

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, individually and on behalf of all others similarly situated,)	Civil Action No. 08-03535
)	
)	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.)	

FED. R. CIV. P. 37 AND L.R. 37.1 CERTIFICATE

NOW INTO COURT, through undersigned counsel and pursuant to Fed. R. Civ. P. 37 and L.R. 37.1, comes plaintiff, Vicki L. Pinero (“Plaintiff”). Plaintiff submits this certificate in support of her Motion to Compel, filed against defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (jointly referred to as “Defendants”). Plaintiff respectfully shows:

1. **FED. R. CIV. P. 37** – Fed. R. Civ. P. 37(a)(1) provides:

On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

2. **L.R. 37.1** – L.R. 37.1 provides:

No motion relative to discovery shall be accepted for filing unless accompanied by a certificate of counsel for the moving party stating that counsel have conferred in person or by telephone for purposes of amicably resolving the issues and stating why they are unable to agree or stating that opposing counsel has refused to so confer after reasonable notice. Counsel for the moving party shall arrange the conference. Any motion filed under this paragraph shall be noticed for hearing. If the court finds that opposing counsel has willfully refused to meet and confer, or, having met, willfully refused or failed to confer in good faith, the court may impose such sanctions as it deems proper.

3. **CERTIFICATE** – Pursuant to Fed. R. Civ. P. 37 and L.R. 37.1, Plaintiff and undersigned counsel certify that they have in good faith conferred with counsel for Defendants in an effort to resolve the discovery dispute without court involvement.

4. On July 10, 2009, undersigned counsel spoke with Andrew S. Wein, counsel for Defendants, by telephone regarding Defendants' deficient response to Plaintiff's First Request for Production of Documents. During the call, undersigned counsel requested that Mr. Wein properly respond to Plaintiff's Request by producing the requested documents, or identifying the allegedly privileged documents in a Privilege Log, as required by Fed. R. Civ. P. 26(b)(5)(A). Mr. Wein stated that Defendants intended to do neither.

5. During the call, Mr. Wein stated that production of the requested documents would reveal "attorney mental impressions." Undersigned counsel explained

to Mr. Wein that Plaintiff is *not* asking for any documents setting forth attorney advice, opinions, or strategy. Instead, Plaintiff is seeking production of documents *from Defendants* that Defendants contend support their position that they were in compliance “with the Federal Trade Commission’s Safeguards Rule, 16 C.F.R. §§ 314.3-314.4, from January 1, 2005 until June 8, 2009.” Pl. Reqs. for Prod.

6. During the call, Mr. Wein advised that Defendants would *not* produce any responsive documents because production of a responsive document would reveal an “attorney mental impression” as to whether the produced document evidenced Defendants’ compliance with the Safeguards Rule. In other words, Defendants now apparently acknowledge that the requested documents are *not* privileged, despite the numerous “privilege” objections in Defendants’ response. Defendants are now refusing to produce the requested documents because production of the requested documents would allegedly reveal an “attorney mental impression” as to whether the produced documents evidenced Defendants’ compliance with the Safeguards Rule. Defendants’ position is illogical and improper.

7. The requested documents are relevant and production of the requested documents would *not* reveal any “attorney mental impression.” As alleged, Defendants fraudulently induced Plaintiff into obtaining tax preparation services based upon their representation that they maintained “physical, electronic, and procedural safeguards that compl[ied] with federal regulations to guard [Plaintiff’s] information.” Docket No. 119, at ¶ 2; *see also* ¶¶ 3, 24, 26-27, 40, 43, and 54-58. Plaintiff has a right to know what documents Defendants contend support their representation that they were in compliance

with federal regulations, including the Federal Trade Commission's Safeguards Rule, 16 C.F.R. §§ 314.3-314.4.

8. On July 15, 2009, undersigned counsel sent a letter to Mr. Wein, again asking Defendants to properly respond to Plaintiff's Request. In the letter, undersigned counsel advised Mr. Wein that Plaintiff would be filing a Motion to Compel on July 22, 2009 if Defendants refused to properly respond to Plaintiff's Request.

9. Despite undersigned counsel's telephone conversation with Mr. Wein, and undersigned counsel's letter to Mr. Wein, Defendants have refused to supplement their deficient response.

WHEREFORE, considering the premises, and the accompanying memorandum, Plaintiff requests that the Court grant her Motion to Compel; compel Defendants to properly respond to Plaintiff's Request and produce the requested documents, if any such documents exist; and, award Plaintiff all costs and attorneys' fees incurred in bringing her Motion to Compel.

Respectfully Submitted,

/s/ Bryan C. Shartle

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

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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 23rd day of July 2009.

/s/ Bryan C. Shartle

Bryan C. Shartle

Attorneys for Plaintiff,

Vicki L. Pinero