

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.)	

MEMORANDUM IN OPPOSITION TO MOTION TO STAY DISCOVERY

Plaintiff, Vicki L. Pinero, submits this memorandum in opposition to the Motion to Stay Discovery filed by defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (collectively “Jackson Hewitt”).

I. INTRODUCTION

Jackson Hewitt tells only part of the story. It is true that counsel have not conducted a formal Fed. R. Civ. P. 26(f) conference, but it is also true that: (1)

defendants have already commenced discovery, (2) defendants contend discovery is needed to respond to plaintiff's Motion for Class Certification, and (3) defendants argue alleged "facts" in opposition to plaintiff's class certification motion, which necessitate discovery. The Court should, therefore, deny Jackson Hewitt's stay motion.

II. BACKGROUND

This case relates to the wrongful disclosure of tax returns by Jackson Hewitt and the local franchise owner, co-defendant Crescent City Tax Service, Inc. d/b/a Jackson Hewitt Tax Service ("CCTSI"). Some of the wrongfully disclosed tax returns were recovered from a public dumpster in Gretna, Louisiana.

Jackson Hewitt correctly notes that counsel have not conducted a formal Fed. R. Civ. P. 26(f) conference. *See* Docket No. 46. But Jackson Hewitt fails to tell the Court the following critical information:

- On October 17, 2008, counsel for CCTSI issued a subpoena to the Jefferson Parish Sheriff's Office, requesting that the "dumpster documents" related to the case be made available for inspection and copying.
- When the sheriff's office refused to comply with the subpoena, the parties filed a *joint* motion to compel enforcement of the subpoena. *See* Docket No. 30.
- On October 28, 2008, the Court entered an order, compelling the Jefferson Parish Sheriff's Office to produce for inspection and copying the "dumpster documents." *See* Docket No. 31.
- All or some of defense counsel have reviewed the "dumpster documents."
- On November 19, 2008, undersigned counsel served plaintiff's discovery. The following day, undersigned counsel advised counsel for Jackson Hewitt, Andrew S. Wein, that plaintiff's discovery need not be answered until after the Rule 26(f) conference was held. During that call, counsel tentatively agreed to hold the Rule 26(f) conference on November 21, 2008, but due to conflicts the conference was not held.
- Plaintiff has filed a Motion for Class Certification, seeking to certify the proposed class. *See* Docket No. 12.
- CCTSI filed an opposition to plaintiff's class certification motion, arguing plaintiff's motion should be denied because "the motion is premature. Discovery

- regarding the matter is in its infancy.” Docket No. 32, at p. 1.
- Jackson Hewitt also filed an opposition to plaintiff’s class certification motion, arguing that plaintiff cannot satisfy the Rule 23 factors. *See* Docket No. 36. *Despite the lack of any supporting discovery*, Jackson Hewitt argues, *inter alia*, that plaintiff cannot satisfy the Rule 23 requirements of commonality, typicality, and predominance because the representations made to the putative class members will vary. *Id.* Again, no discovery regarding this issue has been taken.
 - *After plaintiff’s class certification motion was filed*, Jackson Hewitt and CCTSI filed a motion to dismiss. *See* Docket Nos. 18 & 20.
 - Jackson Hewitt now requests that an order be entered, compelling plaintiff to cease all discovery activities until the pending motions to dismiss are decided. *See* Docket No. 46.
 - Plaintiff’s class certification motion and defendants’ motions to dismiss are set for oral argument on December 3, 2008, at 10:00 A.M. *See* Docket No. 41.
 - Jackson Hewitt’s stay motion is set for oral argument on December 10, 2008, at 11:00 A.M. *See* Docket No. 48.

III. LAW AND ARGUMENT SUMMARY

Jackson Hewitt is trying to “hide the ball.”

As Jackson Hewitt is well aware, plaintiff opposes the Court ruling on 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).

Even though defendants have already commenced discovery; CCTSI argues plaintiff's class certification motion should be denied because more discovery is needed; and discovery is needed to respond to Jackson Hewitt's opposition to plaintiff's class certification motion, Jackson Hewitt asks the Court to stay discovery and halt plaintiff's efforts to investigate defendants' wrongdoing. The Court should deny Jackson Hewitt's motion and permit discovery to proceed. If Jackson Hewitt contends that plaintiff's discovery is overbroad, then that objection should be raised in a separate motion.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Jackson Hewitt's stay motion.

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 1st day of December 2008.

/s/ Bryan C. Shartle

Bryan C. Shartle

Attorneys for Plaintiff and the Class Members,

Vicki L. Pinero