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
Plaintiffs,	)	Sec. R JUDGE SARAH S. VANCE
v.	)	Mag. 3 MAGISTRATE JUDGE DANIEL E. KNOWLES, III
JACKSON HEWITT TAX SERVICE INC.; JACKSON HEWITT INC.; and, CRESCENT CITY TAX SERVICE, INC. d/b/a JACKSON HEWITT TAX SERVICE,	)	
Defendants.	)	

REPLY TO MEMORANDA IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Plaintiff, Vicki L. Pinero, submits this memorandum in reply to the opposition memoranda filed by defendants, Jackson Hewitt Tax Service Inc., Jackson Hewitt Inc., and Crescent City Tax Service, Inc. d/b/a Jackson Hewitt Tax Service (jointly referred to as "Defendants"), in response to plaintiff's Motion for Class Certification.

I. INTRODUCTION

In an attempt to mislead this Court, Defendants claim to be the "victim[s] of a

theft[.]" Docket No. 36, at p. 6. Defendants' allegation is intended to suggest that someone burglarized Defendants' office and stole Defendants' documents and materials. This is simply not true.

Contrary to Defendants' argument, the only innocent victims here are the Jackson Hewitt customers whose tax returns and other confidential and private documents were thrown in a public dumpster, notwithstanding Defendants' implied and express legal and contractual obligations to safeguard such documents. Defendants are *not* the victims of any "theft." No one burglarized any of Defendants' offices. Instead, one of Defendants' own "high level" employees intentionally threw the documents in the dumpster. While Defendants claim they are not responsible for this "high level" employee's action, Defendants are wrong.

To add insult to injury, Defendants are attempting to keep the unlawful disclosure a secret. Rather than advise their affected customers of the improper disclosure, as they committed to do in their press release, Defendants have chosen to ignore the disclosure. The Court should not permit Defendants to continue to hide the truth from the Jackson Hewitt customers who paid Defendants to secure their most highly confidential information and documents. These individuals have the right to know that Defendants violated their legal and contractual obligations. These individuals have the right to know that their personal information, including social security number; date of birth; home address; employer information; bank account information; and other highly confidential information, was put on the street by Defendants. Without such notice, these individuals will be unable to take necessary measures to protect themselves. The Court should grant

plaintiff's class certification motion, order that notice be given to all of the affected Jackson Hewitt customers, and then deny Defendants' motions to dismiss and strike.

II. LAW AND ARGUMENT SUMMARY

A. Plaintiff's Motion For Class Certification Is Not Premature

Contrary to Defendants' argument, the Court should *not* decide the pending motions to dismiss *before* ruling on plaintiff's class certification motion. While it is true that courts have *occasionally* ruled on the merits before ruling on the class certification motion, "it is usually improper to postpone the class certification decision until after a decision on the merits of the case." 32B Am. Jur. 2d Federal Courts § 1781 (gathering authorities). The Seventh Circuit has explained why:

> Rule 23(c)(1) says that that decision must come "as soon as practicable." Sometimes the class issues may be so intertwined with the merits (or the wisdom of a settlement) that they should be handled together. But the propriety of class certification does not depend on the outcome of the suit and one reason for early certification is to identify the stakes of the case so that the parties may choose their litigation strategies accordingly. After even a tentative decision on the merits, incentives are different. Indeed, a class representative who has lost on the merits may have a duty to the class to oppose certification, to avoid the preclusive effect of the judgment, while the defendants suddenly want the certification that they might have opposed at the outset. It is therefore difficult to imagine cases in which it is appropriate to defer class certification until after decision on the merits.

Bieneman v. City of Chicago, 838 F.2d 962, 964 (7th Cir. 1988).

Defendants continue to beat the same drum over and over again regarding plaintiff's alleged failure to plead any "actual damages." As explained in great detail in plaintiff's opposition memorandum to Defendants' motions to dismiss, plaintiff has plead "actual damages." *See* Docket No. 29. Plaintiff has "standing" to assert her claims and

prosecute this class action. The Court should grant plaintiff's class certification motion and then deny Defendants' motions to dismiss.

B. Plaintiff Has Satisfied Her Rule 23 Burden Of Proof For Class Certification

Defendants argue plaintiff's class certification motion should be denied because plaintiff has not submitted any "evidence." *See* Docket No. 36, at p. 13. While it is true that "[g]oing beyond the pleadings [in a class action] is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues," there is no requirement that a plaintiff seeking class certification submit "evidence" in support of her class certification motion. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Plaintiff has alleged the predicate facts in her complaint. *See* Docket No. 9. Defendants do *not* dispute any of the alleged facts. In her motion for class certification, plaintiff thoroughly analyzes her claims and the relevant law. *See* Docket No. 10-6. Plaintiff has submitted sufficient information to the Court to make an informed class certification decision.

Further, although Defendants contend that plaintiff's class certification motion is "premature," Defendants do not explain what additional "evidence" must be submitted to the Court before an informed decision can be made. This omission is telling. The facts here are undisputed. The issues are primarily legal. No additional "evidence" or information is needed for the Court to rule on plaintiff's class certification motion.

C. Plaintiff Has Satisfied The Rule 23 Requirements

1. Class Definition

Plaintiff's class definition defines a group of "clearly ascertainable" individuals. *See Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 611 (E.D. La. 2006); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). There is nothing "amorphous" or "imprecise" about the proposed class definition. Indeed, at least some of the class members have already been identified by Defendants after they reviewed some of the "dumpster documents" being held by the Jefferson Parish Sheriff's Office.

2. Typicality and Adequacy Requirements

Defendants argue plaintiff cannot satisfy the typicality requirement, or the adequacy of representation requirement, because she is subject to "unique defenses" because she previously filed bankruptcy. *See* Docket No. 36, at p. 16. This argument is baseless.

As noted in plaintiff's class certification motion, "[t]he test for typicality, like commonality, is *not* demanding[.]" *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (emphasis added). "The 'typicality' requirement focuses less on the relative strengths of the named and unnamed plaintiffs' cases than on the similarity of the legal and remedial theories behind their claims." *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). "Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat

typicality." *James v. City of Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001) (quotation marks omitted).

Plaintiff's claims are identical to the claims of the class members. By definition, plaintiff has satisfied the typicality requirement. Moreover, the fact that plaintiff has previously filed bankruptcy does *not* make her an improper class representative or subject her to "unique defenses." Plaintiff was damaged just like the class members she seeks to represent and has the right to pursue her claims against Defendants.

3. Superiority Requirement

Defendants argue plaintiff cannot satisfy the superiority requirement because "individual parties have a demonstrated interest and ability to bring their own actions." Docket No. 36, at p. 17. In support of their argument, Defendants point to 2 lawsuits pending in state court. *Id.* Defendants' argument is disingenuous.

Very few of the Jackson Hewitt customers affected by Defendants' improper disclosure have been contacted and advised of the disclosure. Without notification, the class members are unaware that their rights have been violated. Considering that very few of the individuals affected by the improper disclosure have been advised of Defendants' wrongdoing, and that Defendants are attempting to prevent these individuals from learning such, it cannot truthfully be said that the class members have "demonstrated [an] interest and ability to bring their own actions." *Id.*

Further, courts have "rejected the notion that class certification under Rule 23 is 'an all-or-nothing proposition' requiring class certification of *all causes* of action asserted in a single pleading." *Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 544 (D. N.J.

1999) (emphasis added). Courts routinely certify class actions where the class representative has asserted individual claims in addition to the class claims. *See, e.g.*, *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 242 (D. Ariz. 2001) ("The Defendants, however, contend that the named Plaintiffs' prosecution of the consumer fraud claim in their individual capacities raises an interest antagonistic to the class members because the named Plaintiffs have an incentive to litigate their consumer fraud claim with the most effort. The Defendants' argument that the court should certify none of the claims because the class representatives have failed to request certification on all claims is ironic. The pursuit of an additional claim does not raise an apparent and imminent conflict of interest which resides at the very heart of the lawsuit."). When the individual claim cannot be brought as a class claim, like plaintiff's individual claim here under the Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. § 51:1401, *et seq.*, there cannot be any conflict of interest in the class representative pursuing the individual claim. *Id.*

4. Predominance Requirement

Defendants argue that individual, rather than common, questions of law and fact will predominate. *See* Docket No, 36, at p. 19. Defendants are again wrong.

a. Count 1—Unauthorized Disclosure of Tax Returns

Defendants correctly note, in order to state a claim under 26 U.S.C. §§ 6103 and 7431, a plaintiff must establish that his or her "return" or "return information" was disclosed. *See* 26 U.S.C. § 6103(a). Plaintiff agrees the current class definition is *not* limited to just "returns" or "return information," but also includes disclosure of "other

personal or financial information."[1] To address Defendants' argument that plaintiff's class definition is "overbroad" with respect to Count 1 because it sweeps in individuals whose "return" or "return information" was *not* disclosed, the Court should create a subclass for Count 1. The subclass for Count 1 should only include those class members whose "return" or "return information" was disclosed by Defendants. The task of identifying which class members fall within this subclass is ministerial and will simply require a review of the "dumpster documents." This review process does *not* prevent class certification here.

b. Counts 2 And 3—Fraud And Breach Of Contract

According to Defendants, "[p]laintiff has failed to establish that common issues would predominate over individualized issues such as damages, content and uniformity of the representations, materiality, and reliance." Docket No. 36, at p. 20. Defendants' argument is again disingenuous. Can Defendants honestly say that different representations were made to the class members, or that any class member would have obtained services through Jackson Hewitt if he or she had known his or her tax return would be thrown in a public dumpster, examined by a local television station, and then turned over to the Jefferson Parish Sheriff's Office? Of course not.

It is beyond contention that Defendants represented they would secure the documents they threw away. Such representations were made to each class member when he or she visited the local Jackson Hewitt office and are set forth in Jackson

[1] Currently, plaintiff seeks certification of the following class: "All Louisiana residents who received tax preparation services through Defendants and whose tax return information, tax return, or other personal or financial information was disclosed by Defendants, without consent, during the one year period prior to the filing of the complaint." Docket No. 10-6, at p. 9.

Hewitt's "Privacy Policy." *See* Docket No. 9, at ¶¶ 22-28 & 54-63. It is also beyond contention that each class member relied upon these material representations. Said another way, it cannot be denied that *no* class member would have hired Defendants if he or she had known Defendants were going to throw his or her tax returns in a public dumpster. The facts of this case "speak for themselves" and compel these findings. Further, Counts 2 and 3 seek return of all fees and costs paid by the class members to Defendants, so there is uniformity as to the damages sought by plaintiff and the class members in Counts 2 and 3.

D. Bifurcation

Again in an attempt to mislead this Court, Defendants argue plaintiff "conced[es] that individualized inquiries into damages preclude a finding of superiority and predominance[.]" Docket No. 36, at p. 22. Plaintiff "concedes" nothing of the kind. Instead, plaintiff simply requests in her class certification motion that the Court bifurcate the trial into liability and damages phases to ensure judicial efficiency. *See* Docket No. 10-6, at p. 14. As explained in great detail in plaintiff's class certification motion, bifurcation is a common practice in class action litigation.

III. CONCLUSION

The Court should grant plaintiff's class certification motion, order that notice be given to all of the class members, and then deny Defendants' motions to dismiss and strike.

Respectfully Submitted,

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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 11th day of November 2008.

/s/ Bryan C. Shartle
Bryan C. Shartle

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