

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

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

Plaintiff, Vicki L. Pinero (“Plaintiff”), submits this memorandum in support of her Motion for Leave to File Third 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 (jointly referred to as “Defendants”). Specifically, Plaintiff seeks leave to amend her complaint to assert a new claim and related facts for Defendants’

violations of La. Rev. Stat. § 9:3572.1, *et seq.* (the “LA Loan Broker Statute”). Defendants oppose Plaintiff’s leave motion. The Court should grant Plaintiff’s leave request.

II. PROCEDURAL HISTORY

Although there has been some motion practice in this case, the case still remains in its infancy. Indeed, Defendants have not even answered the lawsuit.

A. Original and First Amended Complaint

On May 22, 2008, Plaintiff filed her original Class Action Complaint. *See* Docket No. 1. On July 15, 2008, Plaintiff filed her First Amended Class Action Complaint. *See* Docket No. 9. In her amended complaint, Plaintiff asserted 9 Counts. *Id.* Specifically, Plaintiff alleged: unauthorized disclosure of tax returns per 26 U.S.C. §§ 6103 and 7431 (Count 1); fraud (Count 2); breach of contract (Count 3); negligence (Count 4); invasion of privacy (Count 5); violation of the Louisiana Database Security Breach Notification Law (“LA Security Breach Statute”), La. Rev. Stat. § 51:3071, *et seq.* (Count 6); declaratory judgment (Count 7); injunction (Count 8); and, violation of the Louisiana Unfair Trade Practices and Consumer Protection Law (“LA Unfair Trade Practices Statute”), La. Rev. Stat. § 51:1401, *et seq.* (Count 9). *Id.*

B. Defendants’ Motions to Dismiss and Court’s January 7, 2009 Order

On August 4, 2008, JHTSI and JHI filed a motion to dismiss. *See* Docket No. 20.

On January 7, 2009, the Court granted and denied in part JHTSI and JHI’s motion to dismiss. *See* Docket No. 54. The Court:

- Dismissed Count 1 for unauthorized disclosure of tax returns per 26 U.S.C. §§

6103 and 7431. *Id.* at pp. 25-26.¹

- Dismissed Count 3 for breach of contract. *Id.* at pp. 12-16.
- Dismissed Count 4 for negligence. *Id.* at pp. 8-9.
- Dismissed Count 6 for violation of the LA Security Breach Statute. *Id.* at pp. 10-11.

The Court also granted Plaintiff leave to amend her complaint with respect to Count 2 for fraudulent inducement under La. Civ. Code art. 1953 and Count 9 for violation of the LA Unfair Trade Practices Statute to allege “how” or “why” Defendants’ statements were misleading and to plead fraud with “particularity” per Fed. R. Civ. P. 9(b). *Id.* at pp. 19-22.

The Court denied JHTSI and JHI’s motion to dismiss Count 5 for invasion of privacy; Count 7 for declaratory judgment; and, Count 8 for injunction. *Id.*

In compliance with the Court’s January 7, 2009 order, on January 27, 2009, Plaintiff filed her Second Amended Class Action Complaint. *See* Docket No. 57.

C. JHTSI and JHI’s Pending Motion to Stay and Motion to Dismiss

On February 9, 2009, JHTSI and JHI filed a Motion to Stay Discovery. *See* Docket No. 58. That same day JHTSI and JHI filed its second motion to dismiss, now seeking to dismiss Plaintiff’s Second Amended Class Action Complaint. *See* Docket No. 59.

The pending motions are set for hearing on April 1, 2009.

¹ On February 10, 2009, Plaintiff filed a Motion for Reconsideration, seeking reconsideration of the Court’s dismissal of this claim. *See* Docket No. 66. The motion is still pending.

Again, this case is still in its infancy. No written discovery has taken place. No depositions have been set. No scheduling order has been entered. The Court should grant Plaintiff leave to file her Third Amended Class Action Complaint.

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. Plaintiff should be allowed to amend her complaint to assert a new claim and related facts for Defendants' violations of the LA Loan Broker Statute. The proposed new claim, set forth in proposed Count 10, was recently identified and the amendment will not cause any significant delay in the prosecution of this matter.

The facts and relevant law regarding Plaintiff's proposed new claim are as follows:

1. **Defendants' Loan Brokering Activity.** In addition to providing tax preparation services, Defendants have brokered and continue to broker various loan products, including "Refund Anticipation Loans" or "RALs"; "Money Now Loans"; "Holiday" or "HELP" Loans; "Flex Loans"; and, "iPower" Loans. These loan products have been the source of much debate because of the exorbitant fees associated with the loans and the fact that they target low-income Americans.

2. **RALs.** A RAL is generally a loan made by a third party financial institution to a customer and secured by a customer's anticipated federal tax refund.

3. In its 2006 10-K, JHTSI defined a RAL as follows:

Refund Anticipation Loans (“RALs”). A RAL is a loan made by a third party financial institution to a customer and secured by a customer’s anticipated federal tax refund. The loan amount, less applicable fees and charges, including tax preparation fees, is generally disbursed to the customer within approximately one day from the time the tax return is electronically filed with the IRS.

4. **Money Now Loans.** There are 2 types of Money Now Loans, including the Pre-File Money Now Loan and Standard Money Now Loan. The Pre-File Money Now Loan (sometimes referred to as a “Pay Stub Loan”) is generally an unsecured loan made by a third party financial institution based on, among other things, the customer’s anticipated federal income tax refund, with proceeds of such loan available on the same day the loan is approved by the financial institution, offered in the month of January based upon a pay stub and without a final tax return being prepared and filed with the IRS at the time.

5. In contrast, the Standard Money Now Loan is generally an unsecured loan made by a third party financial institution based on, among other things, the customer’s anticipated federal income tax refund, with proceeds of such loan available on the same day the loan is approved by the financial institution, with a final tax return being prepared and filed with the IRS in the same office visit as the customer applies for such a loan.

6. In its 2006 “Program Agreement” with one of its “lending partners,” JHI defined a Money Now Loan as follows:

1.10 “Money Now Loan” shall mean a Money Now Loan (pf) and Money Now Loan (std) collectively.

1.11 “Money Now Loan (pf)” shall mean a loan by the Originator to an Applicant based on, among other things, the Applicant’s anticipated Federal income tax refund, with proceeds of such loan available on the same day the

loan is approved by the Originator, offered in the month of January and without a final tax return being prepared and filed with the IRS at the time.

1.12 “Money Now Loan (std)” shall mean a loan by the Originator to an Applicant based on, among other things, the Applicant’s anticipated Federal income tax refund, with proceeds of such loan available on the same day the loan is approved by the Originator, with a final tax return being prepared and filed with the IRS in the same office visit as the Applicant applies for such a loan, or if the Applicant applies prior to the first day of electronic filing, the final tax return being filed on the first day of electronic filing.

7. **Holiday or HELP Loans.** A HELP loan is generally an unsecured loan made by a third party financial institution based on, among other things, the customer’s anticipated federal income tax refund, with proceeds of such loan available on the same day the loan is approved by the financial institution, offered from November through December based upon a pay stub and without a final tax return being prepared and filed with the IRS at the time.

8. In their training materials, Defendants define a HELP loan as follows:

HELP® Loan

The Holiday Express Loan Program® is offered for a limited time in November and December. It provides qualified individuals with a loan of up to \$500 with no out-of-pocket expenses*. It’s available to pre-approved, prior-year customers as well as to non-customers who come in to apply for the loan.

Customers who choose to come back to Jackson Hewitt Tax Service at tax time and who qualify for a RAL or ACR can use those proceeds to pay off their HELP loan.

**Subject to qualification. Maximum loan amount is \$575 for pre-approved, prior-year customers; \$375 for all other applicants. All fees deducted from loan proceeds. Purchase of tax preparation is not required.*

9. **Flex Loans.** Upon information and belief, a Flex Loan is an unsecured

short term loan made by a third party financial institution to assist a customer in paying his or her taxes.

10. In their training materials, Defendants describe a Flex Loan as follows:

Flex Loan

- The Flex Loan program allows customers with balances due on their federal tax returns to receive a loan from the bank. This loan will allow the customer to pay off the outstanding balances and any associated preparation fees.
- The Flex Loan program begins on February 7 and will end on April 15.
- Customers are required to sign the Flex Loan application at the time the product is requested (prior to transmission to the bank). The applications will be pre-printed and provided to the processing centers for distribution to the individual offices. As a back up, these applications will also print from FOP. However it is imperative that the pre-printed form be used.
- Results of Flex Loan applications will be available in ProFiler software in three minutes or less.
- The Flex Loan program will include a counter offer process. For example, a customer has a balance due of \$1,000. The request is processed by our banking partner who determines the customer is eligible for a \$500 loan. The customer will have the option to either accept this revised amount or decline the loan. If the customer accepts the counter offer, they are still obligated for the federal balance not covered by the Flex Loan. The benefit of this change is rather than receiving a denial based on the original balance due amount and creating a poor customer service experience, the customer is approved for having at least a portion of their balance due covered by our loan product.
- The Flex Loan product will allow loans for the amount of the federal tax balance due plus associated fees up to \$7,750.
- The Flex Loan product will not be offered on any combination of federal tax balance due and associated fees exceeding \$7,750.
- The customer must have a minimum balance due of \$200. The minimum loan amount is \$300, which includes the balance due amount plus associated fees.
- Offers payment support for the Farmer and Fisherman deadline on March 1.
- Tax Prep Fees are included in the loan.
- Tax Prep Fees are paid to franchisee when the loan is approved (like RAL).
- Application is sent from within ProFiler (like Money Now.)

- Pre-printed Loan Agreements supplied by the bank. Back up agreements will print in FOP.
- Networked environment with an Internet connection is required.
- 90 days same as cash offering.
- Configurable

11. **iPower Loans**. Upon information and belief, an iPower Loan is an unsecured loan made by a third party financial institution based on, among other things, the customer's anticipated federal income tax refund, with proceeds of such loan available on a pre-paid debit card on the same day the loan is approved by the financial institution, offered from at least November to early January based upon a pay stub and without a final tax return being prepared and filed with the IRS at the time.

12. Defendants brokered Pre-File Money Now Loans and HELP Loans (sometimes jointly referred to as the "Pre-Season Loan Products") in at least 2005 and 2006.

13. On November 17, 2008, JHI entered into an agreement with another "lending partner" for Defendants to broker iPower Loans during the pre-season (*i.e.*, November through early January). The iPower Loan is simply a "repackaged" and "renamed" Pre-File Money Now Loan or HELP Loan and constitutes a Pre-Season Loan Product. The only meaningful difference between an iPower Loan obtained during the pre-season and a Pre-File Money Now Loan or HELP Loan is the consumer receiving a pre-season iPower Loan receives his loan proceeds on a pre-paid debit card, rather than by check.

14. **Facts**. On or about January 6, 2006, Plaintiff visited the Jackson Hewitt office located at 6601 Veterans Blvd., Metairie, LA 70003 and obtained a Pre-File

Money Now Loan.

15. Plaintiff and many others were presented a “Santa Barbara Bank & Trust (SBBT) Money Now Loan Application and Agreement” (the “Agreement”). In relevant part, the Agreement states:

Important Money Now Loan Information

Type of Loan: The Money Now Loan is a short-term loan offered to customers of Jackson Hewitt Tax Service.

Maximum Loan Amount and Finance Charge: Depending on your estimated federal income tax refund amount, the maximum loan amount you may qualify for is \$550, \$1200 or \$1900. The maximum loan amount includes a Bank Fee (finance charge) which is 3% of the total loan amount plus \$45. The Bank Fee, a \$50 pre-paid non-refundable portion of your 2006 Jackson Hewitt (JH) tax preparation fees and any fees related to your ipower CashCard or ipower Payroll Card (if applicable) will be deducted from your total loan amount before the balance of your loan is disbursed to you. A portion of the Bank Fee may be shared with Jackson Hewitt Inc. and/or the transmitter of this application.

Loan Approval Process: Money Now Loan applications will be evaluated through a credit-scoring model. A satisfactory credit history will be viewed favorably, but does not guarantee that the loan will be approved. A satisfactory credit history would include a minimum risk score from a credit report, no prior bankruptcies, liens, judgements, or charge-offs within the last 3 years, and no excessive 30, 60, or 90-day delinquencies on any loans or revolving charge accounts, etc. A Money Now Loan will be approved or denied within 24 hours after SBBT receives your loan application.

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Repayment: A Money Now Loan is due and payable in full on or before February 17, 2006. If your 2005 income tax return is prepared and filed by a Jackson Hewitt Tax Service office and if you apply for and are approved for an SBBT Accelerated Check Refund (“ACR”), Assisted Direct Deposit (“ADD”) or a Refund Anticipation Loan (“RAL”) and you are to receive the proceeds of your ACR, ADD or RAL prior to February 17, 2006, SBBT will deduct the outstanding balance of your Money Now Loan, if any, from your

refund or your RAL prior to disbursing any remaining refund or RAL proceeds to you.

16. The Agreement further provides:

DEFAULT: If my Loan is not paid in full by the due date, I promise to contact Lender on the due date at the address and phone number listed below and arrange to make monthly payments. If I fail to make a monthly payment, Lender will declare the entire outstanding principal balance immediately due and payable and Lender may notify a credit-reporting agency that I have failed to fulfill the terms of my credit obligation with Lender. The acceptance of partial or monthly payments from me by Lender does not preclude Lender's right to demand full and immediate payment of the outstanding Loan at any time including the right to offset any refund processed by the Lender on my behalf after the due date. To contact Lender, write to SBBT Money Now Loan, P.O. Box 1270, Solana Beach, CA 92075 or call Lender at 1-668-353-7228.

Id.

17. Plaintiff signed the Agreement and received a \$438 check, with her \$550 Pre-File Money Now Loan being due on February 17, 2006. ***None of the non-RAL loan products brokered by Defendants, including Plaintiff's Pre-File Money Now Loan, are set up to be paid directly by the IRS.***

18. **LA Loan Broker Statute.** Defendants are required to be licensed as loan brokers under the LA Loan Broker Statute when facilitating or brokering non-RAL loan products. Despite the LA Loan Broker Statute, and Defendants' knowledge of said statute, Defendants have brokered non-RAL loan products to Plaintiff and many others.

19. Pursuant to La. Rev. Stat. § 9:3572.12(D), Plaintiff and the class members have a private right of action against Defendants to recover all fees, interest, and other charges Defendants received related to the loans they improperly brokered, plus damages in the amount of twice the total fees Defendants received.

20. Under Louisiana law, Defendants are *not* required to be licensed as loan brokers, provided their “*only* brokering activity is facilitating refund anticipation loans.” La. Rev. Stat. § 9:3572.2(B)(9) (emphasis added). The LA Loan Broker Statute defines a “refund anticipation loan” as “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.” *Id.* (emphasis added).

21. Defendants are required to be licensed as loan brokers for facilitating at least the Pre-File Money Now Loans; Holiday or HELP Loans; Flex Loans; and, iPower Loans. None of these loans are “refund anticipation loans” under La. Rev. Stat. § 9:3572.2(B)(9) because none of the creditors providing these loans arrange to be repaid directly from the IRS from the anticipated proceeds of the customer’s income tax return. *Instead, all of these short-term loans are due on a certain date and are arranged to be repaid directly by the customer.*

22. Defendants are well aware of their obligation to be licensed as loan brokers for facilitating non-RAL loans. 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.” In its 2007 and 2008 10-Ks, JHTSI once again acknowledged that it may be subject to state loan broker statutes.

23. Defendants charge and receive various fees, interest, and charges for brokering Pre-File Money Now Loans, Holiday or HELP Loans, Flex Loans, iPower Loans, and other non-RAL loans subject to the LA Loan Broker Statute. As noted,

pursuant to La. Rev. Stat. § 9:3572.12(D), an unlicensed loan broker is subject to forfeiture of all fees, interest, and charges received, plus damages in the amount of twice the total fee received. Pursuant to her proposed Count 10, plaintiff, on behalf of herself and others similarly situated, seeks return of all fees, interest, and charges paid to Defendants as unlicensed brokers, plus damages in the amount of twice the total fees received.

24. **The Proposed Amendment Will Not Cause Any Prejudice To Defendants.** As noted, no scheduling order has been issued in this case. No discovery has taken place. Plaintiff recently identified the proposed claim and has timely sought to amend her complaint. The proposed amendment will not unduly delay the case. The Court should grant Plaintiff leave to file her proposed amended complaint.

IV. CONCLUSION

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

Respectfully Submitted,

/s/ Bryan C. Shartle

David Israel (LSBA No. 7174) (T.A.)

Bryan C. Shartle (LSBA No. 27640)

Justin H. Homes (LSBA No. 24460)

SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.P.

3850 N. Causeway Blvd.

Lakeway II, Suite 200

Metairie, Louisiana 70002

Telephone: (504) 828-3700

Facsimile: (504) 828-3737

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 26th day of February 2009.

/s/ Bryan C. Shartle
Bryan C. Shartle

Attorneys for Plaintiff,
Vicki L. Pinero