UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL IACOVACCI, Plaintiff, -against- DOUGLAS MONTICCIOLO, as a member and the majority owner of Brevet Holdings, LLC, Chief Investment Officer of Brevet Capital Management, LLC, a member of Brevet Short Duration Partners, LLC, a member of Brevet Short Duration Holdings, LLC, and individually; MARK CALLAHAN, as President of Brevet Capital Management, LLC, a member of Brevet Short Duration Partners, LLC, a member of Brevet Short Duration Holdings, LLC, and individually; JOHNNY LAN, as head of technology and vice-president of Brevet Capital Management, LLC, and individually; and JOHN DOES and JANE DOES 1 through 10; and all known corporate and other entities, Defendants.	:	No. 18 Civ. 7984 (JFK) **OPINION & ORDER**

APPEARANCES

FOR PLAINTIFF PAUL IACOVACCI
David Ross Ehrlich
Debra L. Wabnik
STAGG, TERENZI, CONFUSIONE & WABNIK, L.L.P.

FOR DEFENDANTS DOUGLAS MONTICCIOLO & MARK CALLAHAN
Christine Isabelle Laurent
Joseph Kim
Philip Semprevivo

BIEDERMANN HOENIG SEMPREVIVO, P.C.

FOR DEFENDANT JOHNNY LAN
Daniel Seth Weinberger
Edward William Larkin
GIBBONS P.C.

JOHN F. KEENAN, United States District Judge:

Before the Court is a motion by Defendants Douglas Monticciolo ("Monticciolo") and Mark Callahan ("Callahan") to dismiss the complaint filed by Plaintiff Paul Iacovacci ("Iacovacci") pursuant to Federal Rule of Civil Procedure 12(b)(1). Defendant Johnny Lan ("Lan," and together with Monticciolo and Callahan, "Defendants") joins the motion. For the reasons set forth below, the Court grants Defendants' motion to dismiss.

I. BACKGROUND

A. Factual Background

The Court takes the following relevant facts from the allegations in the amended complaint and, for the purposes of this motion, assumes they are true.

Iacovacci is a citizen of, and domiciled in, Connecticut. (Compl. ¶ 5.) Monticciolo and Lan are citizens of, and domiciled in, New York. (Id. ¶ 6, 8.) Callahan is a citizen of, and domiciled in, New Jersey. (Id. ¶ 7.) Iacovacci asserts that this Court has diversity jurisdiction over his claims pursuant to 28 U.S.C. § 1332(a)(2). (Id. ¶ 3.)

Beginning in 2004, Iacovacci served as Managing Director of Brevet Capital Management, LLC ("BCM"), an investment advisor, where he received a monthly salary of $10,000. (Id. ¶¶ 9, 11.) BCM's sole member and owner is Brevet Holdings, LLC ("BH"). (Id. ¶ 10.) Monticciolo was a member of BH, and the Chief Investment Officer of BCM. (Id. ¶ 13.) He had control over and responsibility for BCM and BH's daily operations. (Id. ¶ 14.) Callahan was the President of BCM, and, together with Monticciolo, oversaw BCM and BH's daily operations. (Id. ¶ 15.) Lan was Vice President and Head of Technology at BCM. (Id. ¶ 17.)

In 2009, Iacovacci, together with Monticciolo and Callahan, founded Brevet Short Duration Partners, LLC ("Partners") and Brevet Short Duration Holdings, LLC ("Holdings," and together with Partners, the "Short Duration Companies"). (Id. ¶ 11.) The Short Duration Companies were Delaware limited liability companies engaged in the short duration lending business. (Id. ¶ 18.) Iacovacci was the "head of sourcing" and was in charge of "finding borrowers to lend funds . . . to the Short Duration Companies." (Id. ¶ 27.)

On or about January 21, 2009, Iacovacci, Monticciolo, and Callahan entered into and executed nearly identical LLC agreements for Holdings and Partners (the "LLC Agreements"). (Id. ¶ 19.) Pursuant to the LLC Agreements, the parties agreed

that each member would maintain a capital account, that net profits and net losses would be allocated on a pro rata basis, and that members could withdraw and retire from the Short Duration Companies at any time as long as he or she gave 180 days' notice. (Id. ¶¶ 20-23.) Upon withdrawal, a member was entitled to "a share of the net profits in the termination year and the member's capital account balance." (Id. ¶ 24.) In addition, a founding member of Partners who elected to withdraw was entitled to receive payments of net profits in declining amounts for an additional five years after withdrawal. (Id. ¶ 25.) A founding member of Holdings was entitled to declining amounts of profits for an additional ten years. (Id. ¶ 26.)

Iacovacci underwent surgery on his knee on December 18, 2015. (Id. ¶ 28.) Given the surgery and the length of recovery, Iacovacci, on January 6, 2016, convened a meeting with Monticciolo and Callahan and informed them that he intended to withdraw from the Short Duration Companies and retire from Brevet. (Id. ¶ 29.) He confirmed this in an email dated January 12, 2016, making this his effective retirement date. (Id. ¶ 30.)

After Iacovacci announced his retirement decision, Monticciolo and Callahan allegedly engaged in a concerted and fraudulent scheme to deprive Iacovacci of the payments to which he was entitled under the LLC Agreements and of future opportunities to work in the hedge fund and lending industries.

(Id. ¶ 31.) The Court will summarize the acts they allegedly committed as part of this scheme.

First, between January and October 2016, Monticciolo and Callahan secretly and without Iacovacci's consent gained access to LogMeIn, a remote access software that Iacovacci and had installed on his personal home computer. (Id. ¶ 32.) They also made at least two dozen attempts to access two external hard drives he owned. (Id.) Iacovacci had authorized Lan to access the hard drives on specific and isolated occasions, but he had not authorized the two dozen attempts that had been made between January and October 2016, and which Iacovacci only discovered after a forensic expert analyzed his computer and hard drives. (Id.)

Second, Monticciolo and Callahan delayed negotiating a withdrawal agreement with Iacovacci. (Id. ¶ 33.) When they finally provided him with a draft agreement, it contained a non-compete provision in violation of the LLC Agreements. (Id. ¶ 35.)

Third, Monticciolo and Callahan further invaded Iacovacci's computer and hard drives, even accessing his Yahoo! Email account, which contained privileged communications with his attorney. (Id. ¶ 37.) On April 19, 2016, they installed the file deletion software File Shredder on Iacovacci's computer and

deleted numerous files, including Iacovacci's personal financial information. (Id.)

Fourth, on October 14, 2016, Monticciolo and Callahan terminated Iacovacci's employment at BCM and BH and unlawfully took possession of all of Iacovacci's interests in the Short Duration Companies. (Id. ¶ 39.) By removing Iacovacci for cause, Monticciolo and Callahan subjected Iacovacci to additional restrictions, like a 24 month non-compete provision, which he would have avoided as a retiring member of the Short Duration Companies. (Id. ¶ 42.)

Finally, Monticciolo and Callahan again hacked Iacovacci's computer after he filed an action, on October 17, 2016, against BH and the Short Duration Companies in Supreme Court, New York County for breach of contract, unjust enrichment, and conversion. (Id. ¶ 43.) Monticciolo and Callahan accessed a "Family" account on Iacovacci's computer, Iacovacci's personal emails, and Iacovacci's external hard drives, and they secretly copied and downloaded large quantities of documents. (Id. ¶¶ 44-47.)

Based on the aforementioned actions, Iacovacci commenced this federal action (the "Federal Action") asserting claims against Defendants for fraud, civil conspiracy to defraud, breach of fiduciary duty, breach of duty of loyalty, unjust enrichment, conversion, and constructive trust. He brings a

claim against Lan for aiding and abetting breach of fiduciary duty and breach of duty of loyalty, and a claim against Monticciolo and Callahan for breach of contract and implied covenant of good faith and fair dealing. Finally, Iacovacci requests a declaratory judgment holding that Monticciolo and Callahan wrongfully terminated Iacovacci's interests in the Short Duration Companies, and an accounting against them.

B. Procedural History

On October 17, 2016, nearly two years before filing this federal action, Iacovacci brought an action in New York State Supreme Court, County of New York against BH and the Short Duration Companies (the "State Action"), which is currently pending before Judge David Cohen. (Semprevivo Decl., Ex. C, ECF No. 32 [hereinafter "Original State Action Compl."].) Iacovaccci requested a declaratory judgment, pursuant to N.Y. C.P.L.R. § 3001, that certain non-compete provisions were unenforceable and asserted claims against the Short Duration Companies for breach of the LLC Agreements, anticipatory breach of the LLC Agreements, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and conversion. (Id. ¶¶ 37-49, 50-89). He also requested the imposition of a constructive trust. (Id. ¶¶ 89-95.)

On August 24, 2018, Iacovacci filed an unopposed motion for leave to amend his complaint in state court. (Semprevivo Decl.,

Ex. D.) The amended complaint adds Brevet Capital Partners, LLC and Brevet Capital Holdings, LLC as defendants, and adds a claim for fraud. (Id. ¶¶ 104-117.) (Semprevivo Decl., Ex. E ¶¶ 79-131, 104-117 [hereinafter "State Action Compl."].)

To date, the parties in the state action have engaged in motion practice and discovery. Defendants represent that the parties have conducted several depositions (including ones in Nevada and Georgia), issued numerous non-party document subpoenas, and briefed twelve different motions. (Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 1, ECF No. 33 [hereinafter "Mem."].) In addition, the state court has ordered that Iacovacci's computer be turned over to a neutral forensic expert for analysis. (Semprevivo Decl., Ex. I.)

On August 31, 2018, one week after amending his complaint in state court, Iacovacci filed this action in federal court. On November 12, 2018, Defendants filed the instant motion to dismiss pursuant to Rule 12(b)(1), arguing that Iacovacci's state and federal court actions are parallel and, therefore, the Court should abstain from exercising jurisdiction.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(1), an action must be dismissed for lack of subject matter jurisdiction when the district court lacks the statutory or constitutional power to adjudicate the case. Fed. R. Civ. P. 12(b)(1). In

adjudicating a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a court may consider matters outside the pleadings. United States v. Blake, 942 F. Supp. 2d 285, 292 (E.D.N.Y. 2013); see also Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000). On a 12(b)(1) motion, the Court accepts all material factual allegations in the complaint as true but does not necessarily draw inferences from the complaint favorable to the plaintiff. J.S. ex rel. N.S. v. Attica Cent. Sch., 386 F.3d 107, 110 (2d Cir. 2004) (citing Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)).

III. DISCUSSION

A. Colorado River Abstention

Defendants argue that this Court should abstain, pursuant to the doctrine established in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), from exercising jurisdiction over the claims in this federal action. (Mem. at 1.) "A motion to dismiss based on Colorado River is considered as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of Federal Rules of Civil Procedure." Stahl York Ave. Co., LLC v. City of New York, No. 14 CIV. 7665 ER, 2015 WL 2445071, at *7 (S.D.N.Y. May 21, 2015), aff'd, 641 F. App'x 68 (2d Cir. 2016).

The Supreme Court in Colorado River, held that "in situations involving the contemporaneous exercise of concurrent jurisdiction," a federal court, in certain "exceptional" circumstances, may abstain from exercising jurisdiction when parallel state-court litigation could result in "comprehensive disposition of litigation" and abstention would conserve judicial resources. 424 U.S. at 813, 817-18. In deciding whether to abstain pursuant to Colorado River, courts consider six factors:

> (1) whether the controversy involves a res over which one of the courts has assumed jurisdiction; (2) whether the federal forum is less inconvenient than the other for the parties; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed, and whether proceedings have advanced more in one forum than in the other; (5) whether federal law provides the rule of decision; and (6) whether the state procedures are adequate to protect the plaintiff's federal rights.

Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84, 100, 100-01 (2d Cir. 2012) (quoting Woodford v. Cmty. Action Agency of Greene Cty., Inc., 239 F.3d 517, 522 (2d Cir. 2001)). "As an additional factor, the Supreme Court has 'found considerable merit in the idea that the vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under Colorado River.'" Abe v. New York Univ., No. 14-CV-9323 (RJS), 2016 WL 1275661, at *5-6

(S.D.N.Y. Mar. 30, 2016) (quoting Telesco v. Telesco Fuel & Masons' Materials, Inc., 765 F.2d 356, 363 (2d Cir. 1985)).

No one Colorado River factor is decisive; instead, a court must engage in a "carefully considered judgment[,] taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise." Colorado River, 424 U.S. at 818 (citation omitted); see also Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 16 (1983) (explaining that the "weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case"). The facial neutrality of a factor "is a basis for retaining jurisdiction, not for yielding it." Woodford, 239 F.3d at 522.

1. The State and Federal Actions Are Parallel

Before applying the Colorado River six-factor analysis, a court must make the threshold determination "that the concurrent proceedings are 'parallel.'" Dittmer v. Cty of Suffolk, 146 F.3d 113, 118 (2d Cir. 1998). Federal and state proceedings are parallel if "'substantially the same parties are contemporaneously litigating substantially the same issue' in both forums." First Keystone Consultants Inc. v. Schelsinger Elec. Contractors, 862 F. Supp. 2d 170, 182 (E.D.N.Y. 2012) (quoting Dittmer, 146 F.3d at 118); see also GBA Contracting Corp. v. Fid. & Deposit Co. of Md., No. 00 CIV. 1333 SHS, 2001

WL 11060, at *1 (S.D.N.Y. Jan. 4, 2001) (holding that parallelism does not require an exact identity of the parties; rather, "the parallel litigation requirement is satisfied when the main issue in the case is the subject of already pending litigation.").

For the following reasons, the Court finds that the state action and this federal action are parallel. First, the same factual allegations -- in sum, the firing of Iacovacci for cause, the denial of his right to seek profits owed to him under the LLC Agreements, and the allegedly fraudulent activities of Monticciolo and Callahan -- underlie the two complaints. See Cong. Talcott Corp. v. Roslin, No. 95 CIV. 7698LAP, 1996 WL 499337, at *3 (S.D.N.Y. Sept. 4, 1996) (finding two actions parallel where "the exact same events underlie both actions"). Second, because of the overlapping factual allegations "[p]resumably, resolution of each matter will be decided on the basis of the same discovery, the same documents, the same depositions, and the same witnesses." Id. Finally, both complaints seek the same relief: an award of compensatory damages not less than $115 million. (Compare Compl. at 23 with State Action Compl. at 27.) See also Telesco, 765 F.2d at 359 (affirming the district court's decision to abstain from exercising jurisdiction over a concurrent federal action because

the plaintiff "essentially made the same claims and sought the same relief in both the state and federal courts.")

Iacovacci argues that the two actions are not parallel for several reasons, the first of which is that the parties in the two lawsuits are not the same. (Pl.'s Mem. of Law in Opp. at 3, ECF No. 38 [hereinafter "Opp."].) The Court does not find this argument dispositive. In Congress Talcott, the district court found concurrent actions parallel where none of the defendants in the actions were the same. No. 85 Civ. 7698LAP, 1996 WL 499337 at *3 (S.D.N.Y. Sept. 4, 1996). There, the plaintiff sued an individual defendant in federal court, and another individual and two corporate entities in state court. Id. The district court found that "the same events" underlay both actions, and the defendants in the state and federal actions were "closely related" because the individual defendants were principals of one entity defendant, and the federal defendant was the president, secretary, and sole shareholder of the other entity defendant. Id.

As in Congress Talcott, Defendants in this action are "closely related" to the defendants in the state action; Callahan and Monticciolo are the founding members of the corporate entities named in the state action and are the individuals through which those corporate entities are alleged to have acted. (See State Action Compl. ¶¶ 38-39, 41, 53, 58

(describing acts committed by Monticciolo and Callahan).) Moreover, the facts alleged against Defendants in this action and BH, the Short Duration Companies, Brevet Capital Holdings, LLC and Brevet Capital Partners, LLC in the state court action are virtually identical. The defendants in both actions will have to argue that Iacovacci was properly terminated for cause and, therefore, not entitled to any profits under the LLC Agreements, and that Monticciolo and Callahan did not engage in fraudulent activities. Thus, because "the main issue[s] in the case [are] the subject of already pending litigation," a perfect match between the parties is not required. GBA Contracting Corp., 2001 WL 11060, at *1.

Nor is the Court persuaded that this action and the state action are not parallel because this action includes Lan as a defendant, whereas the state action does not. Iacovacci's allegations regarding Lan are minimal. In fact, he is mentioned in eleven paragraphs out of an 124-paragraph complaint and named in only two claims. (See Compl. ¶¶ 8, 16, 32, 52-56, 87-89.) The presence of Lan is therefore insufficient to change the fact that the issues being litigated and facts to be proved in the two forums are still "substantially the same." Dittmer, 146 F.3d at 118; see also Pabco Const. Corp. v. Allegheny Millwork PBT, No. 12 CIV. 7713, 2013 WL 1499402, at *2 (S.D.N.Y. Apr. 10, 2013) (holding that even though the parties in the concurrent

state and federal cases were not "strictly identical," and the federal action named a defendant not named in the state action, parallelism still existed because "complete identity of parties is not required" (quoting GBA Contracting, 2001 WL 11060, at *1)).

Iacovacci further argues that there is no parallelism between the state and federal actions because he asserts four claims in the federal action that he does not assert in state court -- civil conspiracy to defraud, breach of fiduciary duty, breach of duty of loyalty, and aiding and abetting a breach of fiduciary duty and duty of loyalty. (Opp. at 3.) Generally, "resolution of the state action must 'dispose of all claims presented in the federal case.'" DDR Const. Servs., Inc. v. Siemens Indus., Inc., 770 F. Supp. 2d 627, 644 (S.D.N.Y. 2011) (quoting Stone v. Patchett, No. 08 Civ. 5171, 2009 WL 1108596, at *14 (S.D.N.Y. Apr. 23, 2009))). Iacovacci's new claims, however, are a mere attempt "to cast the same grievances in the form of . . . new legal theor[ies]," which is insufficient to distinguish the two actions under the Colorado River doctrine. See Telesco, 765 F.2d at 359, 362 (holding proceedings parallel because "in its essential elements the same cause of action, regardless of theory or pleadings, is asserted in both counts."). Supporting this conclusion is, first, the fact that Iacovacci's breach of fiduciary claim consists of the same

factual allegations as his claims for breach of contract and breach of the implied covenant of good faith and fair dealing in state court. (Compare Compl. ¶ 72 ("Defendants design[ed] and further[ed] an unlawful scheme to deprive Iacovacci of his rightful ownership interest in the Short Duration Companies, including but not limited to intentionally refusing to accept Iacovacci's withdrawal and retirement . . . .") with State Action Compl. ¶ 83 ("The reasons proffered by Defendants for Plaintiff's discharge and removal were false and a pretext, and part of Defendants' illegal scheme to deprive Plaintiff of the payments due to him under the LLC Agreements based on his voluntary withdrawal.").) Second, as mentioned above, Iacovacci's new claims in federal court "request[] the same relief" as his claims in the state action: $115 million in damages. Telesco, 765 F.2d at 359. Accordingly, the four additional causes of action are attempts to recast the causes of action that Iacovacci asserts in state court and thereby do not bar a finding that the two actions are parallel.

Finally, Iacovacci argues that the federal and state actions are not parallel because, despite seeking the same amount of damages in the two actions, he seeks a constructive trust against Monticiollo and Callahan in the federal action, which he does not seek in the state action. (Opp. at 4.) As noted, the main form of relief that Iacovacci seeks is the same

in both actions -- damages in the amount of $115 million. However, "even if different relief [were] sought in the two actions, or the claims [were] not exactly the same, they are parallel as long as the causes of action are comprised of the same essential issues." Garcia v. Tamir, No. 99 CIV. 0298 (LAP), 1999 WL 587902, at *3 (S.D.N.Y. Aug. 4, 1999). As the Court has repeatedly stated, the causes of action in both the state and federal actions are comprised of the same essential issues: whether Iacovacci was wrongfully terminated for cause, whether he was wrongfully denied profits owed him under the LLC Agreements, and whether Monticciolo and Callahan, as representatives of various corporate entities, committed fraud against Iacovacci. Therefore, that part of the relief requested in the federal action differs from the relief requested in the state action does not destroy the duplicative nature of the two actions.

2. The Colorado River Factors Weigh in Favor of Dismissal

The federal and state actions being parallel, the Court will now weigh the six Colorado River factors.

(a) Whether the Federal Court Has Assumed Jurisdiction Over a Res

There is no property over which the state court has exercised exclusive jurisdiction -- i.e., this is not an action in rem. See Niagara Mohawk, 673 F.3d at 101 ("First, we consider whether the federal or state court has obtained

jurisdiction over a res. . . . This is not an in rem action, and neither the federal district court nor the New York state courts have assumed jurisdiction over any res or property.") Defendants attempt to argue that the state court has jurisdiction over Iacovacci's computer and hard drives because it has ruled that those devices must be turned over to a neutral forensic expert for discovery purposes. (Opp. at 12.) This argument is unavailing because it misconstrues Colorado River's first factor, which relates to whether a state court has decided to exercise its jurisdiction in determining rights to property. See Colorado River, 424 U.S. at 805 (involving a dispute over "rights to the use of water"); see also United States v. Blake, 942 F. Supp. 2d 285, 298 (E.D.N.Y. 2013) ("First, the dispute between the parties involves a res over which the state court had already assumed jurisdiction in the Quiet Title Action before the Plaintiff even commenced the instant action."). Here, the state court has simply made discovery rulings; it is not determining property rights with regard to Iacovacci's technological devices. The first factor, therefore, does not apply and, accordingly, is neutral and weighs against abstention. See Woodford, 239 F.3d 517 at 522.

(b) Relative Convenience of the Federal Forum

This courthouse and New York Supreme Court are next door to each other. There is no inconvenience to any party in having to

litigate here. "When, as here, dismissing the case would not result in a substantial net gain in convenience, this factor does not favor dismissal." King v. Hahn, 885 F. Supp. 95, 98 (S.D.N.Y. 1995).

(c) Avoidance of Piecemeal Litigation

This factor weighs in favor of abstention. Here, as the federal and state actions are based on the same underlying facts, there is a risk of duplicative litigation and inconsistent results, especially if there are findings in either state or federal court regarding (1) the interpretation of the LLC Agreements, (2) whether Iacovacci was improperly terminated for cause, and (3) whether Iacovacci and Monticciolo, either acting as themselves or as employees of Brevet and founding members of the Short Duration Companies, engaged in fraud. The Court, however, is cognizant that "[i]n all cases where parallel actions overlap, this factor will favor abstention," and "[t]hus, reliance on this factor alone would undermine the notion that the Colorado River doctrine is limited to 'exceptional circumstances.'" Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Thomas, 713 F. Supp. 62, 66 (S.D.N.Y. 1988); see also Fernandez v. City of New York, No. 17-CV-2431 (GHW)(SN), 2017 WL 2894144, at *3 (S.D.N.Y. July 7, 2017) ("[B]ecause 'any case involving parallel proceedings presents a risk of duplicative litigation or a rush to judgment, the

existence of those risks can weigh only modestly in favor of dismissal; otherwise dismissals pursuant to Colorado River would be the rule, not the exception, in cases involving parallel proceedings in state and federal court.'" (quoting Dalzell Mgmt. v. Bardonia Plaza, LLC, 923 F. Supp. 2d 590, 60 (S.D.N.Y. 2013))). Accordingly, this factor weighs "only modestly" in favor of dismissal. King, 885 F. Supp. at 98.

(d) Relative Advancement of Proceedings in Each Forum

Iacovacci sued the state court defendants nearly two years prior to commencing this federal action. (See Original State Action Compl.) "The Supreme Court has made clear that 'priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made on the two actions.'" Millennium Drilling Co. v. Prochaska, No. 14CV1985, 2014 WL 6491531, at *5 (S.D.N.Y. Nov. 18, 2014) (quoting Moses H. Cone, 460 U.S. at 21). Discovery in state court has been ongoing, and Judge Cohen has been actively working to resolve several discovery disputes, including issuing an order mandating Iacovacci's computer and external hard drives be delivered to an expert for analysis. (Ehrlich Decl. ¶ 4, ECF No. 37; Semprevivo Decl., Exs. I, K.) The parties have also engaged in document discovery and conducted numerous non-party depositions. (Ehrlich Decl. ¶ 6.) Iacovacci himself has stated that over "160,000 pages have been produced" in the state

action. (Semprevivo Decl., Ex. N at 4.) By contrast, discovery in this action has not yet commenced, and the parties are still at the pleading stage. Accordingly, this factor weighs in favor of the Court abstaining from its exercise of jurisdiction over this case. See Millennium Drilling Co., 2014 WL 6491531, at *5 ("[I]n the Texas Action over 100,000 pages of documents have exchanged hands and several depositions have taken place . . . . Trial is set to begin in March 2015. By contrast, this lawsuit has not progressed beyond the pleading stage. Given the relative advancement of the Texas Action, this factor weighs in favor of abstention."); see also Paul v. Raytex Fabrics, Inc., 318 F. Supp. 2d 197, 198 (S.D.N.Y. 2004) (abstaining upon finding that the parallel state court action, which had commenced nine months earlier, had already proceeded into discovery).

(e) Whether Federal Law Provides Rules of Decision

"When the applicable substantive law is federal, abstention is disfavored." Niagara Mohawk, 673 F.3d at 102. In addition, "although the presence of federal issues strongly advises exercising federal jurisdiction, the absence of federal issues does not strongly advise dismissal, unless the state law issues are novel or particularly complex." Vill. of Westfield v. Welch's, 170 F.3d 116, 124 (2d Cir. 1999).

Iacovacci argues that his conspiracy to defraud claim would be governed by federal law, and, therefore, this Court should not abstain from exercising its jurisdiction. (Opp. at 19.) Regardless of whether federal common law would apply to Iacovacci's conspiracy claim (and the Court doubts that it does), at a minimum, ten out of Iacovacci's eleven claims are governed by state law. Accordingly, this factor favors dismissal, although it does not do so "strongly." Vill. of Westfield, 170 F.3d at 124.

(f) Whether State Procedures Are Adequate to Protect Plaintiff's Federal Rights

"In assessing the adequacy of the state court forum, the court must determine whether the 'parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties.'" Millennium Drilling Co., 2014 WL 6491531, at *5 (quoting Moses H. Cone, 460 U.S. at 28.). Iacovacci has not explained why the New York state court is not able to resolve the predominantly state law issues he asserts. He argues that "defendants have made every effort to delay the litigation [in state court] by creating ludicrous issues and taking nonsensical positions on simple matters." (Opp. at 20.) There is no reason to believe, however, that Defendants will not engage in the same behavior in federal court, thereby causing this action to proceed at the same pace as the state action. Accordingly, this factor is

neutral. Stahl York Ave. Co., LLC, 2015 WL 2445071, at *12 ("[T]he ability of the state court to adequately protect Stahl's interests only makes this factor neutral.").

(g) Analysis of the Factors

Three of the six factors weigh in favor of abstention. The Court is aware that "[t]he abstention doctrine comprises a few extraordinary and narrow exceptions to a federal court's duty to exercise its jurisdiction" and that, as a result, "the balance is heavily weighted in favor of the exercise of jurisdiction." Woodford, 239 F.3d at 522. The Court holds, however, that this case meets the narrow exception that permits the Court to abstain from exercising its jurisdiction.

To recap, the state and federal actions are parallel, the law to be decided is predominately state law, and the state action has been proceeding in front of Judge Cohen for almost two years. Notably, although Judge Cohen has not yet ruled on the merits of either Iacovacci's claims or the state action defendants' counterclaims, he has grappled with difficult discovery issues relating to Iacovacci's computer and hard drives and has ruled that Iacovacci's technological devices be turned over to a neutral expert. (Semprevivo Decl., Ex. I.) By contrast, discovery has not yet commenced in this case. In addition, it would appear that when confronted with unfavorable rulings related to discovery, Iacovacci attempted to turn to

this Court to litigate his claims. This would hint that Iacovacci "was merely seeking to pit the state and federal judicial systems against each other, and hoping for a better outcome in the latter." Abe, 2016 WL 1275661, at *10. These facts all tip the balance in favor of abstention. Accordingly, Defendants' 12(b)(1) motion is granted.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is GRANTED. The Clerk of Court is respectfully directed to terminate the motions pending at docket entries 31 and 34 and close this case.

SO ORDERED.

Dated: New York, New York
May 9, 2019

John F. Keenan
United States District Judge