) In other words, not only is there no sufficient allegation of any false statement, but the Complaint's allegations prove that the statements were true at the time they were made. It goes without saying that truthful statements cannot support a fraud claim. *See, e.g., McGuire v. Ameritech Cellular Corp.*, 314 Ill. App. 3d 83, 87 (Ill. App. Ct. 2000) (finding that failure to allege why a statement was

false warranted dismissal of claims under the Act).

2. The AG Does Not Allege that Statements Regarding the Criminal Justice Program Were Knowingly False When Made.

The Complaint alleges, for example, that Mr. Rasmussen told students that "Defendants would receive regional accreditation by a certain date . . . ." (¶ 256.) The Complaint also alleges that Ms. Williams told "students that they could become Chicago police officers with a degree from Westwood." (¶ 271.)[6] But the Complaint never alleges to which students these statements were made, when they were made, or that Mr. Rasmussen and Ms. Williams knew these statements were false when they made them. In fact, according to the Complaint, Westwood was in the process of becoming regionally accredited during this time period and Defendants did not learn that the Chicago Police would not accept national accreditation until sometime in 2005. (¶¶ 69-73, 104.) Failure to plead that the defendant knew the statements were false when made warrants dismissal. *See Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87, 97 (Ill. App. Ct. 1992) (affirming dismissal of claims under the Act because plaintiff failed to allege that defendants knew the statements were false when made).

3. The AG Fails to Sufficiently Allege Facts Regarding the Alleged False and Misleading Statements About Students' Criminal Backgrounds.

The AG claims certain unnamed admissions representatives at Westwood either told students with criminal backgrounds that they could pursue careers in criminal justice fields or failed to tell students that a criminal background might affect their ability to work in criminal justice fields. (¶¶ 141, 143, 276.) The Complaint does not allege who made these statements, when they were made, to whom they were made, how they were conveyed to the students, that these unnamed admissions representatives knew this information was false, or even that the information was false. For example, there is no allegation that a criminal background is an absolute bar to a career in any

[6] In 2010, the Chicago Police Department changed its employment criteria to allow credits earned at or degrees conferred by nationally accredited colleges to meet the Department's educational requirements. Students earning credits or degrees at Westwood, regardless of when earned, now meet the educational requirements of the Chicago Police, making the alleged statements attributed to Ms. Williams true.

of the fields for which a criminal justice degree might be obtained, such as corrections officers, children's advocates, police officer, federal agents, crime scene investigators, and coroners, which is a prerequisite to establishing the falsity of these statements.

In addition, the AG claims that "Defendants' admissions representatives did not refer prospective students to seek the advice of legal counsel concerning expungement." (¶ 145.) The AG never alleges, and cannot allege, that the admissions representatives had a duty to refer prospective students to legal counsel or even to disclose the virtually self-evident fact that a criminal background might adversely affect employability in various fields of criminal justice. "A complaint sounding in fraud must allege, *inter alia*, that the defendant falsely stated a material fact or concealed a material fact that the defendant had a duty to disclose." *Lewis v. Lead Indus. Ass'n, Inc.*, 342 Ill. App. 3d 95, 104 (Ill. App. Ct. 2003) (affirming dismissal of fraud claims as insufficiently pled). The AG's allegations are insufficient.

4. The AG Has Not Sufficiently Alleged That Any False Statement Was Made in Connection With the Student Loan Process.

The Complaint alleges that Westwood misled students regarding student loans and their obligation to repay the loans, but it does not allege particular facts to support such allegations. (*See, e.g.*, ¶¶ 151-164.) For example, the Complaint alleges that Westwood "made misrepresentations or false promises to students and prospective students regarding the nature of the students' financing options." (¶ 164.) The Complaint also alleges that "Defendants led some students and prospective students to believe that if they made all of their monthly APEX payments while earning a degree, they would have paid off their APEX financing by the time they graduated." (¶ 182.) The Complaint does not, however, identify what actual statements were made, who made them, when they were made, to which students, or how the statements were false. By way of example, the Complaint repeatedly alleges that "Defendants' financial aid officers told students that they qualified for loans in the full amount of the cost approximated to the students, but then encouraged the students to take additional loans 'just in case.'" (*see* e.g., ¶¶ 195, 199, 203-207.) The AG never

explains, however, who made this statement, when it was made, or how a suggestion that a student might need extra money "just in case" could possibly be an objectively false statement known to be false by the speaker at the time it was made.

B. There Are No False Statements in Defendants' Advertising.

1. There Are No False Statements About Law Enforcement Careers.

The Complaint does not allege any false statements in Defendants' advertising. The AG alleges Defendants advertised that "students who graduate with an associate's degree or bachelor's degree in criminal justice would be eligible to obtain positions within the law enforcement field, including, but not limited to, corrections officers, children's advocates, youth care counselors, police officers, federal agents, crime scene investigators, forensic scientists, and coroners." (¶ 117.) But there is not a single allegation that a graduate with a Westwood criminal justice degree could not obtain a job in any of these fields other than as a Chicago police officer or Illinois state trooper. (¶¶ 126-128). Nor is there a single allegation that any advertisement told students that they could become Chicago police officers or Illinois state troopers, as opposed to police officers with the police departments of myriad other cities, such as Bolingbrook or Cicero. Simply, there is no allegation that any statement made in Defendants' advertisements about its criminal justice program was false.

2. There Were No False Statements in Defendants' Internet Advertisements.

Nor were Defendants' internet ads false. The Complaint alleges that Defendants used search engine optimization to advertise their business in a deceptive manner. (¶¶ 218-46.) Leaving aside that search optimization is a legal and common form of internet advertising, the Complaint fails to allege that any such advertisement contained a false statement. For example, the Complaint alleges that a search of the term "Regionally Accredited College List Illinois" was designed "to either (1) optimize the likelihood that a website advertising Defendants' programs would appear first or near to first in the search results list; (2) prompt an internet advertisement for Defendants' programs; or

(3) both." (¶ 228.) But even the Exhibits attached to the Complaint do not support the statement that Westwood's advertisements appeared within the actual search results. (*See* Complaint Ex. 13-14.) Instead, Westwood ads appeared in a separate advertising window to the right of the Google search results or in the advertising banner above the search results (*Id.*) – but never within the results themselves. And there is no allegation that any page suggested in the advertisements contained misstatements, or that any advertisement represented that Westwood was regionally accredited. Indeed, the ad provides a link to Westwood's website, which has prominent and specific disclosures that Westwood is not regionally accredited.

The Complaint does not allege whether a search of the terms "Regionally Accredited College List Illinois" would have generated different results than a search for "Accredited College List Illinois." This distinction is critical because search engines search for words individually which can lead to search results that are not uniform. For example, a search for "Illinois Attorney General," generates advertisements for a Naperville Divorce Lawyer, Lawyers in Illinois, Illinois Lawyer Referrals, and Illinois Attorney Listings – none of which would assist a person in locating the AG's office. (*See* Google screen shots attached hereto as Exhibit 3.)[7]

Nor are these ads any different than thousands of other ads throughout the internet advertising industry. For example, if one searches for "law school Chicago," the very first entry is an advertisement for Loyola that states: "Earn a Paralegal Certificate from Loyola. Be in High Demand. Apply!" Obviously, a paralegal certificate will not allow a student to practice law, but that does not mean Loyola's advertisement violates the Consumer Fraud Act; it merely suggests an alternative to law school. (*See* Exhibit 4.) Similarly, Defendants' internet ads merely suggest an alternative for someone who is interested in a post-secondary education and make no misstatements in the process. Absent a false statement, which is never alleged, Defendants' internet ads cannot

[7] The Court can take judicial notice of Google search results. *People v. Clark*, 406 Ill. App. 3d 622, 633 (Ill. App. Ct. 2010) ("information acquired from mainstream Internet sites such as Map Quest and Google Maps is reliable enough to support a request for judicial notice").

support the AG's claims.

C. The Alleged Misstatements Are Future Projections, Not Fraud.

Even had the AG alleged its claims with requisite particularity (it did not), the statements at issue are future projections, not actionable misstatements of fact. "To support an action for fraud, the alleged misrepresentation must be one of fact and not an expression of opinion." *Prime Leasing*, 332 Ill. App. 3d at 309. Indeed, "under Illinois law there is no action for promissory fraud; meaning that the alleged misrepresentations must be statements of present or preexisting facts, and not statements of future intent or conduct." *Ault v. C.C. Services, Inc.*, 232 Ill. App. 3d 269, 271 (Ill. App. Ct. 1992) (holding that representations that another employee would be fired and his accounts reassigned to plaintiff were non-actionable representations of future conduct).

The alleged misstatements in this case are mere statements of opinion or future conduct. For example, supposed statements that Westwood would be regionally accredited *in the future*, or that students would be able to transfer their credits to another school *in the future*, or that students would be able to get jobs at as police officers *in the future*, or that students would be able to get jobs in criminal justice despite criminal backgrounds *in the future*, all are statements of opinion and/or future projections. Even if these statements were incorrect (they were not), they cannot support a fraud claim as a matter of law.

Accordingly, for all of these reasons, the Complaint should be dismissed pursuant to 735 ILCS 5/2-615 because it fails to state a claim upon which relief can be granted.

III. The Complaint Should Be Dismissed Under 735 ILCS 5/2-619(5) to the Extent That it Relies Upon Statements Prior to January 18, 2009.

The statute of limitations for claims under the Act is three years. *McCready v. Illinois Sec'y of State, White*, 382 Ill. App. 3d 789, 798 (Ill. App. Ct. 2008). Thus, the AG's claim can survive only if it is predicated on particular statements made on or after January 18, 2009 (*i.e.*, three years before the Complaint was filed). As noted above, the Complaint fails to allege when many of the alleged false statements were made, and the statements that are dated are alleged to have been made

in 2006-2008. (*See, e.g.*, ¶¶ 251, 257, 265, 364.) Indeed, the students the AG uses as "Consumer Illustrations" all enrolled at Westwood before 2007. (*See* ¶¶ 283, 297, 327, 378) And other than Mr. Brown, who graduated in 2009, all of these students graduated and left Westwood before January 18, 2009, so any alleged misstatement made to them is outside the statute of limitations. (*Id.*) Any statements outside the statute of limitations cannot form the basis of the AG's claims. *Ko v. Eljer Indus., Inc.*, 287 Ill. App. 3d 35, 43 (Ill. App. Ct. 1997) (affirming dismissal of claims under the Act as time-barred because alleged misstatements were made outside the statute of limitations). Thus, the AG's claim should be dismissed pursuant to 735 ILCS 5/2-619(5) because it has failed to identify particular false statements made within the statute of limitations.

CONCLUSION

For the forgoing reasons, the Court should dismiss the Complaint in its entirety with prejudice.

Dated: April 5, 2012

Respectfully submitted,

ALTA COLLEGES, INC.; WESTWOOD COLLEGE, INC.; WESGRAY CORPORATION; ELBERT, INC.; and EL NELL, INC.

By: _____
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CERTIFICATE OF SERVICE

I, Henry M. Baskerville, an attorney, hereby certify that the attached **Defendants' Memorandum in Support of Their 2-619.1 Motion to Dismiss** was filed with the Clerk of Circuit Court and served via United States Mail upon:

Akeel White
Michele Casey
Colleen Bisher
Gregory Grzeskiewicz
Office of the Illinois Attorney General
Consumer Fraud Bureau
100 W. Randolph St., 12th Floor
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on April 5, 2012.

Henry M. Baskerville