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 OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS JACKSON HEWITT TAX SERVICE INC.'S AND JACKSON HEWITT INC.'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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[1] All unpublished opinions cited herein are attached hereto, *in globo*, as Exhibit A.

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Defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (collectively "Jackson Hewitt") bring this renewed motion to dismiss the Second Amended Complaint of Plaintiff Vicki Pinero ("Plaintiff") pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), or in the alternative to strike class allegations pursuant to Federal Rules of Civil Procedure 12(f) and 23(d)(1). For the reasons set forth below, Jackson Hewitt's motion should be granted.

PRELIMINARY STATEMENT

Last month, this Court dismissed all but one of the seven counts in Plaintiff's First Amended Complaint, but granted Plaintiff leave to amend as to two counts, fraudulent inducement and violations of the Louisiana unfair trade practice statute. *See* Order and Reasons, Jan. 7, 2009, Docket Entry No. 54 ("Order").[2] Plaintiff's Second Amended Complaint fails to cure the pleading deficiencies this Court identified in its January 7, 2009 ruling, and instead her fraudulent misrepresentation claims rely on vague statements, conclusory allegations, and "group pleading," all in contradiction of Rule 9(b) and the law of the Fifth Circuit. Moreover, by withdrawing allegations of fraudulent intent and conduct, leaving only allegations of negligence, Plaintiff has fatally undermined the one claim that survived this Court's prior ruling – the invasion of privacy claim. As set forth below, Plaintiff's Second Amended Complaint should be dismissed in its entirety.

BACKGROUND

Plaintiff filed her original complaint on May 22, 2008, pleading five causes of action[3] against Jackson Hewitt and Crescent City Tax Service, Inc. ("CCTS") and seeking certification as a class action. On July 15, 2008, Plaintiff filed her First Amended Complaint, pleading two new counts – fraud and invasion of privacy. On July 22, 2008, just one week later, Plaintiff

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[2] The Order has also been assigned both Westlaw and LEXIS case numbers (2009 WL 43098, and 2009 U.S. Dist. LEXIS 660).

[3] While Plaintiff's original complaint purports to plead seven causes of action, two of these – declaratory judgment and injunctive relief – are more appropriately styled as requests for relief than as causes of action, as neither one alleges a basis for a finding of liability but instead requests a form of relief.

moved for class certification. On August 4, 2008, Jackson Hewitt moved to dismiss Plaintiff's First Amended Complaint. Oral Argument on both motions took place on December 3, 2008. On January 7, 2009, this Court dismissed six of the seven causes of action in Plaintiff's First Amended Complaint and dismissed Plaintiff's motion for class certification as premature.[4]

Specifically, this Court dismissed Plaintiff's 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 motion to dismiss was the invasion of privacy count,[5] although the Court gave Plaintiff leave to amend her fraudulent inducement and LUTPA claims to comply with Rule 9(b). Plaintiff filed her Second Amended Complaint on January 27, 2009.

In her Second Amended Complaint, Plaintiff withdrew her earlier allegations that Jackson Hewitt acted intentionally to disclose the documents, and instead cast her allegations in the form of negligence. *Compare* First Amended Complaint at ¶ 3 ("Defendants have a practice of throwing … documents [containing customer information in public dumpsters") *with* Second Amended Complaint at ¶ 3 ("Defendants do not maintain proper confidentiality and security of the highly confidential information and documents entrusted to them") (emphasis omitted). Plaintiff also added new conclusory allegations, which grouped together all defendants collectively. *See* Second Amended Complaint at ¶¶ 25-29 ("*Defendants*' confidentiality representations were made to fraudulently induce customers . . . *Defendants* have a corporate culture of disregard . . . *Defendants* do not store confidential information and documents in safe or secured locales") (emphasis added).

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[4] Contemporaneously with this motion to dismiss, Jackson Hewitt has moved to stay discovery on the grounds that Plaintiff has failed to comply with this Court's directives and that discovery should therefore be stayed pending a ruling on this motion.

[5] However, the Court expressed some skepticism as to whether such a claim would be successful under Louisiana law. *See* Order at 24 ("Whether additional factual development will support defendants' contention that under the circumstances the information was not made public remains to be seen").

But despite the myriad of claims and causes of action, Plaintiff's various assertions come down to one core allegation: that a former employee of CCTS improperly disposed of Plaintiff's 2005 tax returns at some point in 2008. *See* Second Amended Complaint at ¶¶ 32-36. As set forth below, Plaintiff's Second Amended Complaint should be dismissed in its entirety.

ARGUMENT

I. LEGAL STANDARD

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted) *see also Samford v. Staples*, 249 F. App'x 1001, 1003-4 (5th Cir. 2007); *Henry v. Allstate Ins. Co.*, No. 07-1738, 2007 WL 2287817 at *8 (E.D. La., Aug. 8, 2007). Though the Court must accept all factual allegations in the complaint as true, the Court cannot assume that the plaintiff can prove facts that she has not alleged or that Defendants have injured Plaintiff in ways that have not been alleged. *See Associated Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Plaintiff's Second Amended Complaint also must plead enough facts to state a claim to relief that is plausible on its face. *Twombly*, 127 S. Ct. at 1966. Thus, a Rule 12(b)(6) motion to dismiss should be granted when plaintiff fails to "nudge[] [her] claims across the line from conceivable to plausible." *Id.* at 1974.

Furthermore, as this Court already found, Plaintiff's claims sounding in fraud must be plead with particularity, as required under Federal Rule of Civil Procedure 9(b). Order at 17; *see also U.S. ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 385 (5th Cir. 2003); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not"); *Vinewood Capital, L.L.C. v. Dar al-Maal al-Islami Trust*, No. 4:06-CV-316-Y, 2007 WL 2791876 (N.D. Tex. Sept. 26, 2007) (holding that a mere failure to fulfill a promise is not

sufficient to support an allegation of fraud under Rule 9(b)). This requirement applies not only to the claim for fraudulent inducement, but to the LUTPA claim, which is based on an allegedly fraudulent misrepresentation.[6] Order at 22.

As set forth below, neither of Plaintiff's two fraud-base claims, nor her invasion of privacy claim, satisfy either the *Twombly* rule or the Rule 9(b) requirements, and therefore her Second Amended Complaint must be dismissed.

II. PLAINTIFF'S FRAUD AND LUTPA CLAIMS SHOULD BE DISMISSED

Despite this Court having granted Plaintiff leave to replead her fraud and LUTPA claims with the particularity required by Rule 9(b), Plaintiff's Second Amended Complaint similarly fails to meet the requirements of Rule 9(b), and therefore should be dismissed.

First, attempting to sidestep the strictures of Rule 9(b), and contrary to this Court's directive, Plaintiff continues to fail to identify specifically who made the alleged misrepresentations, and how the alleged misrepresentations were fraudulent. Indeed, her fraud allegations attempt to blur the lines between the actions of Jackson Hewitt and those of CCTS, the local independent franchisee whose former employee – according to Plaintiff's own allegations – allegedly disposed of Plaintiff's documents improperly. Indeed, Plaintiff's fraud allegations repeatedly refer to "Defendants" collectively, even where the use of that collective term is not plausible and indeed is contradicted by Plaintiff's own allegations in her Second Amended Complaint. The Second Amended Complaint is replete with this type of "group pleading" which attempts to blur the lines between defendants. *See, e.g.*, Second Amended Complaint at ¶ 27 ("Defendants do not store confidential customer information and documents in

[6] As is discussed in further detail below, the LUTPA claim cannot be certified as a collective action by the terms of the statute itself, and the fraudulent inducement and invasion of privacy claims cannot be certified as a matter of law due to the individualized issues which would predominate.

safe or secured locales. Defendants' buildings, warehouses, and offices are not properly monitored by alarm or otherwise") (emphasis omitted) .

As the Fifth Circuit has held repeatedly, plaintiffs resorting to such "group pleading" violate Rule 9(b). *See, e.g., Southland Sec. Corp. v. INSpire Ins. Solutions. Inc.*, 365 F.3d 353, 365 (5th Cir. 2004) (rejecting "group pleading" and holding that "we do not construe allegations contained in the Complaint against the 'defendants' as a group as properly imputable to any particular individual defendant unless the connection between the individual defendant and the allegedly fraudulent statement is specifically pleaded").

As noted by other courts in this district and this circuit, "[o]ne of the purposes of Rule 9(b) is to 'guard[] against guilt by association,'" and accordingly lumping together all parties under the term "Defendants" is not permissible for claims sounding in fraud. *U.S. v. The La. Clinic*, No. 99-1767, 2002 WL 1066745 at *2 (E.D. La. May 28, 2002) (citing *In re Uncarco Sec. Litig.*, 148 F.R.D. 561, 569 (N.D. Tex. 1993)); *see also, e.g., Unimobil 84 v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986) (holding that "[Plaintiff's] general allegations, which do not state with particularity what representations each defendant made, do not meet [the Rule 9(b)] requirement.'); *In re Alamosa Holdings, Inc.*, 382 F. Supp. 2d 832, 857 (N.D. Tex. 2005) (holding that "[a]ny allegations in the complaint made against "Defendants" (plural or group) do not meet the requirements of pleading allegations of fraud"); *Pearlstein v. Justice Mortgage Investors*, No. CA-3-76-1476-D, 1978 WL 1143 at *6 (N.D. Tex. Oct. 17, 1978) (holding that, under Rule 9(b), "the pleading should designate the specific defendants who are responsible for each individual document or the nature of their participation in the alleged scheme").

The particulars of the fraud claims are impossible to discern from a reading of the Plaintiff's Second Amended Complaint, including which representations it is contending were made by which defendants, whether those representations were oral or in writing, and at what manner Plaintiff contends the circumstances demonstrate an intent to defraud the Plaintiff. Under Rule 9(b), such a failure mandates dismissal.

But even putting aside the "group pleading" issue, Plaintiff has also failed to comply with the Rule 9(b) requirement of explaining "how" the statements allegedly made were fraudulent. As the Court noted in its prior order, "the Court may not infer that defendants entered the promise without any intention of fulfilling it, and plaintiff's complaint offers no other explanation as to why the statements regarding the privacy policy were fraudulent." Order at 20; *see also U.S. ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d at 386 (holding that intent to defraud cannot be imputed through inference just because a promise made is subsequently not performed).

While Plaintiff's Second Amended Complaint somewhat embellishes the content of the alleged misrepresentations (Second Amended Complaint ¶¶ 25-29), albeit on an impermissible group pleading basis (see above), contrary to this Court's Order Plaintiff still fails to allege how an isolated failure to comply with those representations, two years later in time, constitutes a fraud. *See* Order at 20 (noting the two year passage of time and stating that "the Court may not infer that defendants entered the promise without any intention of fulfilling it"). Louisiana courts have consistently held that "[f]raud cannot be predicated on unfulfilled promises or statements as to future events." *Johnson v. Unopened Succession of Alfred Covington*, 969 So.2d 733, 742 (La. Ct. App. 2007) (rejecting a rescission claim based on fraudulent inducement); *see also Bass v. Coupel*, 671 So.2d 344, 351 (La. Ct. App. 1995) (rejecting a fraudulent misrepresentation claim and holding that "[a]t best these allegations only go to show that [defendant] promised to perform acts in the future").

The Second Amended Complaint still sounds in a failure to perform a future event – the alleged promise to keep Plaintiff's materials free from disclosure at any point in the future. Rather than remedy this failing, Plaintiff's amendments of her Second Amended Complaint have actually made her fraudulent inducement claim less viable. Rather than alleging, as the prior iteration of the First Amended Complaint did, that Defendants "intentionally" disposed of Plaintiff's tax returns, the Second Amended Complaint now sounds in terms like "disregard", "not proper[ly] monitor[ing]", and inadequate supervision of employees. *Compare* First

Amended Complaint at ¶ 3 ("Defendants have a practice of throwing such documents in public dumpsters") with Second Amended Complaint at ¶¶ 25-29. These allegations, describing an alleged failure by generic "Defendants" to take certain steps Plaintiff contends are reasonable and necessary, amount to nothing more than a negligence claim, not a claim for fraud. "Fraud cannot be imputed, and simple broken promises alone are not sufficient." *Bass v. Coupel*, 671 So.2d at 351 n. 12 (citing *Silver v. Nelson*, 610 F. Supp. 505, 518 (E.D. La. 1985).

This is not enough to satisfy either Rule 9(b) or the "plausibility" standard laid out in *Twombly*. Read in conjunction, *Twombly* and Rule 9(b) require not only that the plaintiff provide particularity as to the "who, what, when, where, how and why" of its fraud claims, but that those facts be plausible. To contend, as Plaintiff apparently does, that Jackson Hewitt specifically intended, in 2006, to breach every single one of its privacy safeguards, two years down the road, and to cause Plaintiff's tax returns to be improperly disposed of, is simply not plausible and accordingly cannot satisfy this standard. Such allegations, regarding events which occurred years after the contract was entered into, cannot form the basis of a claim for fraud.

III. PLAINTIFF'S AMENDMENT OF HER COMPLAINT FATALLY UNDERMINES THE INVASION OF PRIVACY CLAIM.

These Amendments have similarly undermined Plaintiff's only claim to survive the Court's original order of dismissal – invasion of privacy. As noted by this Court, invasion of privacy is an intentional tort. Order at 23. While invasion of privacy claims do not require *malice* towards the Plaintiff, they nonetheless require that the Plaintiff *intended* for private facts to be made public. *See id.*; *Leger v. Spurlock*, 589 So.2d 40, 43 (La. Ct. App. 1991). However, Plaintiff's amendment of her complaint withdrew her allegations of intentional conduct, and her Second Amended Complaint speaks exclusively in terms of recklessness or negligence – the failure to *prevent* material from being accessed by the public, rather than an intent to publicize. Accordingly, the invasion of privacy claim, as currently pled by Plaintiff, is insufficient as a matter of law.

Plaintiff, by her own allegations, contends only that "Defendants" failed to implement reasonable safeguards or to properly supervise employees – in short, committed *negligence*. *See* Second Amended Complaint ¶¶ 25-29. However, this is insufficient as a matter of law to state a claim for invasion of privacy. Under Louisiana law, such a claim requires a knowing and conscious decision by the defendant to share private facts with some portion of the public. *See Leger v. Spurlock*, 589 So.2d at 41 (involving a doctor voluntarily calling the district attorney to give information about his patient) (cited in Order at 23); *see generally Lamartiniere v. Allstate Ins. Co.*, 597 So.2d 1158, 1159 (5th Cir. 1992) (involving an invasion of privacy claim based on allegation that defendant looked over a wall into a storage facility rented by plaintiffs) (*claim dismissed on other grounds*); *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386 (La. 1979) (involving allegations of intentional publication of pictures of plaintiff's home with caption regarding its poor condition) (*claim dismissed on other grounds*).

Because invasion of privacy is an intentional tort under Louisiana Law, the mere negligent failure to protect information, as Plaintiff alleges in her Second Amended Complaint, cannot survive and should be dismissed as a matter of law.

IV. IN THE ALTERNATIVE, THE COURT SHOULD STRIKE THE CLASS ALLEGATIONS UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(F) AND 23(D)(1).

As established above, Plaintiff's claims should be dismissed in their entirety. However, in the alternative, Jackson Hewitt renews its request that the class claims be dismissed on the pleadings under Federal Rules of Civil Procedure 12(f) and 23(d)(1). Where it is clear on the face of the complaint that class treatment would be improper, a court may properly strike class allegations at the outset of the litigation. *See Gen. Tel. Co. of the SW. v. Falcon*, 457 U.S. 147, 160 (1982). "A court may strike class allegations under [Rule 23(d)(1)] where a complaint fails to plead the minimum *facts* necessary to establish the existence of a class satisfying Rule 23's

mandate." *Henry v. Allstate Ins. Co. of Am.*, No. 07-01738, at *2 (E.D. La., Aug. 8, 2007), 2007 WL 2287817, (emphasis added) (citing *Terrebonne v. Allstate Ins. Co.*, 251 F.R.D. 208, 210 (E.D. La. July 31, 2007).

Furthermore, class treatment is improper where individual issues will predominate. *Keyes v. Guardian Life Ins. Co.*, 194 F.R.D. 253, 256-57 (S.D. Miss. 2000); *See* Order at 28 (stating that class certification requires "a finding that questions of law or fact common to class members predominate over questions affecting only individual members and that a class action is the best way to adjudicate the controversy"). As a matter of law, Plaintiff's remaining LUTPA, fraudulent inducement, and invasion or privacy claims cannot be the subject of class certification.

First, as a matter of law, Plaintiff's fraud-based claims cannot be certified. LUTPA claims, by the terms of the statute, cannot be brought on a collective basis. La. Rev. Stat. Ann. § 51:1409 ("Any person who suffers [a loss under LUTPA] *may bring an action individually but not in a representative capacity* to recover actual damages") (emphasis added). Nor are fraudulent inducement claims like those Plaintiff alleges here amenable to class treatment. *See e.g., Banks v. New York Life Ins. Co.*, 737 So.2d 1275, 1281-82 (La. 1999); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996).

Second, Plaintiff's invasion of privacy claim is also incapable of certification as a matter of law. Under Louisiana law, the nature of the information allegedly disclosed, whether such information was in fact "private," and whether the alleged disclosure "seriously interferes" with each class members' privacy interests will require a highly individualized inquiry and analysis. The degree to which any individual's information was given "publicity" would be similarly individualized, and not amenable to class treatment. Most importantly, any inquiry as to damages would require an individualized analysis.

Because individual issues would obviously predominate as a matter of law, at a minimum Plaintiff has failed to meet the pleading requirements of Fed. R. Civ. P. 23 and the class allegations should be struck from the pleadings.

CONCLUSION

All of Plaintiff's causes of action fail as a matter of law. For the foregoing reasons, Defendant respectfully requests that this Court dismiss Plaintiff's Second Amended Complaint with prejudice.

Dated: February 9, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th of February, 2009, a copy of the above and foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system and U.S. Mail to all counsel of record.

/s/ Veronica D. Gray