

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, individually and on	)	Civil Action No. 08-03535
behalf of all others similarly situated,	)	
	)	Sec. R
Plaintiffs,	)	JUDGE SARAH S. VANCE
	)	
v.	)	Mag. 3
	)	MAGISTRATE JUDGE DANIEL E.
JACKSON HEWITT TAX SERVICE	)	KNOWLES, III
INC.; JACKSON HEWITT INC.; and,	)	
CRESCENT CITY TAX SERVICE, INC.	)	
d/b/a JACKSON HEWITT TAX	)	
SERVICE,	)	
	)	
Defendants.	)	

**PLAINTIFF VICKI L. PINERO’S REPLY TO MEMORANDUM IN  
OPPOSITION TO EX PARTE MOTION TO AMEND DOCUMENT NUMBER 77**

Defendants’ latest is another missal aimed, not at any substantive issue in the case, but instead at undersigned counsel. See Docket No. 104. Rather than focus on the legal issues in the case, defendants are now attacking the lawyers. Contrary to defendants’ argument, undersigned counsel has not done anything inappropriate, unethical, or improper. To the contrary, undersigned counsel has acted with the utmost professionalism and has simply

complied with the Court's instructions. It is time for opposing counsel's unfair attacks to stop. The Court should consider the following:

1. Defendants have been aware of the proposed new claims for months. Undersigned counsel discussed the proposed new claims with Andrew S. Wein several months ago. In fact, as a professional courtesy and in an attempt to vet all legal issues at the beginning of the case, undersigned counsel set plaintiff's Motion for Leave for hearing far enough in the future, so that all legal issues could be thoroughly analyzed by opposing counsel. Undersigned counsel also sent a copy of plaintiff's leave motion to opposing counsel, prior to filing the motion.

2. Prior to the hearing on plaintiff's leave motion, undersigned counsel again spoke with Mr. Wein. Undersigned counsel advised Mr. Wein that plaintiff would be seeking to add an additional plaintiff. Although no agreement was reached, Mr. Wein indicated there would likely be no opposition to adding an additional plaintiff if the Court were inclined to grant plaintiff's leave motion. Indeed, Mr. Wein indicated that, in his view, the adding of an additional plaintiff was unnecessary.

3. As the Court will recall, at the leave hearing, the adding of an additional plaintiff was discussed. Opposing counsel lodged no objection to the adding of an additional plaintiff, but simply indicated they wanted to see the complaint.

4. Defendants have now seen the complaint. They have no substantive objection to the latest Third Amended Class Action Complaint. They simply complain about how the document was presented.

5. Despite opposing counsel's unnecessary attacks, undersigned counsel is not attempting to "trick" anyone or "sneak in" anything. Undersigned counsel is simply trying to address all of the legal issues in an efficient manner that complies with all applicable rules and the Court's instructions.

6. Most importantly, defendants have not explained how they have suffered any prejudice by what they allege to be improper actions. Plaintiff's latest Third Amended Complaint is no surprise to defendants.

7. Defendants accuse undersigned counsel of misconduct, but yet they bury critical information in a footnote. *See* Docket No. 104, p. 2, fn. 3. Yesterday, Donna L. Wilson sent undersigned counsel a letter, again accusing undersigned counsel of improper conduct and requesting that plaintiff withdraw her Ex Parte Motion to Amend Document Number 77. According to opposing counsel, the motion was improperly filed ex parte. Undersigned counsel responded to opposing counsel's accusations, stating:

Donna:

Your accusations of wrongdoing are not helping. The motion was filed *ex parte* per instructions from Judge Vance's office.

Further, these issues were discussed during the April 1 hearing, so the revised Third Amended Class Action Complaint is no surprise to you. Again, we are trying to complete the amendments in an efficient process. You have not been prejudiced, but file whatever you want... We will eventually get to the merits.

If you would like to discuss this issue more, please call me on my cell phone 985-768-0252. I will be out of the office tomorrow, working from home.

8. Rather than accept my invitation to call, opposing counsel filed her accusatory motion. *Opposing counsel could have, and indeed should have, contacted undersigned counsel before boring the Court with such unnecessary issues.* Contrary to opposing counsel's argument, opposing counsel *did not* attempt to address this issue with undersigned counsel without the intervention of the Court.

9. To answer opposing counsel's unfounded accusations of wrongdoing: on the morning of April 7, 2009, undersigned counsel received a call from Judge Vance's Docket Clerk, Bonnie Catalanotto. Ms. Catalanotto questioned why a new Third Amended Class Action Complaint was attached to the plaintiff's supplemental memorandum, *i.e.*, Docket No. 101. Undersigned counsel explained that, plaintiff was trying to present the Court with one amended complaint, which incorporated Judge Vance's requested changes, included the new claims, responded to some of opposing counsel's concerns, and included the new plaintiff. Undersigned counsel explained to Ms. Catalanotto, if procedurally the amended complaint was not being presented properly, plaintiff would file another motion for leave. Ms. Catalanotto stated that another leave motion was unnecessary and that undersigned counsel should file an *ex parte* Motion to Amend Document Number 77 (*i.e.*, plaintiff's Motion for Leave), and reference in the *ex parte* motion the request to substitute the complaint and exhibit. Undersigned counsel followed these instructions. *See* Docket No. 103.

10. Defendants are seeking to deflect from the real issues in this case. As noted, defendants have *not* been prejudiced by any of plaintiff or undersigned counsel's actions—defendants are just upset that they got caught violating the law.

11. Defendants are merely asking for more delay and briefing of legal issues. Even if the Court permits the requested amendment, defendants can later file another motion to dismiss, which will provide defendants the additional briefing opportunity they are requesting now.

### **CONCLUSION**

For the foregoing reasons, and as explained in plaintiff's memoranda in support of her request for leave to amend, the Court should grant plaintiff's Motion for Leave and permit plaintiff to file the Third Amended Class Action Complaint.

Respectfully Submitted,

/s/ Bryan C. Shartle

David Israel (LSBA No. 7174) (T.A.)

Bryan C. Shartle (LSBA No. 27640)

Justin H. Homes (LSBA No. 24460)

SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.P.

3850 N. Causeway Blvd.

Lakeway II, Suite 200

Metairie, Louisiana 70002

Telephone: (504) 828-3700

Facsimile: (504) 828-3737

#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record  by ECF;  by email;  by hand;  by fax;  by FedEx;  by placing a copy of same in the U.S. Mail, postage prepaid this 8th day of April 2009.

/s/ Bryan C. Shartle

Bryan C. Shartle

Attorneys for Plaintiff,

Vicki L. Pinero