Pinero v. Jackson Hewitt Tax Service Inc. et al Doc. 173 Att. 4

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, *et al.*,	)	Civil Action No. 08-03535
	)	
Plaintiffs,	)	Sec. R
	)	JUDGE SARAH S. VANCE
v.	)	
	)	Mag. 3
JACKSON HEWITT TAX SERVICE INC., *et al.*,	)	MAGISTRATE JUDGE DANIEL E. KNOWLES, III
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE FOURTH AMENDED CLASS ACTION COMPLAINT

Plaintiff, Vicki L. Pinero ("Plaintiff"), submits this memorandum in support of her Motion for Leave to File Fourth Amended Class Action Complaint.

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 15(a), Plaintiff seeks leave to amend her class action complaint against defendants, Jackson Hewitt Tax Service Inc. ("JHTSI"); Jackson Hewitt Inc. ("JHI"); and, Crescent City Tax Service, Inc. d/b/a Jackson Hewitt Tax Service ("CCTSI") (jointly referred to as "Defendants"). Specifically, Plaintiff seeks leave to add to her complaint: (a) three new counts and related facts; and (b)

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an additional plaintiff (*i.e.*, Erick G. Adkins) for the new counts only. Plaintiff seeks to include new counts for violation of La. Rev. Stat. § 51:1910, *et seq.* (proposed Count 10); rescission of unlawful fee agreement/contract (proposed Count 11); and, payment of a thing not owed (proposed Count 12). Plaintiff also seeks leave to amend her class definition to include 3 classes and to expand her request for declaratory and injunctive relief. The Court should grant Plaintiff's leave request.

II. PROCEDURAL HISTORY

On June 5, 2009, the Court granted and denied in part Defendants' last motion to dismiss. *See* Docket No. 139. Plaintiff's claims for fraud (Count 2), invasion of privacy (Count 5), and unfair trade practices (Count 9) remain in the lawsuit. Count 5 for invasion of privacy remains against CCTSI only, *not* against JHTSI or JHI.

On June 29, 2009, Defendants answered. *See* Docket Nos. 149-150.

No motions to dismiss or for summary judgment are currently pending and the deadline to amend the pleadings is August 31, 2009. *See* Docket No. 161.

Although there has been some motion practice in this case, the case still remains in its infancy. Indeed, Defendants have *not* produced a single document to Plaintiff in discovery as of this filing.

Plaintiff is not requesting leave to amend her current claims. Nor is Plaintiff again requesting leave to include a claim directly under La. Rev. Stat. § 9:3572.1, *et seq.* As the Court will recall, in an earlier motion for leave to amend, Plaintiff sought leave to include a new claim directly under La. Rev. Stat. § 9:3572.1, *et seq.*—one of the two Louisiana loan broker statutes. *See* Docket No. 77. The Court denied Plaintiff's leave

request based upon a finding that the requested amendment would be futile because the proposed statutory claim is barred by the statute of limitations. *See* Docket No. 117. Plaintiff appealed the Court's order. *See* Docket No. 121. The appeal is currently pending before Chief Judge Vance.

Plaintiff is now seeking leave to assert different, ***new claims*** regarding Defendants' unlawful loan brokering activity. Plaintiff seeks leave to amend her complaint to include new claims for violation of the second Louisiana loan broker statute, *i.e.*, La. Rev. Stat. § 51:1910, *et seq.*; rescission of unlawful fee agreement/contract; and, payment of a thing not owed. Plaintiff also seeks leave to: add Mr. Adkins as a named plaintiff for the new counts only; amend her class definition to include 3 classes; and, expand her request for declaratory and injunctive relief.

III. LAW AND ARGUMENT SUMMARY

Fed. R. Civ. P. 15(a) provides that leave to file amending and supplemental pleadings shall be freely given when justice so requires. The Court should grant Plaintiff's leave motion. The proposed amendments will ***not*** cause any delay in the prosecution of this matter. As explained below, the proposed new claims are viable and the proposed amendments are appropriate.

A. Plaintiff's Proposed Claims For Violation Of Loan Broker Statute (La. Rev. Stat. § 51:1910, Et. Seq.) (Proposed Count 10)

Plaintiff requests leave to add Count 10 for violation of loan broker statute (La. Rev. Stat. § 51:1910, *et. seq.*). As noted, Plaintiff was previously denied leave to include a loan broker claim directly under La. Rev. Stat. § 9:3572.1, *et seq.*, because the Court

found the proposed amendment would be "futile in that [the proposed statutory claim] is barred by the applicable statute of limitations[.]" Docket No. 117, at p. 1. Plaintiff now seeks leave to include a claim directly under the second loan broker statute, *i.e.*, § 51:1910, *et seq.* This proposed claim is ***not*** barred by the applicable statute of limitations. *See Fox v. Dupree*, 633 So.2d 612 (La.App. 1st Cir. 1993).

1. Defendants Are Loan Brokers

Under La. Rev. Stat. § 51:1910(1)(a)(i), a "loan broker" is "any person, firm, or corporation who, in return for any consideration from any person, promises to . . . [p]rocure for such person, or assist such person in procuring a loan from any third party[.]" Pursuant to La. Rev. Stat. § 51:1910(1)(b)(xi), "[a]ny income tax preparer who is an authorized Internal Revenue Service e-file provider and whose only brokering activity is facilitating refund anticipation loans" is *not* considered a "loan broker." In other words, an income tax preparer who is an authorized Internal Revenue Service e-file provider and who brokers loans is considered a loan broker and subject to the restrictions set forth in the statute, ***unless*** the income tax preparer's "***only brokering activity*** is facilitating refund anticipation loans[.]" La. Rev. Stat. § 51:1910(1)(b)(xi) (emphasis added). A "refund anticipation loan" or "RAL" is a "loan whereby the creditor arranges to be repaid directly by the Internal Revenue Service from the anticipated proceeds of the debtor's income tax refund." La. Rev. Stat. § 51:1910(1)(b)(xi); La. Rev. Stat. § 9:3572.2(B)(9).

As alleged in the proposed complaint, Defendants are loan brokers per § 51:1910 because they, in return for consideration from customers, procure for customers loans

from third parties. *See* Proposed Complaint, at ¶¶ 5 and 118. Further, Defendants are ***not*** exempt under the statute because their brokering activity is ***not*** limited to brokering or facilitating ***only*** RALs. *Id.* at ¶¶ 41 and 118. Defendants have brokered and continue to broker many types of loans that are ***not*** considered RALs, including the following: Pre-File Money Now Loans; Holiday or Help Loans; Flex Loans; and, iPower Loans. *Id.* at ¶¶ 30-37.[1] These loans are ***not*** RALs because the creditors providing these loans do not arrange to be repaid directly from the IRS from the anticipated proceeds of the customer's income tax return. *Id.* at ¶ 43. Instead, all of these short-term loans are due on a certain date and are arranged to be repaid directly by the customer. *Id.*

Defendants have been well aware of their obligation to be licensed as loan brokers. *Id.* at ¶ 44. In its 2006 10-K, JHTSI acknowledged "many states . . . have statutes regulating, through licensing and other requirements, the activities of brokering loans and offering credit repair services to consumers as well as local usury laws which could be applicable in certain circumstances." *Id.* In its 2007 and 2008 10-Ks, JHTSI once again acknowledged that it may be subject to state loan broker statutes. *Id.*

2. Defendants Violated the Statute

Pursuant to La. Rev. Stat. § 51:1911(A), loan brokers must obtain a surety bond or

[1] The non-RAL products, particularly the "Pre-Season Products," have been the subject of justifiable criticism. Rarely are these short-term usurious loans clearly explained to consumers. Further, low-income and uneducated Americans are often the target of these abusive loans, which include APRs into the triple digits. For example, the APR associated with Plaintiff Pinero's Pre-File Money Now Loan is 118.905%. John Hewitt, *one of the founders of Jackson Hewitt*, called these loans "a kind of predatory lending." Mr. Hewitt has publicly stated his disapproval of such loans, comparing their high fees to cash-advance, "payday" loans.

establish a trust account. The amount of the bond or trust account must be $25,000. *See* La. Rev. Stat. § 51:1911(A). Per La. Rev. Stat. § 51:1911(E), "[i]t shall be unlawful for any loan broker or its agent or employee to collect or attempt to collect any deposit or payment toward a fee where a valid bond . . . is not posted[.]"

The statute also requires loan brokers to provide certain disclosures to consumers in a written document, the cover sheet of which must be titled in at least ten point bold face capital letters "**DISCLOSURE REQUIRED BY LOUISIANA LAW**." *See* La. Rev. Stat. § 51:1914. Along with other information, the document must contain the following disclosures: (1) the name of the broker; whether the broker is doing business as an individual, partnership, or corporation; the names under which the broker has done, is doing, or intends to do business; and the name of any parent or affiliated companies; (2) the names, addresses, and titles of the broker's officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the broker's business activities; and all the broker's employees located in Louisiana; (3) the length of time the broker has conducted business as a loan broker; (4) a full and detailed description of the actual services that the broker undertakes to perform for the prospective borrower; and, (5) a statement regarding whether the broker has obtained a bond, or established a trust account. *Id.*

Defendants have *not* obtained a surety bond or established a trust account. *See* Proposed Complaint, at ¶¶ 5 and 119. Despite this fact, on or about January 6, 2006, Defendants brokered a Pre-File Money Now Loan to Plaintiff Pinero and, on or about January 12, 2006, Defendants brokered a Pre-File Money Now Loan to proposed Plaintiff

Adkins. *Id.* at ¶¶ 65-66. Based upon a fee agreement/contract, each of the Defendants charged *and* received a fee/sum from each Plaintiff for brokering her/his Pre-File Money Now Loan. *Id.* at ¶ 69. Defendants did *not* provide any of the disclosures required by La. Rev. Stat. § 51:1914 to either Plaintiff before or after brokering the loan. *Id.* These Pre-File Money Now Loans were ***not*** RALs per the § 51:1910(1)(b)(xi) exemption for tax return preparers. *Id.*

On or about January 31, 2006, Defendants brokered a RAL to Plaintiff Pinero and, on or about January 22, 2007, Defendants brokered a RAL to proposed Plaintiff Adkins. *Id.* at ¶ 70. Once again, based upon a fee agreement/contract, each of the Defendants charged *and* received a fee/sum from each Plaintiff for brokering her/his loan. *Id.* And once again, Defendants did *not* provide any of the disclosures required by La. Rev. Stat. § 51:1914 to either Plaintiff before or after brokering the loan. *Id.*

Defendants violated the statute by, *inter alia*, failing to obtain a surety bond or establish a trust account and provide the required disclosures. *Id.* at ¶ 119. In violation of the statute, Defendants have brokered loans to Plaintiffs and many others. *Id.* at ¶ 120. Defendants have wrongfully received certain fees, sums, interest, and other charges from Plaintiffs and the class members for their unlawful loan brokering activity. *Id.*

3. The Statutory Claims

A violation of any of the provisions set forth in La. Rev. Stat. § 51:1910, *et seq.*, constitutes a violation of the Louisiana Unfair Trade Practices and Consumer Protection Law ("LA Unfair Trade Practices Statute"). *See* La. Rev. Stat. § 51:1915(A) ("Violation of any of the provisions of this Chapter shall constitute an unfair practice under R.S.

51:1405(A).”). Further, in relevant part, the statute provides:

> B. ***If a loan broker*** uses any untrue or misleading statements in connection with a loan brokerage contract, ***fails to fully comply with the requirements of this Chapter***, fails to comply with the terms of the contract or any obligation arising therefrom, or fails to make diligent effort to obtain or procure a loan on behalf of the prospective borrower, then, upon written notice to the broker, ***the prospective borrower may void the contract, and shall be entitled to receive from the broker all sums paid to the broker, and recover any additional damages including attorney's fees***.
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> . . . .
>
> D. The remedies provided herein shall be in addition to any other remedies provided for by law.

La. Rev. Stat. § 51:1915 (emphasis added).

Plaintiff Pinero and proposed Plaintiff Adkins assert claims against Defendants under subsections A and B of § 51:1915. *See* Proposed Complaint, at ¶¶ 121-122. Both claims are timely.

a. La. Rev. Stat. § 51:1915(A) Claim

Pursuant to La. Rev. Stat. § 51:1915(A), Defendants' violations of the loan broker statute constitute a violation of the LA Unfair Trade Practices Statute, for which Plaintiffs and the class members have a private right of action against Defendants to recover all fees, sums, interest, and other charges Defendants received related to the loans they improperly brokered, plus damages and attorneys' fees. Regardless of whether this claim is subject to a prescriptive or peremptive period of 1 year, the claim is timely.

In *Fox*, *a case involving the same violations alleged here*, the court explained:

> [The reconventional defendant's] alleged failure to comply with the bond filing and disclosure requirements of the Loan Brokers' statute was a continuing violation of the statute. Every day he was not in compliance

> with the law, [the reconventional defendant] violated the statute. The law provides that a violation of the statute is an unfair trade practice. LSA-R.S. 51:1915(A). The private right of action for an unfair trade practice perempts one year from the date the transaction or act giving rise to the right of action. LSA-R.S. 51:1409(E). In this case, violation of the Loan Brokers' statute gives rise to an unfair trade practice claim. The peremptive term could not even begin to run until a loan broker complied with the law because every day he is in violation gives rise to a new right of action for an unfair trade practice.

Fox, 633 So.2d at 614.

As the court ruled in *Fox*, "every day [Defendants] [are] in violation [of the statute] gives rise to a new right of action for an unfair trade practice." *Id.* As alleged, Defendants violations are on-going and continuing because Defendants continue to violate the statute by failing to obtain a surety bond or establish a trust account and provide the required disclosures. *See* Proposed Complaint, at ¶ 119. The proposed claim under § 51:1915(A) for unfair trade practices, therefore, is timely.[2]

b. La. Rev. Stat. § 51:1915(B) Claim

Under § 51:1915(B), "[i]f a loan broker . . . fails to fully comply with the requirements of [the statute] . . . , the prospective borrower may void the contract [with the loan broker], and shall be entitled to receive from the broker all sums paid to the

[2] *See also Benton, Benton and Benton v. Louisiana Public Facilities Authority*, 672 So.2d 720 (La.App. 1st Cir. 1996); *Capitol House Preservation Co. v. Perryman Consultants, Inc.*, 1998-1514 (La.App. 1st Cir. 1998), 725 So.2d 523. *Fox*, *Benton*, and *Capitol* were all decided *after* the federal district court decisions in *Neill v. Rusk*, 745 F.Supp. 362 (E.D. La. 1990), and *Cason v. Texaco, Inc.*, 621 F.Supp. 1518 (M.D. La. 1985), which held the continuing violation doctrine does not apply to the 1-year peremptive period under the LA Unfair Trade Practices Statute. In light of this fact, the Fifth Circuit overruled the federal decisions. *See Tubos de Acero de Mexico, S.A. v. American Intern. Inv. Corp., Inc.*, 292 F.3d 471, 482 (5th Cir. 2002); *see also James v. New Century Mortgage Corp.*, 2006 WL 2989242, *7 (E.D. La. 2006).

broker, and recover any additional damages including attorney's fees." In *Fox*, the court explained the statutory remedies as follows:

> The statute expressly allows an unfair trade practice action in subsection A; subsections B and C provide contractual remedies, and subsection D states that the remedies provided are in addition to any other remedies provided by law. Clearly, a party is not limited to only one cause of action. The statute allows contractual and tort remedies, and any other remedies provided by law. [The] reconventional demand alleges both contract and tort claims, including rescission of the fee agreement, rescission of the option contract, breach of fiduciary duty, and misrepresentation. The trial court erred in dismissing all of these claims under the one-year prescriptive term provided for private actions for unfair trade practices in Revised Statute 51:1409(E).

Fox, 633 So.2d at 614.

Pursuant to La. Rev. Stat. § 51:1915(B), Plaintiffs and the class members have a private right of action against Defendants to recover all fees, sums, interest, and other charges Defendants received related to the loans they improperly brokered, plus damages and attorneys' fees. This claim, which is subject to the 10-year prescriptive period set forth in La. Civ. Code art. 3499, is timely. Even if the claim is subject to the 1-year prescriptive period in Article 3492, the claim is timely because of Defendants' continuing violation of the statute.

The Court should grant Plaintiff leave to include her proposed Count 10 for violation of La. Rev. Stat. § 51:1910, *et. seq.*

B. Plaintiff's Proposed Claim For Rescission Of Unlawful Fee Agreement/Contract (Proposed Count 11)

La. Civ. Code art. 7 provides "[p]ersons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such

laws is an absolute nullity." La. Civ. Code art. 2030 provides:

> A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed.
>
> Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.

La. Civ. Code art. 2032 provides "[a]ction for annulment of an absolutely null contract does ***not*** prescribe." (emphasis added). La. Civ. Code art. 2033 provides "[a]n absolutely null contract . . . is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made. If it is impossible or impracticable to make restoration in kind, it may be made through an award of damages."

As the Fifth Circuit ruled less than 2 weeks ago, "Louisiana courts have long recognized that statutory licensing requirements 'were enacted to protect an interest vital to the public order,' and have relied on these Civil Code articles to invalidate contracting agreements entered into with unlicensed contractors." *Tradewinds Environmental Restoration, Inc. v. St. Tammany Park, LLC*, 2009 WL 2371427, *2 (5th Cir. 2009). Recently, *Chief Judge Vance* applied these articles in a case involving an unlicensed contractor. *See Touro Infirmary, Preferred Continuum Care-New Orleans, LP v. Travelers Prop. Cas. Co. of America*, 2007 WL 496858 (E.D. La. 2007).

In *Touro Infirmary*, Judge Vance found the contract to pay the unlicensed contractor was an absolute nullity because the contractor was not licensed. *Id.* at *5. Judge Vance ruled:

> It is undisputed that [the contractor] was not a licensed contractor under Louisiana law at the time it entered into the contract at issue or at any time

> thereafter. Plaintiffs argue that [the contractor's] lack of a contractor's license renders the contract between them a nullity under Louisiana law. Louisiana has enacted a broad licensing scheme for contractors. Under this scheme, it is "unlawful for any person to engage or to continue in this state in the business of contracting, or to act as a contractor as defined in this Chapter, unless he holds an active license as a contractor under the provisions of this Chapter." Violations of this provision are misdemeanors punishable by fines and/or imprisonment.
>
> . . . .
>
> Louisiana law provides that "[a] contract is absolutely null when it violates a rule of public order, as when the object of the contract is illicit or immoral." The absolute nullity of a contract may be asserted "by any person or may be declared by the court on its own initiative." Louisiana law also provides that "[p]ersons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity."
>
> Louisiana courts rely on these articles to invalidate contracts made in violation of licensing requirements.
>
> . . . .
>
> For all of the foregoing reasons, the Court finds that the contract at issue was an absolute nullity. When a contract is null, it "is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made."

Id. at *2-5 (citations omitted) (gathering authorities).

Like Judge Vance in *Touro Infirmary*, numerous other courts have invalidated as absolutely null contracts made in violation of licensing requirements.[3]

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[3] *See West Baton Rouge Parish School Bd. v. T. R. Ray, Inc.*, 367 So.2d 332 (La. 1979); *Towne Center, Ltd. v. Keyworth*, 618 So.2d 467, 471 (La.App. 4th Cir. 1993) (unlicensed real estate broker) ("Because Keyworth entered into the agreement when he was not a licensed broker . . ., the contract violated La. R.S. 37:1437 (now Section 37:1436) and was null *ab initio.*"); *Alonzo v. Chifici*, 526 So.2d 237 (La.App. 5th Cir. 1988).

As alleged, the Louisiana loan broker statutes (*i.e.*, La. Rev. Stat. § 9:3572.1, *et seq.*, and La. Rev. Stat. § 51:1910, *et seq.*) are prohibitory laws. *See* Proposed Complaint, at ¶ 125. These laws prohibit persons from engaging in unregulated loan brokering activity. As prohibitory laws, the licensing, bond, and disclosure requirements set forth in the loan broker statutes cannot be avoided by private agreement, or otherwise. Indeed, this fact is expressly stated in La. Rev. Stat. § 51:1915(C) ("Any contract for loan brokering services is unenforceable against the prospective borrower and a violation of this Chapter if it contains any provisions whereby the prospective borrower agrees to waive any requirements of this Chapter.").

Defendants are ***not*** licensed as loan brokers, and Defendants have ***not*** obtained a surety bond or established a trust account, as required by La. Rev. Stat. § 9:3572.1, *et seq.*, and La. Rev. Stat. § 51:1910, *et seq.* *See* Proposed Complaint, at ¶¶ 5 and 44. Nor have Defendants provided the disclosures required by these statutes. *Id.* at ¶¶ 5, 69-70, and 119. Therefore, any fee agreement/contract with Defendants, which permits Defendants to receive a fee for brokering a loan even though Defendants are not in compliance with the loan broker statutes, is unlawful and subject to rescission as an absolutely null agreement/contract.

As alleged and noted above, based upon fee agreements/contracts, each of the Defendants charged *and* received a fee/sum from Plaintiff Pinero and proposed Plaintiff Adkins for brokering her/his Pre-File Money Now Loan and RAL. *Id.* at ¶¶ 69-70. Considering Defendants are not licensed loan brokers and are not in compliance with the loan broker statutes, these fee agreements/contracts are absolutely null and void. *See*

Tradewinds Environmental Restoration, 2009 WL 2371427 at *2; *Touro Infirmary*, 2007 WL 496858 at *2-5. Pursuant to La. Civ. Code art. 2033, Defendants are obligated to return all fees, sums, interest, and charges they received from the Plaintiffs and class members through the absolutely null fee agreements/contracts. Considering that actions for annulment of an absolutely null contract do *not* prescribe, this claim is timely. *See* La. Civ. Code art. 2032.

The Court should grant Plaintiff leave to include her proposed Count 11 for rescission of fee agreement/contract.

C. Plaintiff's Proposed Claim For Payment Of A Thing Not Owed (Proposed Count 12)

La. Civ. Code art. 2299 provides "[a] person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it." In contrast to a claim for enrichment without cause under Article 2298, a claim for payment of a thing not owed under Article 2299 is ***not*** subsidiary. *See* La. Civ. Code art. 2299, Comment (c) ("The remedy that Article 2299 provides is not subsidiary; this remedy is available even if other remedies are also available but there can be no double recovery.").

As alleged and noted above, Defendants were prohibited from contracting to receive and from actually receiving any fee or sum for their loan brokering activity because they were not in compliance with the loan broker statutes. *See* La. Rev. Stat. § 9:3572.12(D); La. Rev. Stat. § 51:1915(B); La. Rev. Stat. § 51:1911(E). Yet Defendants improperly charged and received from Plaintiff Pinero, proposed Plaintiff Adkins, and the class members certain fees, sums, interest, and other charges they are not owed

relating to their improper loan brokering activity. *See* Proposed Complaint, at ¶¶ 5, 45, 69-70, 120-122, 127, and 131. Pursuant to Article 2299, Defendants are obligated to return all such fees, sums, interest, and charges they improperly received from the Plaintiffs and class members.

Plaintiffs' payment of a thing not owed claim is timely. Such claims are subject to the 10-year prescriptive period set forth in La. Civ. Code art. 3499. The Louisiana Supreme Court has held:

> One who receives what is not due him, whether he does so through error or knowingly, obliges himself to restore it to the one making the payment. There arises from such receiving a quasi contract to return what was so received. The action to recover the amount is prescribed only by the prescription of ten years, relating to all personal actions, except those otherwise provided for.

Smith v. Phillips, 143 So. 47, 48 (La. 1932) (citations omitted); *see also Julien v. Wayne*, 415 So.2d 540, 542 (La.App. 1st Cir. 1982) ("A claim for restitution of payment not due is based on the doctrine of quasi contract, which prescribes only by prescription of ten years[.]").

This case is similar to *United Gas Pipe Line Co. v. Socony Mobil Oil Co.*, 220 F.Supp. 685, 686 (W.D. La. 1963), wherein the plaintiff gas company entered into a contract with the defendant natural gas supplier to purchase natural gas. The contract rate for the gas exceeded the rate permitted by the Federal Power Commission pursuant to an order issued under the Natural Gas Act. *See United Gas Pipe Line*, 220 F.Supp. at 686. After the contract was signed, the plaintiff purchaser sued the defendant to recover the overpayments made to defendant due to the excessive rate charged. *Id.* The defendant

answered, arguing plaintiff's claim was prescribed. *Id.*

The court rejected defendant's prescription argument and held the 10-year prescriptive period for personal actions applied to plaintiff's claim. *Id.* at 687-88. The court ruled:

> The complaint filed in this case clearly indicates that plaintiff is seeking recovery of a specific sum of money unlawfully collected by defendant in violation of the Natural Gas Act and the Federal Power Commission order. To allow defendant to retain this sum of money would unjustifiably enrich it, since the excess payments were not due, but rightfully belonged to plaintiff. Thus the tortious action of defendant also created a quasi contractual obligation giving plaintiff the right to demand restitution of the money unlawfully received by defendant.
>
> . . . . [P]laintiff has alleged a quasi contractual obligation and thus the ten-year prescriptive period is applicable.

Id. at 688 (citations omitted).

As in *United Gas Pipe Line*, Plaintiffs are seeking to recover certain fees and sums unlawfully collected by Defendants in violation of the loan broker statutes. Plaintiffs' claim for restitution is timely per Article 3499.[4]

In prior memoranda, Defendants argued Plaintiff Pinero could not allege a "quasi-contractual claim" for unjust enrichment or payment of a thing not owed because she

[4] *See also* La. Atty. Gen. Op. No. 01-0456, 2002 WL 388775 (La. A.G. Feb. 15, 2002) (10-year prescriptive period applies to claims for reimbursement of gas overcharges); *Succession of Granger v. Worthington*, 2002-0433 (La.App. 3d Cir. 2002), 829 So.2d 1108 (10-year prescriptive period for personal actions, not one-year period for delictual actions, applied to administratrix's action against decedent's cousin for recovery of succession assets); *Julien v. Wayne*, 415 So.2d 540, 542 (La.App. 1st Cir. 1982) ("What [the administratrix] is alleging is that [defendant] was paid legal fees which were not due to him, and she is asking for a return of same. A claim for restitution of payment not due is based on the doctrine of quasi contract, which prescribes only by prescription of ten years[.]").

alleged Defendants' actions were "unlawful." Defendants' argument was based upon old case law, which relies upon an Article ***no longer in the Civil Code***.[5] To the extent Defendants again make this improper argument, Plaintiffs remind the Court that, under current law, whether the underlying act is "lawful" or not is irrelevant to whether the act gives rise to a claim for payment of a thing not owed.

The Court should grant Plaintiff leave to include her proposed Count 12 for payment of a thing not owed.

D. Plaintiff's Other Proposed Amendments

Plaintiff also seeks leave to add Mr. Adkins as an additional plaintiff for the proposed new claims only; amend her class definition to include 3 classes; and, expand her request for declaratory and injunctive relief. The Court should grant Plaintiff's leave request.

As noted, the deadline to amend the pleadings is August 31, 2009. *See* Docket No. 161. Plaintiff's request to add an additional plaintiff is timely. Plaintiff seeks to add Mr. Adkins as a plaintiff with respect to the proposed new claims only (*i.e.*, proposed Counts 10-12). In light of this fact, Defendants will not suffer any prejudice due to the amendment—Defendants will *not* be required to re-litigate any issues previously litigated with Plaintiff Pinero.

Nor will Defendants suffer any prejudice if Plaintiff is permitted to expand her

[5] La. Civ. Code art. 2293 formerly provided: "Quasi contracts are the lawful and purely *voluntary* act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties." The Article was removed from the Civil Code per 1995 La. Acts 1041.

request for declaratory and injunctive relief to address Defendants' improper loan brokering activity. *See* Proposed Complaint, at ¶¶ 108-111. Again, the pleadings amendment deadline has not passed and the proposed expanded relief is limited to addressing Defendants' improper loan brokering activity.

Finally, Plaintiff should be granted leave to amend her class definition to include 3 classes. *Id.* at ¶¶ 86-89. Amendments to the class definition are commonly permitted and a court is never bound by the proposed definition. As this Court has noted, the "class definition is a process of 'ongoing refinement and give-and-take[.]'" *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 611 (E.D. La. 2006); *see also In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) ("[H]olding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition.").

IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for leave.

Respectfully Submitted,

/s/ Bryan C. Shartle

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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 24th day of August 2009.

/s/ Bryan C. Shartle
Bryan C. Shartle

N:\1-DI-Non-Collector-Misconduct\Pinero, Vicki-Class Action\Pleadings\LA Lawsuit\Fourth Amended Complaint\Brief\Memo. Sup. Leave File Fourth Amen. Complaint.08.24.09.doc