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**

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF VICKI L. PINERO'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

Pursuant to this Court's April 2, 2009 Order directing the parties to submit supplemental briefing on the issue of whether Plaintiff's pending Motion for Leave to File a Third Amended Complaint (filed on February 26, 2009) (the "Rule 15(a) Motion") is barred by the applicable statute of limitations, Defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (collectively "Jackson Hewitt") hereby submit this supplemental memorandum.

I. PRELIMINARY STATEMENT

Plaintiff's latest brief disregards Your Honor's April 2, 2009 Order and Federal Rule of Civil Procedure 15(a), by attempting to graft a new substantively revised Proposed Amended Complaint onto its pending Rule 15(a) Motion, which already has been briefed and argued before this Court.[1] In contrast to the version of the Proposed Third Amended Complaint attached

[1] As further noted by Jackson Hewitt's Memorandum in Opposition to Plaintiff's *Ex Parte* Motion to Amend Document No. 77 (Docket Entry No. 104) Plaintiff first attempted to attach a new Proposed Third Amended Complaint to her Supplemental Memorandum, only to be rebuffed by the clerk of the Court. *See* Docket Entry No. 102. The procedural history since our

to her Rule 15(a) Motion, this new complaint -- which is confusingly mis-styled as a "Proposed Third Amended Complaint" but which in actuality is at least a fifth attempt at amendment[2] – contains new allegations, a brand-new cause of action, and an additional named plaintiff, all unsuccessfully aimed at staving off a denial of her pending Rule 15(a) Motion.

As a result, rather than filing, as directed by Your Honor, "a supplemental brief regarding the prescription issue," Plaintiff is attempting to circumvent both this Court's April 2nd Order and Rule 15(a).[3] If Plaintiff sought to withdraw her pending Rule 15(a) Motion in favor of seeking leave to file a different, substantively revised complaint, a supplemental memorandum on a narrow issue of law certainly is not the proper place to do it.

In accordance with the Court's April 2, 2009 minute order, this supplemental memorandum will address the single issue which this Court directed to be briefed by the parties concerning the only Proposed Third Amended Complaint that is before this Court: that Plaintiff's proposed 10th Count – which is the only Proposed Amended Complaint properly before this Court -- under the Louisiana Revised Statutes § 9:3572[4] is time-barred, under either Section 9:3552 or Louisiana Civil Code Article 3492. And Plaintiff's belated argument for a ten-year prescriptive period – raised for the first time in oral argument last week before this Court –

---

last appearance before Your Honor, and the various reasons why Plaintiff's actions were improper, are more fully discussed in that opposition.

[2] Although Plaintiff's original Motion sought leave to file a Third Amended Complaint, Judge Vance has already found the Second Amended Complaint insufficient and has ordered Plaintiff to amend his Complaint. *See* Transcript of Oral Argument ("Transcript"), April 1, 2009 at 13:17 - 24, annexed hereto as Exhibit A; Minute Order of April 1, 2009, Docket Entry No. 97 (directing that Plaintiff amend her complaint within 15 days). Accordingly, even the proposed amendment attached to Plaintiff's original Motion would have amounted to the Fourth Amended Complaint, and this new version of the Complaint accordingly would constitute the Fifth Amended Complaint.

[3] Minute Entry Order of Magistrate Judge Daniel E. Knowles, dated April 2, 2009, Docket Entry No. 98.

[4] All references to "§" or to a "section" are to the Louisiana Revised Statutes Annotated, unless otherwise noted.

is unsupported as a matter of Louisiana law. Accordingly, Plaintiff's Motion for Leave to File a Third Amended Complaint should be denied.[5]

II. PLAINTIFF'S PROPOSED COUNT 10 IS TIME-BARRED.

A. The 60-day Peremptive Period Under § 9:3552 Governs All Claims Under the Louisiana Consumer Credit Law.

As noted in our original opposition brief, Plaintiff's purported claim under the Louisiana Consumer Credit Law is governed by its 60-day peremptive period – which Plaintiff does not address in his supplemental brief. *See* § 9:3552. Moreover, as a threshold matter, Plaintiff does not take issue with the fact that § 9:3572 is part of the overall "chapter" entitled the Louisiana Consumer Credit Law, nor that § 9:3552 is the procedural arm of the LCCL, which purports on its face to govern the remedies and penalties available under the consumer credit law. Nor does Plaintiff dispute that § 9:3552 imposes a 60-day peremptive period for claims to be brought, reflecting, as one Court described it, "the legislative intent to have claims arising out of Louisiana Consumer Credit Law dealt with quickly." *Fidelity Funds, Inc., v. Price*, 491 So.2d 681, 684 (La. Ct. App. 1986) (holding that the 60-day peremptive period applies to all claims under the LCCL); § 9:3552(E) ("[a]ny civil action under this section must be brought ***within sixty days of final payment*** of the consumer credit contract, or in the case of a revolving loan or revolving charge account, within one year of the date of the violation." Furthermore, Plaintiff

[5] To the extent that the Court wishes to have a full briefing on Plaintiff's Proposed "Fifth" Amended Complaint, Jackson Hewitt requests that the Court first rule on Plaintiff's pending Rule 15(a) Motion, which has now been fully-briefed and argued. Otherwise, Jackson Hewitt, apart from the prejudice it would suffer from having to oppose the pending Rule 15(a) Motion, which Plaintiff now attempts to disclaim, will be deprived of notice and an opportunity to be heard.

does not dispute that no other section of the LCCL, including § 9:3572, on which Plaintiff bases his claim, dictates a different peremptive or prescriptive period.[6]

Plaintiff provides no basis to interpret the 60-day peremptive period of § 9:3552 as applying only to some claims under the LCCL and not to others. By its own terms, section § 9:3552 governs all remedies under the Louisiana Consumer Credit Law ("LCCL"), as § 3552 is Part VII of the LCCL, entitled "Remedies and Penalties." Plaintiff's entire argument hinges on whether Jackson Hewitt can be termed "an extender of credit" under the terms of § 3552 – but that is not what she alleged in her Proposed Amended Complaint. *See* Plaintiff's Reply Memorandum in Support of the Motion for Leave to File a Third Amended Complaint at 4-5.

While Jackson Hewitt does not dispute that it is not a bank, the thrust of the allegation in Plaintiff's Proposed Third Amended Complaint is that Jackson Hewitt has allegedly acted in concert with banks to extend credit to customers in the form of various loan products, which Plaintiff contends are not refund anticipation loans, thus alleged failing to exempt Jackson Hewitt from the scope of § 3572. That certain provisions of the LCCL may be inartfully drafted does not change the fact that the legislature clearly intended all claims under the LCCL to be brought quickly, within the 60-day peremptive period described in § 3552.[7] Plaintiff has not

---

[6] Notably, as a peremptive, not prescriptive, period of limitation, there can be no tolling. *See Guillory v. Avoyelles Ry. Co.*, 28 So. 899, 901 (La. Ct. App. 1900); *see State of La. Through Div. of Admin. v. McInnis Bros. Const.*, 701 So.2d 937, 941 (La. 1997) (stating that, "[t]he idea that a statute is peremptive where it both creates the right of action and stipulates the time within which that right may be executed has been oft repeated since *Guillory* by the courts of this state and commentators alike."); *Ferguson v. Sugar*, 988 So.2d 816, 828 (La. Ct. App.. 2008) (stating peremptive periods are not subject to *contra non valentem*).

[7] Notably, Plaintiff did not address the appropriate peremptive or prescriptive period for his proposed Amendment in the prior round of briefing, despite being given leave to file a reply after Jackson Hewitt pointed out that not one, but two different periods of limitation would time-bar Plaintiff's claim. *See* Jackson Hewitt's Memorandum in Opposition to the Motion for Leave to File a Third Amended Complaint at 8-9.

complied with this peremptive period, as her transaction was completed over three years ago. *See* Proposed Third Amended Complaint ¶ 50.

Plaintiff fails to explain why a claim against a lender, made under the LCCL, for charging improper fees or charges, would be governed by a 60-day peremptive period, but a claim against an alleged broker, made under a different section of the LCCL, for charging improper fees or charges, would be governed by a 10-year prescriptive period. To the contrary, such a disparate treatment of similar claims under the LCCL makes no interpretative sense.

B. Alternatively, Plaintiff's Proposed Claim Is Barred By the One-Year Prescriptive Period Under Article 3492.

In the alternative, even were § 3552's limitation period inapplicable, Plaintiff's proposed claims is barred under the only applicable prescriptive period – Louisiana Civil Code Article 3492[8], the one-year prescriptive limit for delictual acts. Plaintiff's position that her new proposed claim for a wrongful violation of a statute can be interpreted to fall under Article 3499 for ***personal actions sounding in contract*** contravenes well-established Louisiana law. The one-year prescriptive period applies because Plaintiff is seeking relief in the form of ***damages or a penalty*** allegedly ***wrongful conduct.*** While Plaintiff attempts to salvage her three-year old claim by casting it as *ex contractu* when it plainly is *ex delicto,* such an attempt fails as a matter of law, and accordingly her claim is time-barred.

Plaintiff's supplemental memorandum acknowledges that the one-year prescriptive period of Louisiana Civil Code Article 3492 governs *ex delicto* claims. *See* Plaintiff's Supplemental Memorandum in Support of her Motion for Leave to File a Third Amended

[8] All references to "Article" shall refer to the Louisiana Civil Code, unless otherwise indicated.

Complaint ("Pl. Supp. Memo.") at 11. However, she attempts to draw a false distinction between the *ex delicto* claim at issue here, and quasi-contractual claims which are not.

Contrary to Plaintiff's attempt to draw this distinction, both the Louisiana Supreme Court and the Fifth Circuit agree that:

> [T]he marked distinction between a *quasi* contract and an offense or *quasi* offense is that the act which gives rise to a *quasi* contract is a lawful act, and therefore is permitted; while the act which gives rise to an offense or *quasi* offense is unlawful, and therefore is forbidden.

Fid. & Deposit Co. of Md. v. Smith, 730 F.2d 1026, 1031 (5th Cir. 1984) (citing *Knoop v. Blaffer*, 6 So. 9 (La. 1887)) (internal quotation omitted); *see also Aetna Life & Cas. Co. v. Dotson*, 346 So.2d 762, 764 (La. Ct. App. 1977) (holding that an action in *quasi* contract "would not appear applicable to a situation where a person actively and unlawfully takes a thing to which he is not entitled" and apply the one-year prescriptive period .)

Indeed, the distinction between *ex contractu* and *ex delicto* has been described as:

> when the wrong results from a breach of a promise the claim is *ex contractu,* but if the wrong springs from a breach of a duty growing either from the relationship of the parties or imposed by law then the claim is *ex delicto*.

Litvinoff, Saul, Louisiana Civil Law Treatise, The Law of Obligations § 16.13 (2008-2009).[9]

Plaintiff's proposed Count 10 states that Jackson Hewitt allegedly violated an obligation imposed by statute by engaging in loan-brokering without a proper license.[10] *See* Proposed Third Amended Complaint at ¶ 72 ("Unless a person has first been licensed by the commissioner

---

[9] *See also* Litvinoff, Saul, The Law of Obligations § 16.17 ("violation perpetrated through an act which is ***wrongful*** is an ***act in tort*** while a violation perpetrated by ***a party not doing that which he bound himself to do*** is an ***act in contract.***")

[10] Jackson Hewitt reserves all rights with regard to its position that the only loans at issue in the proposed amendment are, in fact, refund anticipation loans under the meaning of § 3572.

[of financial institutions] . . ., he shall not engage in the business of loan brokering"); *id.* at 115 ("*In violation of the LA Loan Broker Statute*, Defendants have brokered non-RAL loan products to Plaintiff and many others."). Her argument that where a claim seeks restitution of money unjustly enriched the 10-year *ex contractu* period applies is not only wrong as a matter of law, but is irrelevant here, because her Proposed Third Amended Complaint does not seek restitution of any kind. Instead, her Proposed Third Amended Complaint repeatedly states that Plaintiff is seeking statutory damages and penalties imposed by law as a penalty for Jackson Hewitt's alleged failure to acquire a license under § 3572.[11] *See, e.g., id.* at ¶ 72 ("In case the fee has been paid, the person by whom it has been paid may recover from the loan broker the amount of the fee thus paid, plus damages in the amount of twice the fee."); § 9:3572.12(D). Indeed, no claim for unjust enrichment can be viable where the action complained of was allegedly unlawful. *See, e.g., Aetna Life & Cas. Co. v. Dotson*, 346 So.2d at 765.

Further, even if Plaintiff were to style Count 10 as seeking restitution, that is not enough, as one of the cases he cites makes clear. This Court must look beyond Plaintiff's characterization of her action, and instead look to whether the factual allegations support a contractual or *quasi* contractual claim, or whether they are complaining of an offense or *quasi* offense. *See Schouest v. Texas Crude Oil*, 141 So.2d 155, 160-61 (La. App. 1 Cir. 1962) (cited in Plaintiff's Supp. Mem.) (holding that one-year, **not** a ten-year, period, applied to the plaintiff's claim, even though styled as a quasi-contract claim). Indeed,

> [i]t is well settled in Louisiana that where, as here, the acts and

---

[11] Jackson Hewitt is not, in this supplemental memorandum, addressing the validity of the additional new Count Plaintiff attempted to amend her Complaint to contain in her improper *ex parte* motion. Jackson Hewitt contends that such a claim would be deficient as a matter of law both due to prescriptive and substantive reason, and would respectfully request leave to be heard on that issue if the Court decides to treat his *ex parte* motion as a new Motion for Leave to Amend under Rule 15(a).

> conduct which give rise to the cause of action are treated as wrongful and illegal and amount in law to an offense or quasi offense, and where, as here, the demand is for a money judgment for the value of the property illegally taken, the suit is a tort action to recover damages for an offense or quasi offense and is barred by the prescription of one year.

Iberville Land Co. v. Amerada Petroleum Corp., 141 F.2d 384, 386 (5th Cir. 1944).

Similarly, Plaintiff's bald assertion that somehow there was a contractual relation between Plaintiff and Jackson Hewitt with respect to this alleged loan is not alleged in the Proposed Third Amended Complaint. To the contrary, Plaintiff's complaint alleges that the loan contract was between Plaintiff and Santa Barbara Bank and Trust ("SBBT"). *See* Proposed Amended Complaint ¶ 48.

Furthermore, the cases on which Plaintiff relies do not support her argument that the ten year period applies to her three-year old claim. *See, e.g*, Plaintiff's Supplemental Memo. at 6-8 (cases cited therein). For example, none of those cases address the situation where, as here, there was no contractual or quasi contractual agreement giving rise to the suit, but rather a statute purporting to make certain conduct unlawful.[12] Indeed, Plaintiff makes no such allegation. *See supra*. Likewise unavailing are the cases Plaintiff cites which do not involve conduct, such as here, alleged to be "wrongful." [13]

---

[12] *See, e.g., Schouest v. Texas Crude Oil Co.*, 141 So.2d 155 (La. App. 1st Cir. 1962) (court ultimately holding that the delictual one-year prescriptive period applied, not ten-year prescriptive for personal actions, because despite plaintiff's attempt to characterize the action as a quasi contract the claims sought compensation for wrongful conduct); *Munson v. Martin*, 192 So.2d 126 (La. 1966) (case over disputed terms in an oral contract ***without any allegations of wrongful conduct*** held to be quasi contract claim and subject to ten-year prescription); *Largarde v. Dabon*, 98 So. 744 (La. 1973) (plaintiff seeking compensation under alleged oral agreement, but not damages);

[13] *See, e.g., Julien v. Wayne*, 415 So.2d 540 (La. App. 1st Cir. 1982) (court held that because plaintiff elected to sue for money "had and received" ***instead of damages***, action could be brought as quasi contractual claim with a ten-year prescription); *Alonzo v. Parish of St. Bernard Through Its Duly Elected Policy Jury*, No. 91-681, 1992 WL 31844 (E.D. La. Mar. 11, 1992) (plaintiff's claim did not seek damages).

Moreover, Plaintiff cites to cases addressing claims which do not seek a statutory penalty or damages for prohibited conduct, but rather claims under regulatory statutes that proscribe the way in which contractual relationships may be formed. For example, in *Dantagnan v. I.L.A. Local 1418, AFL-CIO*, 496 F.2d 400 (5th Cir. 1974), the court held that a claim between a union and its members for excessive dues collected was subject to the ten-year period. However, the statute at issue, the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(3), merely proscribed procedures with which the union had to comply in order to raise and collect dues, as opposed to the Louisiana Loan Broker Statute, which forbids unlicensed loan brokers from engaging in loan brokering activity and proscribes a specific penalty against the violation thereof.[14]

Accordingly, Count 10 of the Proposed Amended Complaint is plainly subject to 1-year delictual prescription.[15]

C. The Doctrine of *Contra Non Valentem* Does Not Apply To Toll the Prescriptive Period.

In a final attempt to salvage her time-barred three-year old claim, Plaintiff argues that the doctrine of *contra non valentum* acts to toll this one-year prescriptive period. However, *contra non valentum*, when invoked in the form of the "discovery rule", as Plaintiff attempts to do here, is subject to a "standard [which] is exceedingly stringent and should be applied only in exceptional circumstances," such as scenarios where the injured party could not even know *of*

---

[14] *See also United Gas Pipe Line Co. v. Socony Mobil Oil Co.*, 220 F. Supp. 685 (W.D. La. 1963) (action to recover ***overpayments, not damages,*** based on law which requires contracts to follow the gas price set by the Federal Power Commission but that does not deem any conduct to be wrongful).

[15] In fact, even if Plaintiff's claim could be brought as both a claim *ex contractu* and *ex delicto*, which it cannot, Louisiana law would require Plaintiff to clearly waive or abandon any right to damages in order to proceed under the ten-year limitation period of Article 3499. *See City Nat. Bank of Baton Rouge v. Louisiana Sav. Bank & Trust Co.*, 43 So.2d 602 (La. 1949).

their loss or damage until some later time. *Eastin v. Entergy Corp.*, 865 So.2d 49, 55 (La. 2004) (distinguishing an age-discrimination claim, for which *contra non valentum* did not apply, from cases such as long-term occupational disease or medical malpractice.) The standard for *contra non valentum* is whether a reasonable person would have had sufficient information to "excite attention," "or put a reasonable person on guard to call for inquiry and includes knowledge or notice of everything to which that inquiry might lead." *See Babineaux v. La. Dep't of Transp. and Development*, 927 So.2d 1121 (La. Ct. App. 2005).

Moreover, when prescription is evident from the face of the pleadings, as it is here, the burden shifts to the party claiming a tolling to establish that the action is not prescribed. *See Eastin v. Entergy Corp.*, 865 So. 2d at 54. Plaintiff's bare assertion that "Plaintiff was unaware of defendants' failure to be licensed until February 2009" (Plaintiff's Supplemental Memorandum at 13) – which is not alleged in her Proposed Third Amended Complaint and which appears for the first time in her supplemental memorandum without benefit of an affidavit) both fails to carry that burden and misunderstands the applicable standard. The question is not whether Plaintiff knew that Jackson Hewitt was licensed in 2006, it is whether she knew she had paid a fee in which Jackson Hewitt might be partaking – i.e., sufficient facts to call for inquiry.

In *Babineaux*, *supra*, a plaintiff was involved in a car accident in which she hydroplaned over standing water on the highway. At the time of the accident, she took no further steps to inquire regarding whether anyone was liable. Some time after her accident, she saw a billboard that warned of a hydroplane hazard on the same highway on which she got in her accident, and she then became curious enough to contact an attorney. The court held that a reasonable person should have conducted the further inquiry at the time of the accident, despite what some may

consider the common belief that hydroplaning is no one's fault. The court found plaintiff's actions unreasonable since information was immediately available to lead her to bring suit against the state for the hazard.

Similar to *Babineaux*, Plaintiff's own pleading admits that she received a disclosure form, back in January of 2006, which informed her that she was being charged a bank fee, and that portions of this fee could be shared with Jackson Hewitt. *See* Proposed Amended Complaint at ¶ 47. Plaintiff had just as much of a reason to inquire about Jackson Hewitt's licensing status on the day she obtained her loan as she did three years later. Plaintiff fails to explain the delay and has not met her burden of establishing her entitlement to relief from the prescriptive period. *See Herman v. State Farm Mutual Auto. Ins. Co.*, 977 So.2d 41, 45 (holding the application of "*contra non valentem* is exceedingly stringent and applies only in 'exceptional circumstances' and therefore refusing to apply it in the face of plaintiff's willful ignorance and neglect") (quoting La. Civ. Code. Art. 3467, Official Revision Comment (d)). Accordingly, her pending Motion for Leave to File A Proposed Third Amended Complaint should be denied.

V. CONCLUSION

For the foregoing reasons, along with those set forth in Jackson Hewitt's prior Memorandum in Opposition, Plaintiff's Motion for Leave to File a Third Amended Complaint should be denied.

Respectfully submitted,

Dated: April 8, 2009

/s/ Veronica D. Gray

Donna L. Wilson (Admitted *pro hac vice*)
Andrew S. Wein (Admitted *pro hac vice*)
Veronica D. Gray (Admitted *pro hac vice*)
KELLEY DRYE & WARREN LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
Telephone: (202) 342-8400

AND

KEAN, MILLER, HAWTHORNE,
D'ARMOND, McCOWAN & JARMAN, L.L.P.
Glenn M. Farnet (#20185)
Gina D. Banks (#27440)
One American Place, 18th Floor
Post Office Box 3513
Baton Rouge, Louisiana 70825
Telephone: (225) 387-0999

Attorneys for Jackson Hewitt Tax Service Inc., and 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