

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

VICKI L. PINERO, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

JACKSON HEWITT TAX SERVICE
INC.; JACKSON HEWITT INC.; and,
CRESCENT CITY TAX SERVICE, INC.
d/b/a JACKSON HEWITT TAX
SERVICE,

Defendants.

CASE NO.: 08-3535

SECTION R

**JUDGE
SARAH VANCE**

**MAGISTRATE JUDGE
DANIEL E. KNOWLES**

**JACKSON HEWITT TAX SERVICE INC.'S AND JACKSON HEWITT INC.'S
MEMORANDUM IN OPPOSITION TO PLAINTIFF VICKI L. PINERO'S *EX PARTE*
MOTION TO AMEND DOCUMENT NUMBER 77**

This memorandum in opposition, to what appears to be – at first blush – a ministerial motion, is made necessary by the troubling circumstances and genesis surrounding this *ex parte* motion. Having been thwarted in her efforts to convert her supplemental memorandum on the statute of limitations issue¹ into a *new motion for leave to amend*, Plaintiff has now filed an *ex parte* motion to amend (the “Ex Parte Motion”), seeking to substitute a revised version of the very document which is the *subject* of Plaintiff’s Motion for Leave to File a Third Amended Complaint (“the “Rule 15(a) Motion”): the actual proposed amended complaint.

By way of background, on February 26, 2009, Plaintiff moved for leave to file a Proposed Third Amended Complaint. That Proposed Third Amended Complaint was filed only by the original plaintiff in this action, and added new claims and factual allegations regarding

¹ On April 2, 2009, Magistrate Judge Daniel E. Knowles had specifically directed that the parties file supplemental briefing on the narrow issue of the appropriate prescriptive or preemptive period applicable to Count 10 of the Proposed Third Amended Complaint. *See* Minute Order at 2, Docket Entry No. 98.

Jackson Hewitt's loan programs. The Rule 15(a) Motion was fully briefed by the parties, and oral argument was heard before Your Honor on April 1, 2009. At the hearing, and subsequently in a minute order, Your Honor directed the parties to file a supplemental brief on the narrow issue of whether the applicable statute of limitations barred the filing of Plaintiff's Proposed Third Amended Complaint. Rather than comply with Your Honor's directive, Plaintiff sought to "amend" her fully briefed and argued Rule 15(a) Motion by substituting a new complaint which Plaintiff confusingly mis-styled as a "Proposed Third Amended Complaint."² That new version of the Complaint contained a (1) a new cause of action; (2) new allegations; and (3) a new named plaintiff – none of which were the subject of her original Rule 15(a) Motion and none of which had been the subject of the prior round of briefing and argument. *See* Docket Entry No. 101. That revised version – which had never before been presented either to this Court or to Jackson Hewitt – appears to be an unsuccessful attempt to address the fatal flaws in Plaintiff's original Proposed Third Amended Complaint, which again were the only subject of briefing and oral argument before Your Honor.

Plaintiff's conduct violates this Court's directives, the Federal Rules of Civil Procedure, and the Local Rules for the Eastern District of Louisiana, and there appears to be no credible excuse for it.³ Plaintiff's improper attempt to slip a *new* Proposed Third Amended Complaint

² Rather than being a proposed *Third* Amended Complaint, this proposed Complaint will actually be the *fifth* actual or proposed amendment of the Complaint. As Judge Vance has already directed Plaintiff to amend her Second Amended Complaint, that amendment will be the actual Third Amended Complaint, which makes Plaintiff's original proposed amendment the Fourth iteration of the Complaint, and accordingly this new proposed amendment would be the *Fifth Amended Complaint*. *See* Minute Order, April 1, 2009, Docket Entry No. 97.

³ Counsel for Jackson Hewitt attempted to resolve these issues without resorting to the Court. *See* Letter of Donna L. Wilson, dated April 7, 2009, annexed hereto as Exhibit A. In response, Plaintiff's counsel now claims to have followed this unusual pleading procedure pursuant to an *ex parte* conversation with "Judge Vance's office [sic]." *See* e-mail of Bryan Shartle, dated April 7, 2009, annexed hereto as Exhibit B. Plaintiff's assertion begs the question of why she

into her supplemental brief was discovered by the Court Clerk, who yesterday struck the 505 pages of documents Plaintiff attached to her supplemental brief, which included the new version of the Proposed Third Amended Complaint. *See* Docket Entry No. 102. The clerk noted that Plaintiff's attachments exceeded the scope of Your Honor's Order, and that Plaintiff should properly file a motion for leave to amend. *See* Docket Entry No. 102 (stating "[Magistrate Judge Knowles Minute Order] ordered supplemental memorandum to be filed. Images of attachments were deleted. Attachments to [the Motion for Leave to File a Third Amended Complaint] are pending leave to be filed. If these attachments are to be amended, a properly formatted MOTION for leave to amend [the Motion] should be filed.")

This *Ex Parte* Motion, which wrongfully implies the correction of a mere clerical error in Document 77 (i.e., Plaintiff's pending, briefed, and argued Rule 15(a) Motion) followed. Plaintiff's flouting of the Rules by attempting to slip in this substantive amendment of her pending Rule 15(a) Motion and Proposed Third Amended Complaint *ex parte* and in violation of Rule 15(a) should be rejected. *See* Plaintiff's Supplemental Memorandum in Support of the Motion for Leave to Amend at 2-3.

In addition to amounting to a flouting of the Rules and Your Honor's directive, to allow this back-door amendment would prejudice Jackson Hewitt and impose undue and unnecessary burdens on this Court. Jackson Hewitt has briefed Plaintiff's pending Rule 15(a) Motion and this Court already has heard oral argument on it, allowing only for supplemental briefing on the applicable period of preemption or prescription. *See* Docket Entry No. 98. Notably, her new version of the "Third Proposed Amended Complaint" was not even made available to this Court

did not mention such a salient fact in her *Ex Parte* Motion, and why Plaintiff would contact Judge Vance's chambers regarding the proper form and substance of a motion pending before Your Honor, as well as the interpretation of an Order issued by Your Honor.

and Jackson Hewitt until two days ago.⁴ As the “Proposed Third Amended Complaint attached to Plaintiff’s *Ex Parte* Motion contains new claims, allegations, and parties, Plaintiff should be required to withdraw the portions of her supplemental brief which address a substantively new version of her “Proposed Third Amended Complaint,” as well as her improper *Ex Parte* Motion.

We respectfully request that Your Honor rule on Plaintiff’s pending Rule 15(a) Motion. This is the only properly-filed motion before you, and the only Proposed Amended Complaint for which Jackson Hewitt has had notice and an opportunity to be heard. After that ruling, Plaintiff is free through to file, through the required channels, a properly noticed motion for leave to file a newly-revised version of her complaint, in compliance with Rule 15(a) and the rules and directives of this Court.⁵ We also respectfully request that Your Honor order that Jackson Hewitt be reimbursed for its costs and fees required to be expended in opposing Plaintiff’s *Ex Parte* Motion.

⁴ Per Your Honor’s April 2, 2009 Order, today Jackson Hewitt will be filing its supplemental memorandum with respect to Plaintiff’s pending Rule 15(a) Motion and the original version of the Proposed Third Amended Complaint attached thereto. Plaintiff’s supplemental memorandum, with the newly-revised version of her “Proposed Third Amended Complaint,” “was filed two days ago.

⁵ Alternatively, if Plaintiff wishes to avoid the Court ruling on her pending Rule 15(a) Motion, she may withdraw it and move for leave to file the new version of the proposed amended complaint – another logical course which she did not follow here.

In sum, Your Honor should reject Plaintiff's attempt to sidestep the Federal Rules of Civil Procedure and Your Order, and deny the Ex Parte Motion.⁶

DATED: April 8, 2008

By /s/ Veronica D. Gray

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Jackson Hewitt Inc.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 8th day of April, 2009, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system and U.S. Mail to counsel of record for Plaintiffs. A copy of this filing will also be sent via electronic mail and U.S. mail to counsel for Crescent City Tax Service, Inc.

/s/ Veronica D. Gray

⁶ Jackson Hewitt reserves its right to pursue available remedies in light of this abuse of the judicial process, including attorneys fees and sanctions.