

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA**

VICKI L. PINERO, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

JACKSON HEWITT TAX SERVICE  
INC.; JACKSON HEWITT INC.; and,  
CRESCENT CITY TAX SERVICE, INC.  
d/b/a JACKSON HEWITT TAX  
SERVICE,

Defendants.

CASE NO.: 08-3535

SECTION R

JUDGE  
SARAH VANCE

MAGISTRATE JUDGE  
DANIEL E. KNOWLES

**MEMORANDUM IN SUPPORT OF DEFENDANT JACKSON HEWITT TAX  
SERVICE, INC. AND JACKSON HEWITT INC.'S MOTION TO STAY DISCOVERY**

Defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (collectively “Jackson Hewitt”) hereby submit this memorandum in support of their Motion to Stay Discovery (“Motion”) pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

**I. PRELIMINARY STATEMENT**

Despite the rules and precedent of this Court, Plaintiff has served a veritable mountain of discovery demands,<sup>1</sup> as to both the Defendants and third-parties, even while a dispositive motion to dismiss is pending and before it adequately pleads its claims under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. The Court has already dismissed most of Plaintiff’s claims, making many of Plaintiff’s discovery demands moot. Further, Plaintiff’s Second Amended Complaint still fails to adequately plead her fraud and LUTPA claims under Rule 9(b) and fundamentally alters her original invasion of privacy claim to a degree that fails to state a

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<sup>1</sup> Jackson Hewitt reserves all rights to object to, or seek a protective order in regard to, Plaintiff’s discovery demands on other grounds.

cause of action under Rule 12(b)(6). Jackson Hewitt has filed a Motion to dismiss Plaintiff's Second Amended Complaint, which if granted, would make Plaintiff's discovery demands completely moot. The Court should stay discovery pending a resolution of that motion or until the Second Amended Complaint is amended, so that Jackson Hewitt can be on notice of what claims, if any, are being alleged against it, and thus what discovery is relevant.<sup>2</sup> Discovery based on a complaint with such deficiencies is a futile exercise.

## II. BACKGROUND

Jackson Hewitt filed its first Motion to Dismiss on August 4, 2008, and co-defendant Crescent City Tax Service, Inc. ("CCTS") filed its own Motion to Dismiss on August 11, 2008. On November 18, 2008, without conferring with the Defendants pursuant to Rule 26(f), Plaintiff served Jackson Hewitt with her various demands for the production of documents, interrogatories, and deposition notices. *See* Letter of Bryan Shartle dated November 18, 2008, attached hereto as Exhibit A. For reasons similar to those raised in this motion, Jackson Hewitt moved to stay discovery pending the resolution of the Defendants original motions to dismiss. *See* Motion to Stay Discovery, Nov. 24, 2008, Docket Entry No. 46. However, after the parties' counsel reached an agreement to stay discovery until thirty days after the resolution of dispositive motions, Jackson Hewitt withdrew the motion to stay from the Court's calendar. *See* Order Canceling Oral Hearing and Noting that Defendant's Motion to Stay is Withdrawn Without Prejudice to Reurge Same Pursuant to the Agreement of the Parties, Dec. 09, 2008, Docket Entry No. 53.

The Court issued an Order on January 7, 2009, ruling on Defendants' motions to dismiss

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<sup>2</sup> Defendant Jackson Hewitt reserves its right to object to Plaintiff further amending the complaint in this action.

and Plaintiff's motion for class certification. The Order denied class certification as premature and dismissed claims based on negligence, breach of contract, violations of 26 U.S.C. § 6103, violations of the Louisiana Database Security Breach Notification Law, fraudulent inducement and violations of the Louisiana Unfair Trade Practices Act ("LUTPA"). The only claim to survive the motions to dismiss was the invasion of privacy count, although the Court gave Plaintiff leave to amend her fraudulent inducement and LUTPA claims to comply with Rule 9(b).

On January 9, 2009 before filing a Second Amended Complaint, Plaintiff's counsel contacted Defendants to reiterate its discovery demands. *See* Email from David Israel, dated January 9, 2009, attached hereto as Exhibit B. According to Plaintiff, discovery responses were due as soon as February 8, 2009, despite Plaintiff having not yet filed an amended complaint or serving amended discovery requests in light of the dismissed claims.

Plaintiff filed her Second Amended Complaint on January 27, 2009, just over one week before discovery responses were allegedly due. The Second Amended Complaint still fails to adequately plead its fraud and LUPTA claims with particularity. Furthermore, Plaintiff fundamentally altered her invasion of privacy claim and thus the Second Amended Complaint also fails to sufficiently state a cause of action under this intentional tort.

### **III. DISCOVERY SHOULD BE STAYED PENDING A RULING ON THE MOTION TO DISMISS.**

It is well established that, in cases where there is a dispositive motion to dismiss pending, it is appropriate for discovery to be stayed pending resolution of that Motion. *See, e.g., Petrus v. Bowen*, 833 F.2d 581, 582 (5th Cir. 1987) (affirming a decision by a trial court to exercise its "inherent power to stay discovery until preliminary questions that may dispose of the case are determined"); *Dresser v. MEBA Med. & Benefits Plan*, No. 08-2662, 2008 U.S. Dist. LEXIS

55356 at \*6 (E.D. La. July 10, 2008) (Knowles, J.); *O'Dwyer v. U.S.*, No. 06-10811, 2007 U.S. Dist. LEXIS 44341 at \*4 (E.D. La. June 19, 2007) (Knowles, J.); *see also* Fed. R. Civ. P. 26(c)(1).<sup>3</sup>

As this Court previously has held:

In balancing the harm produced by such a temporary stay at the outset of this case (which is nil) against the *possibility* that the motion to dismiss will be granted and entirely eliminate the need for such discovery, this Court has determined that a temporary stay is appropriate.

*Dresser, supra*, at \*6 (emphasis in original).

The Motion to Dismiss Plaintiff's Second Amended Complaint, which was filed with the Court today, February 9, 2009, is dispositive as to each and every Count in the Plaintiff's Complaint. This motion addresses fundamental infirmities in the Plaintiff's claim, including Plaintiff's failure to plead its claim for fraud with particularity as required under Rule 9(b), and Plaintiff's failure to allege any intentional conduct for her fraud, LUTPA, or invasion of privacy claims. The Motion to Dismiss will obviate any need for discovery. Plaintiff cannot argue that she requires discovery to oppose the pending Motion to Dismiss, as the motion involves issues of law, and accordingly, there will be no prejudice to the Plaintiff from a stay.

In contrast, allowing discovery to go forward would unfairly prejudice Jackson Hewitt. Responding to extensive and burdensome discovery requests will cause Jackson Hewitt to incur significant cost and expense, and if the Court grants the Motion to Dismiss, those expenditures will have been for naught. Similarly, in light of Plaintiff's vague and conclusory allegations with respect to her fraud, LUTPA, and invasion of privacy claims, Jackson Hewitt would face great difficulty crafting responses to Plaintiff's discovery requests in the face of such unclear

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<sup>3</sup> All unpublished opinions cited herein are attached hereto, *in globo*, as Exhibit C.

allegations regarding the precise conduct allegedly committed by Jackson Hewitt, and upon which Plaintiff bases her allegations against Jackson Hewitt.

Furthermore, and in conflict with this Court's prior ruling, Plaintiff's discovery requests are not limited to matters relating to class certification, and will thus cause further unnecessary cost and expense at this time. In the Court's Order denying class certification, Judge Vance ordered the parties "to present a schedule for refiling their motion for class certification which incorporates a period for discovery on the class issues," Order at 29. Plaintiff has yet to do so and is in violation of the Court's order by attempting to elicit discovery on the merits of the claims. Judicial efficiency and the balance of the equities both dictate that the Court stay discovery pending resolution of the pending Rule 12(b)(6) motion.<sup>4</sup>

#### **IV. CONCLUSION**

The pending motion to dismiss is based on threshold issues, which could render all discovery moot. Accordingly, the Court should issue a stay of discovery pending resolution of the motion.

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<sup>4</sup> If the Court is disinclined to stay discovery pending the ruling on the Motion to Dismiss, we respectfully request that the Court issue a finite stay pending a scheduling conference before this Court, such that a schedule which properly bifurcates discovery between class and merits issues could be agreed upon. *See, e.g.,* Fed. R. Civ. P. 23, Advisory Committee Notes for 2003 Amendments: Subdivision (c). This is in line with the Court's ruling that discovery should address issues of class certification prior to the merits of Plaintiff's complaint. *See* Order at 29.

Respectfully submitted,

Dated: February 9, 2009

/s/Veronica D. Gray

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