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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO * Docket 08-CV-3535-R
*
versus * New Orleans, Louisiana
*
JACKSON HEWITT TAX SERVICE, * December 3, 2008
INC., et al *
* * * * *

ORAL ARGUMENT BEFORE THE
HONORABLE SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Sessions Fishman Nathan & Israel
BY: BRYAN C. SHARTLE, ESQ.
JUSTIN H. HOMES, ESQ.
3850 N. Causeway Blvd., Suite 200
Metairie, Louisiana 70002

For Jackson Hewitt Tax Service, Inc. and
Jackson Hewitt, Inc.: Kelley Drye & Warren
BY: DONNA L. WILSON, ESQ.
ANDREW S. WEIN, ESQ.
3050 K Street, N.W., Suite 400
Washington, DC 20007

For Jackson Hewitt Tax Service, Inc. and
Jackson Hewitt, Inc.: Kean Miller
BY: GLENN M. FARNET, ESQ.
One American Place, 18th Floor
Post Office Box 3513
Baton Rouge, Louisiana 70821

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APPEARANCES:

For Crescent City Tax
Service, Inc.:

Blue Williams
BY: THOMAS G. BUCK, ESQ.
3421 N. Causeway Blvd., Suite 900
Metairie, Louisiana 70002

Official Court Reporter:

Toni Doyle Tusa, CCR, FCRR
500 Poydras Street, Room HB-406
New Orleans, Louisiana 70130
(504) 589-7778

Proceedings recorded by mechanical stenography, transcript
produced by computer.

PROCEEDINGS

(December 3, 2008)

THE DEPUTY CLERK: All rise.

Court is in session. Please be seated. First up on the Court's civil docket: Civil Action 08-3535, Pinero versus Jackson Hewitt. Counsel, please make your appearances for the record.

MR. SHARTLE: Bryan Shartle on behalf of the plaintiff, Vicki Pinero.

MR. HOMES: Justin Homes on behalf of the plaintiff.

THE COURT: Good morning.

MR. FARNET: Glenn Farnet on behalf of Jackson Hewitt, defendant.

MS. WILSON: Donna Wilson on behalf of defendant Jackson.

MR. WEIN: Andrew Wein on behalf of defendant Jackson.

MR. BUCK: Tom Buck on behalf of Crescent City Tax Service.

THE COURT: Good morning everyone. We are here on a motion to dismiss and class certification. Let's start with the motion to dismiss.

MR. SHARTLE: Your Honor, if I may, we have presented this argument in our briefs. We strenuously object to the Court hearing the motion to dismiss.

1 I'm sorry. We have briefed this ad nauseam in
2 our papers. We strenuously object to the Court hearing the
3 motion to dismiss now. We believe that it's very clear, under
4 Fifth Circuit law and even this Court's rulings, that it's
5 improper to rule on a motion to dismiss before ruling on the
6 motion for class certification.

7 **THE COURT:** Have you read the Federal Rules of Civil
8 Procedure lately on class certification?

9 **MR. SHARTLE:** Yes, Your Honor, and I know that there
10 are a few decisions out there where courts have ruled on
11 motions to dismiss before ruling on a motion for class
12 certification, but that is a disfavored procedure. Generally,
13 you want the --

14 **THE COURT:** The rule used to say that you had to do
15 it at the earliest possible time or some practical time. It
16 doesn't say that anymore. It was changed -- I know this -- to
17 permit courts to take up issues like motions to dismiss before
18 class certification so you can figure out what you're
19 certifying. I don't think that that argument is correct. I
20 hear you, but I don't think that that argument is correct, so
21 let's not spend a lot of time on that. Let's go to the motion
22 to dismiss.

23 **MR. SHARTLE:** Okay, Your Honor.

24 **MS. WILSON:** Good morning, Your Honor. Donna Wilson
25 on behalf of defendants Jackson Hewitt Tax Service, Inc. and

1 Jackson Hewitt, Inc. With me is my colleague Andrew Wein, from
2 my firm, as well as my co-counsel Glenn Farnet. In addition,
3 counsel for CCTS, our independent franchisee, Tom Buck, is
4 here. I'm going to be taking the lead in the argument,
5 Your Honor, but Mr. Buck may at the end of the argument have
6 some comments or is available for questions.

7 **THE COURT:** Okay. There's a lot of claims in this
8 and we are not going to be here all morning. I'm going to give
9 you about 15 minutes.

10 **MS. WILSON:** That's fine, Your Honor. I intend to be
11 brief. I think we have adequately covered everything in the
12 papers, but I would just like to highlight some issues.

13 First of all, Your Honor, this case, as
14 presented and argued by plaintiff, invokes the famous line:
15 "Full of sound and fury, signifying nothing." The fact of the
16 matter is that plaintiff throws around a lot of terms and
17 relies on a lot of loaded terms like *treachery* and *deceit*, but
18 at the end of the day, when you strip out these sort of
19 aspersions, what you are left with is the fact that plaintiff
20 is relying on a legally unsupportable and attenuated damages
21 theory; relying on facts that don't appear in the complaint
22 and, indeed, which appear for the first time in her briefs, and
23 which are inconsistent with allegations in the complaint; and
24 basically urging this Court to disregard the plain language of
25 statutes and to basically disregard an amount of case law that

1 cuts in our favor and supports our arguments. For these
2 reasons, Your Honor, the complaint should be dismissed and our
3 motion to dismiss should be granted.

4 The first one I want to look at is our
5 overarching argument in our motion to dismiss that the
6 plaintiff has failed to allege legally cognizable damages with
7 respect to most of her claims or injury in fact.

8 First, as set forth in the brief, regardless of
9 how the legal claim itself is styled -- whether it's
10 negligence, breach of fiduciary duty, breach of complaint --
11 courts across the country have held that the type of damages
12 that plaintiff is alleging here -- that is, emotional damages
13 based on a fear or a speculation that there might be some risk
14 of identity theft in the future arising from an allegedly
15 improper handling of documents or information -- simply is not
16 injury in fact. It's too speculative. It doesn't constitute
17 damages under any legal theory. Most importantly, Louisiana
18 law is in accord with this.

19 I want to take the three categories of claims
20 here, Your Honor. First is the negligence claim and the
21 Louisiana database breach notification statute claim.

22 The first claim, negligence, damages have to be
23 established as a matter of law with respect to a negligence
24 claim. Again, courts across the country have said these very
25 same damages that are alleged, these emotional damages, are not

1 sufficient to establish this required element. But more
2 importantly, in Louisiana two federal courts have already ruled
3 on this and have reached the same holding, and that is these
4 kinds of damages are not cognizable under a negligence claim.

5 **THE COURT:** I'm all right with you on negligence with
6 Louisiana law.

7 **MS. WILSON:** I'm on a roll, Your Honor. That's
8 great.

9 Then with respect to the database breach
10 notification act, *Ponder* speaks directly to this. It addressed
11 that expressly on point. More importantly, plaintiff only
12 raises two arguments with respect to *Ponder* and the database
13 breach notification act. First is it's wrongly decided, and
14 the basis for plaintiff's contention is that if you interpret
15 it the way that the *Ponder* court has, to require damages for
16 there to be an action under the statute, if you require that,
17 then it frustrates the purposes of the statute because there's
18 no penalty if you don't give notice.

19 What plaintiff doesn't point out to the Court,
20 although plaintiff cites to this regulation in her brief, is
21 that the attorney general, pursuant to regulations promulgated
22 by the attorney general's office, has the authority to issue
23 and is to issue substantial fines if there's no notice given.
24 So that argument is gone.

25 **THE COURT:** But clearly the allegation is there was

1 no notice here; right?

2 **MS. WILSON:** Well, actually, she was notified, and
3 there is no allegation that she wasn't given notice. That
4 assertion is made in the briefs, Your Honor, but not in the
5 complaint. As we understand it from the complaint, she knew
6 about this before we did because the TV reporter had given the
7 material back to her.

8 **THE COURT:** Yes, but the notice had to come from you,
9 not from somebody on the street.

10 **MS. WILSON:** Yes, Your Honor, but we didn't know
11 about it. In fact, we have just filed a supplemental brief, I
12 believe, on Monday setting forth the notice that we sent out.
13 So notice has been sent, but she has not alleged in her
14 complaint that it wasn't timely. She hasn't alleged that there
15 was no notice given.

16 **THE COURT:** Some of these statutes are starting to
17 merge in my mind.

18 **MS. WILSON:** I understand, Your Honor.

19 **THE COURT:** Is this the one that involves computers
20 too?

21 **MS. WILSON:** Yes. Your Honor, not only did she fail
22 to plead and allege actual damages, as required by the statute
23 and as required by *Ponder*, but the whole purpose of the statute
24 and the entire statute speaks in terms of data on a data
25 system, not paper documents. The only thing that the complaint

1 alleges is a disposal of paper documents. It doesn't mention
2 anything about a loss of computerized data. So for that
3 reason, too, Your Honor, that claim should not stand.

4 **THE COURT:** All right.

5 **MS. WILSON:** Then, with respect to the breach of
6 contract, fraudulent inducement, and LUTPA claims, all of those
7 claims basically rest on, one, emotional damages and, two, on
8 the circular argument --

9 **THE COURT:** The contract claim does.

10 **MS. WILSON:** Pardon me?

11 **THE COURT:** The contract claim is alleging a
12 pecuniary loss. They're alleging fraud in the inducement and
13 they get their money back or, alternatively, a breach of
14 contract because the policy was -- the allegation is was part
15 of the contract and that you didn't perform that portion of the
16 contract, therefore, a breach of contract entitles them to
17 damages, which they contend is fees and other things. They are
18 also claiming emotional distress under 1998, in addition. I
19 don't think this is just a purely emotional claim.

20 **MS. WILSON:** No. I was actually about to say that,
21 Your Honor. There were two issues. One was based on emotional
22 damages and two was based on, basically, the circular damages
23 argument, which is that rescission equals damages equals
24 rescission; that is, if damages always would constitute the
25 amount you paid for the contract, well, then the damages

1 requirement of a breach of contract claim would be written out.

2 **THE COURT:** Rescission, you put the parties back to
3 where they were and you give them their money back. So that's
4 monetary loss, which is not emotional loss; it's a financial
5 loss.

6 **MS. WILSON:** Your Honor, we would argue that the
7 rescission part of this is the remedy, but you have to prove
8 they actually were damaged by the breach, and here there is no
9 damage caused by the breach.

10 **THE COURT:** If they prove that they were fraudulently
11 induced to enter a contract and they allege fraud and
12 misrepresentation they relied on in the contract and that this
13 was a material term and it wasn't performed, then I think that
14 they would get their money back. When you rescind a contract,
15 you put the parties back to where they were.

16 **MS. WILSON:** Right. Even under the fraudulent
17 inducement claim, Your Honor, there was a requirement that you
18 show actual damages or a probability of damages. What are the
19 damages here? Again, how was she injured by the breach?

20 **THE COURT:** Where are you getting that?

21 **MS. WILSON:** That would be 1953.

22 **THE COURT:** Which says what?

23 **MS. WILSON:** I believe it's actual -- I can find the
24 cases, Your Honor, but basically you have -- it's cited also in
25 the plaintiff's briefs, I believe -- actual or probability of

1 damages.

2 **THE COURT:** Wait a minute. That's completely out of
3 context. What are you talking about?

4 **MS. WILSON:** You have to establish --

5 **THE COURT:** I understand that, but tell me what
6 you're citing and what does it say.

7 **MS. WILSON:** With the Court's indulgence.

8 As cited in the plaintiff's brief actually on
9 pages 26 and 27, "...the plaintiff need only show the *strong*
10 *possibility* of damages, or damages are *probable*," and it's
11 citing *Golden Rule Ins. Co. v. Strauss*, 1997 WL 119854, *3
12 (5th Cir. 1997). The parenthetical there is "actual loss or
13 damage or strong possibility thereof."

14 **THE COURT:** For what? In what context is that being
15 cited?

16 **MS. WILSON:** The fact that they have got to show that
17 there's damages is an element of the claim. For there to be a
18 breach of contract -- if I breach a contract and you're not
19 injured, you have suffered no injury. For example, Your Honor,
20 if this was an identity theft case, if she came in and said,
21 "My identity was stolen," absolutely was stolen -- I'm not
22 speculating about a risk of identity theft, it was actually
23 stolen -- well, then they have established a breach of contract
24 claim, perhaps. I don't want to concede that.

25 **THE COURT:** If you promise to marry me and tell me

1 that you have never been married before or you are not
2 currently married and that's not true and we rescind that
3 contract, then I don't have a financial loss by virtue of the
4 fact that you lied to me and induced me to enter a marriage on
5 the grounds that you're married to somebody else, but you can
6 rescind the contract.

7 My point is, on a rescissionary basis, I think
8 that getting your money back is your damages because you did
9 not get what you bargained for. I think this is on a motion to
10 dismiss. Let's just move on to the 1998 portion of this.

11 **MS. WILSON:** Sure, Your Honor. Then under LUTPA,
12 Your Honor --

13 **THE COURT:** No. Let's talk about Civil Code Article
14 1998 because they're arguing two things: They are arguing
15 fraudulent inducement, contract fraud, 1958; and they are
16 arguing breach of contract, which would entitle them to
17 compensatory damages -- I think they want their fees -- and
18 then they say emotional distress under 1998.

19 **MS. WILSON:** Actually, Your Honor, if you look at the
20 complaint and you look at their brief, with respect to
21 Article 1998, in the complaint they don't argue, as they are
22 required to, that the nonpecuniary interest here was a
23 significant component of the contract to prepare tax returns.
24 That's the first thing.

25 The second thing is, in their opposition brief,

1 they don't address the cases and they don't address the
2 argument on nonpecuniary loss. All they address is the
3 pecuniary portion of it, and they appear to have abandoned that
4 argument, Your Honor.

5 **THE COURT:** No. What they are arguing and what you
6 misread in this article is that it has two parts. The first
7 part of it is that the contract has to be of a nature that
8 addresses a nonpecuniary interest. I would agree with you that
9 a contract to get your tax returns is not a contract like that.
10 The second part says, regardless of the nature of the contract,
11 these damages may be recovered also when the obligor intended,
12 through his failure, to aggrieve the feelings of the obligee.

13 This is a motion to dismiss a complaint. The
14 argument is that you intentionally breached this privacy
15 provision, which has the natural effect of aggrieving the
16 feelings of the obligee. They are arguing the second part and
17 you haven't addressed that, so tell me what's wrong with that
18 argument.

19 **MS. WILSON:** I think, Your Honor, that with any
20 breach of contract -- when I contract with someone, I usually
21 contract with someone to make sure I don't have to worry about
22 X and I don't have to worry about Y and I don't have to worry
23 about Z. If the standard is mere worry about whether a
24 contract has been complied with satisfies this, then every
25 contract would fall under that category.

1 Your Honor, frankly, the reason we didn't look
2 at that section, we weren't trying to misread it, but we
3 actually -- plaintiff had made no attempt to fit the claim into
4 that, and we just thought facially it didn't apply here. They
5 haven't really pled facts that say this is something different.

6 **THE COURT:** They said you intended to put the stuff
7 in the garbage can, that that was a breach of contract, an
8 intentional breach, and that that amounted to the obligor
9 intending to aggrieve the feelings of the obligee by virtue of
10 that contract.

11 **MS. WILSON:** One, I don't think the complaint
12 actually alleges that. They don't make that causation
13 argument. It doesn't make that causation tie.

14 Secondly, I think that -- again, I think it
15 converts every contract -- it shoehorns everything into this
16 exception, this narrow exception.

17 **THE COURT:** Okay. I understand your argument on
18 that. What else?

19 **MS. WILSON:** Your Honor, then we have the LUTPA
20 claim, which again is based on -- it's brought only
21 individually, not on a class-wide basis. The LUTPA claim,
22 again, is based on an emotional damages argument.

23 **THE COURT:** I think they are arguing that they get
24 their money back under LUTPA too. I think the LUTPA claim
25 looks okay. LUTPA let's you get emotional distress. I just

1 don't know if the claim for emotional distress is concrete
2 enough, but the Louisiana cases let people get emotional
3 distress under LUTPA. It's not a prohibited form of damages.

4 **MS. WILSON:** Right, but it's a very narrow exception.
5 I think, too, that under those cases you always have a
6 situation where -- for example, the *Bank of New Orleans* case,
7 the court emphasizes this is about harm, not speculation.

8 **THE COURT:** I agree with you that the cases that
9 awarded emotional damages had a much more immediate cause of
10 emotional damages. I would agree with you on that. All I'm
11 saying is that, as construed by the Louisiana courts, it
12 doesn't forbid the recovery of emotional distress if you have
13 got it and you can show it, A; and that, B, under the claim as
14 pled, they're claiming a monetary relief.

15 **MS. WILSON:** Again, Your Honor, just to get back on
16 it, with respect to those three claims, all of those elements
17 require an injury that's not talking about the relief. At the
18 end of the day, what is the damage here? The damage here is a
19 speculative risk of identity theft and because of that
20 speculative risk of identity theft I want my money back, but
21 the speculative risk of identity theft, that's where this claim
22 fails.

23 **THE COURT:** Regardless of how the claim is styled,
24 Your Honor, you have to have it. Otherwise, what you would
25 have is any time there is a speculative risk of damage arising

1 from a breach of contract and I say, "I get rescission," you
2 know, "I get my money back. I was damaged because I paid money
3 for the contract," every breach of contract claim would
4 withstand a motion to dismiss. It's a necessary predicate,
5 Your Honor.

6 **THE COURT:** Talk about the privacy claim.

7 **MS. WILSON:** Well, the privacy claim, Your Honor --

8 **THE COURT:** Let me ask you this. Where was this
9 dumpster? How big was it?

10 **MS. WILSON:** The office which the plaintiff alleges
11 she went to was in Kenner. She alleges that, as a matter of
12 practice across the country, I guess, Jackson Hewitt has a
13 practice of dumping this information into public dumpsters. It
14 was in a dumpster behind an apartment complex is my
15 understanding. It was a construction dumpster. I don't know.

16 **MR. BUCK:** According to Mr. Angelico's report and our
17 finding of the dumpster, it was located at a set of duplexes on
18 the West Bank. It was a construction dumpster for a duplex
19 that was under construction and all the material -- which
20 included a lot more than just tax returns. It included
21 promotional materials, some of our proprietary tax manuals, and
22 things like that. It was all in a construction dumpster on the
23 West Bank.

24 **THE COURT:** I was just wondering, for a privacy
25 claim, the issue -- go ahead.

1 **MS. WILSON:** Sure. The issue is that Jackson Hewitt
2 must have publicized this information to the public generally,
3 for example, a newspaper ad, let's say, which is so many
4 people -- I will read that, Your Honor, because it's important.
5 I think the wording alone takes care of this claim.

6 **THE COURT:** The wording of what?

7 **MS. WILSON:** Of the restatement with respect to this,
8 Your Honor.

9 **THE COURT:** Restatements in Louisiana are not the
10 strongest authority in the world.

11 **MS. WILSON:** Okay, Your Honor. I will note that the
12 plaintiff agreed that this applied.

13 **THE COURT:** Agreeing on the wrong law doesn't help
14 you.

15 **MS. WILSON:** Okay, Your Honor. With respect to the
16 breach of privacy claim, it's required that it be publicized,
17 and that is defined as communicating it to the public at large
18 or communicating it to so many persons that the matter must be
19 regarded as substantially certain to become one of public
20 knowledge.

21 So here, Your Honor, yes, it was placed in a
22 dumpster, but the only allegation here is that someone might
23 have been able to jump in the dumpster and look at the
24 documents. With respect to the complaint itself, the only
25 allegation as to who viewed the documents was Mr. Angelico and

1 Ms. Walker, who discovered the documents.

2 **THE COURT:** I thought under Louisiana law that one of
3 the elements was unreasonable public disclosure of private
4 facts. I know, also, there are Supreme Court cases in the
5 context of lawyers or people ferreting around and whether or
6 not there's an expectation of privacy in the garbage. The
7 Supreme Court has used all this language that this stuff is
8 public. If you put something in a garbage can, you have no
9 expectation of privacy because everybody knows this is public.
10 Well, by analogy, that could apply to a dumpster.

11 **MS. WILSON:** Sure, but it also could apply to turn
12 virtually any disclosure of information into a breach of
13 privacy claim. For example, if I have documents on a desk and
14 members of the public go by, have I breached someone's privacy
15 by the fact that someone may have looked at it?

16 **THE COURT:** Putting them on your desk and putting
17 them outside in a place that anybody has access to are two
18 different things.

19 **MS. WILSON:** Your Honor, I would contend that you
20 still have to show that it was likely or substantially certain
21 that people would see the materials, and in this case that just
22 wasn't the case.

23 **THE COURT:** Did the dumpster have a top?

24 **MR. BUCK:** No, ma'am.

25 **THE COURT:** It was just an open dumpster?

1 **MR. BUCK:** It's big. It's six, seven feet tall and
2 20 feet long.

3 **THE COURT:** How did this woman get this stuff out of
4 there?

5 **MS. WILSON:** As I understand it, Your Honor --
6 And, Tom, correct me if I'm wrong.

7 **THE COURT:** This is not all in the complaint.

8 **MS. WILSON:** As I understand it, again, second or
9 thirdhand, basically, Ms. Walker was in her apartment building
10 or duplex and could see it; looked down and said, "Well, this
11 looks sort of funny because all the rest of it is construction
12 debris," I assume, but then basically people had to jump in --

13 **MR. SHARTLE:** She jumped in and retrieved the
14 documents, some of the documents, and turned them over to
15 Channel 6.

16 **THE COURT:** Okay. I think I've got your argument.
17 Let me hear from your opponent.

18 **MR. BUCK:** Could I add just very briefly --

19 **THE COURT:** Okay.

20 **MR. BUCK:** -- I think the last discussion that we
21 have been having has to do with the whole issue that was
22 brought up first as to whether or not there's a potential for
23 disclosure as opposed to a real, actual disclosure to the
24 public. We do know for a fact that the documents were
25 collected and appear to be in the same form that they were

1 taken from our facility. If somebody was really going to
2 gather that information, it doesn't make a lot of sense they
3 would take it from the dumpster, make copies, put it back in
4 the dumpster. It would have been gone. So the fact it was
5 still there I think indicates there hasn't been an actual
6 disclosure.

7 I also wanted to address your 1998 question
8 regarding paragraph 2. If you go to the revision comments
9 under 1998, talking about the nature of the contract being
10 irrelevant, Comment D goes on to say that you can get
11 nonpecuniary loss which the obligee sustains -- so there has to
12 be an actual nonpecuniary loss sustained -- when the obligor
13 fails to perform in circumstances that give rise to the
14 presumption that the obligee's embarrassment or humiliation was
15 intended by the obligor.

16 I don't think you have those circumstances that
17 would give rise to that presumption. It references Section C,
18 if the nature of the contract itself is one that is intended to
19 satisfy an interest of a spiritual order such as to create a
20 work of art or --

21 **THE COURT:** Wait. That goes back to the first part
22 of A.

23 **MR. BUCK:** That's A, if it's intended, or if it's
24 done under circumstances where you have to assume that it was
25 done intentionally, with the intent, and I don't think that

1 assumption is reasonable under the circumstances, even as pled,
2 no matter how unlikely the facts are that this stuff was
3 intentionally dumped. Then you go to Comment E and it goes on
4 to say that the jurisprudence has held that mere worry or
5 vexation is not a compensable nonpecuniary loss. So they have
6 a big hurdle there, too, if they are just worried.

7 I think you may realize already that Richard
8 Angelico calling my client and saying, "I have a bunch of your
9 tax returns," was the first notice that we had that this was
10 even there. If you look at the TV report, it's obvious this
11 woman was shocked that her things had been stolen from her. I
12 truly believe that her status as a victim here --

13 **THE COURT:** Who is she?

14 **MR. BUCK:** Barbara Hirsch. She's the local
15 franchisee doing business as Crescent City Tax Service, Inc.
16 She had no idea that any of this stuff had been thrown in the
17 dumpster by her former employee. It was the first notice she
18 had.

19 As far as notice, you will note from the record
20 that we had to get a court order to allow Jefferson Parish --
21 Mr. Angelico told me he was going to shred the material, and I
22 told him I would get an order preventing him from that or he
23 could turn it over to the sheriff.

24 He turned it over to the sheriff. It took us a
25 while to get. We finally ended up getting a joint court order

1 to get it. We got it last week. We mailed notices to the
2 people. The number of inquiries we had after he
3 sensationalized this three times on television -- three
4 different reports -- we got three phone calls from the
5 thousands of Jackson Hewitt customers.

6 For her to be victimized by the former employee
7 that stole the things, three times with this sensational
8 journalism, and now by one single person who claims to be a
9 class representative of a group of people who haven't even
10 suffered any damages I don't think is fair to Crescent City Tax
11 Service.

12 **THE COURT:** Thank you. Let me hear from your
13 opponent.

14 **MR. SHARTLE:** Your Honor, a few points here. First,
15 as you have correctly noted, we are dealing with a motion to
16 dismiss, and the Court is well aware of the standard. I want
17 to advise the Court of some facts that are not in the record,
18 that are not in the pleadings I have only recently learned.

19 They continue to allege that they are the
20 victims of some kind of theft. It's simply not true. They are
21 not the victims of any theft or crime. No office was
22 burglarized here. What happened is one of their own high-level
23 employees, who is known around the office as "the file
24 cabinet," was responsible for intentionally throwing these
25 documents in the dumpster. Why was she known around the office

1 as "the file cabinet"? Because if anything was missing from
2 the office, any file or any tax return, it was always in this
3 lady's car. So they are not the victims of any theft.

4 This lady also, very interestingly, was the
5 director of compliance for the local franchise and was also the
6 general manager. So this isn't some low-level employee we are
7 dealing with. We are dealing with a high-level employee who
8 Crescent City reported to the police department -- and I'm
9 going to quote this --

10 **MS. WILSON:** Your Honor, I can --

11 **THE COURT:** Wait.

12 **MR. SHARTLE:** -- "had a position of authority with
13 access." So this isn't a situation where there was some
14 accident or some breach. This was an intentional act by a
15 senior-level member of management who threw the documents in
16 the trash.

17 **THE COURT:** As we all know, none of this is germane
18 to the motion to dismiss.

19 **MR. BUCK:** It's a former employee.

20 **THE COURT:** I am just considering what is alleged
21 right now.

22 **MR. SHARTLE:** Right, but I thought it was important
23 for me to raise those issues.

24 **THE COURT:** I understand.

25 **MR. SHARTLE:** I'm not going to bore the Court anymore

1 with details, but there are five police reports that we have
2 obtained over the past few years. They have had numerous
3 security issues involving their own employees.

4 **THE COURT:** Okay. I hear you.

5 **MR. SHARTLE:** To respond to some of the arguments
6 that they have raised, they say, "Well, with respect to the
7 security breach statute, the AG has the power to impose some
8 kind of civil penalty." Well, if the AG doesn't know about the
9 disclosure, how can they impose a penalty?

10 Again -- and we have briefed this issue -- the
11 *Ponder* decision is backwards. If you don't permit the claim to
12 be brought until after there has been some use of the
13 information to the detriment of the consumer, then you haven't
14 furthered the purpose of the statute in any way. The purpose
15 should be to require the defendant to give notice so that the
16 consumer can take necessary measures to protect himself or
17 herself. If the notice is given timely, there's no cause of
18 action. So the decision is just backwards, in my mind, and I
19 respectfully request that the Court not follow that decision.

20 As to the *Melancon* decision regarding the
21 negligence claim and whether or not emotional distress damages
22 is sufficient, that case is distinguishable for a number of
23 reasons. First, the Supreme Court has been very clear that
24 when you have a special relationship -- and here we are dealing
25 with a fiduciary relationship.

1 **THE COURT:** How does it get to be a fiduciary --

2 **MR. SHARTLE:** Well, because, remember, these
3 individuals are responsible for handling the most sensitive
4 information. The IRS and a tax return preparer has more
5 information about you than any other government entity or any
6 other entity that I could possibly think of, any employer.
7 They have Social Security numbers, dates of birth, driver's
8 licenses, bank accounts, employer tax ID numbers, the most
9 confidential information about your life. Here, they put that
10 information on the street, so it's just mind-boggling to me.

11 We are dealing with a special relationship where
12 these individuals entrusted Jackson Hewitt to protect that
13 information and they did not. So that rule that generally you
14 can't recover emotional distress damages absent some type of
15 physical trauma simply doesn't apply according to the Louisiana
16 precedent.

17 **THE COURT:** I haven't seen any cases that are close
18 to this one.

19 **MR. SHARTLE:** Well, I would generally agree, but they
20 have on numerous occasions said that that exception does exist,
21 and the court has repeatedly reminded the courts that Louisiana
22 law is very unique. There are no clear lines. Judges are
23 required to take into consideration the principles in the
24 Civil Code and apply those in each case. So we are dealing
25 with a situation here where these individuals entrusted Jackson

1 Hewitt and that trust was violated.

2 The *Melancon* decision is also distinguishable --
3 and we have briefed this, Your Honor -- because in that case
4 the disclosure was accidental. They really were the victims.
5 Here, this isn't a situation where Jackson Hewitt's office was
6 broken into and someone stole their materials and they're the
7 victims. They created this problem through their employee. So
8 you have an intentional act, not just negligence. So I think
9 that is an important factor for the Court to consider.

10 **THE COURT:** You pled negligence.

11 **MR. SHARTLE:** We have pled both. We have pled a
12 negligence claim, but the conduct is intentional. I don't know
13 how that works out, Your Honor. I haven't figured out
14 conceptually where that gets me, but I agree with the Court. I
15 agree with you, Your Honor, that it's a negligence claim, but
16 the conduct was intentional here.

17 **THE COURT:** A lot of negligence claims involve
18 intentional conduct. I intentionally put my foot on the
19 accelerator that hits another car, but I'm not deciding to
20 crash into them. It's an accident.

21 **MR. SHARTLE:** Well, every act begins with a intent to
22 commit some -- but here we are dealing with something more than
23 just the initial act of opening the business and inviting
24 individuals --

25 **THE COURT:** Tell me how your client was harmed by all

1 of this.

2 **MR. SHARTLE:** Interestingly, Your Honor -- and I'm
3 going to answer that question, but I want to tell you --

4 **THE COURT:** No, "interestingly" answer my question.

5 **MR. SHARTLE:** She has been harmed in numerous ways.
6 First of all, she has had to take necessary measures to protect
7 herself and make sure that she is not going to be the victim,
8 but she suffered emotional distress. This lady is worried
9 about the fact her identity is going to be stolen and used by
10 someone.

11 I think anyone, when they hear what happened
12 here -- many individuals only recently learned about this.
13 Opposing counsel has represented that these individuals
14 recently got notice. I will talk about that in a second. But
15 when you get that letter and you learn that your information
16 was put in the dumpster, I think everyone's natural reaction is
17 going to be, "Gosh. That concerns me. I'm very alarmed."

18 **THE COURT:** How long ago did it happen?

19 **MR. SHARTLE:** I'm sorry?

20 **THE COURT:** How long ago did it happen?

21 **MR. SHARTLE:** How long ago did what happen?

22 **THE COURT:** Did they put it in the dumpster.

23 **MR. SHARTLE:** About six months ago, but no one knew
24 whose information was put in the dumpster until about a week
25 ago, when they sent the letter.

1 **THE COURT:** Usually, when you have identity fraud,
2 they start using your stuff right away.

3 **MR. SHARTLE:** For all we know, there may be hundreds
4 of individuals whose identities were stolen. I doubt that. I
5 doubt that seriously, but we don't know that yet. I have not
6 had the opportunity to speak with each one of these
7 individuals, but their letter that they sent, they give a
8 laundry list of things these individuals need to do -- which,
9 by the way, several of the things they recommend the
10 individuals do, it's going to cost them something.

11 So you not only are dealing with the emotional
12 distress and the anxiety, the sleeplessness of having to deal
13 with this nonsense, but you are going to have to incur some
14 hard costs to make sure you are protected.

15 **THE COURT:** Did she incur costs?

16 **MR. SHARTLE:** Did she incur costs?

17 **THE COURT:** Yes.

18 **MR. SHARTLE:** I have spoken with my client. My
19 client has told me that she has undertaken these measures. I
20 haven't specifically asked her, "How much, by way of dollar
21 amount, have you spent in protecting yourself?" Clearly, she
22 has emotional distress damages.

23 We have other claims in the case. So when we
24 are speaking about the damages issue, as Your Honor did, you
25 have to analyze it with respect to each claim. So with respect

1 to the negligence claim, which it sounds like we are focusing
2 on now, those damages are going to primarily relate to
3 emotional distress damages and any costs or expenses that
4 related to these actions they needed to take to protect
5 themselves. If any of the class members have been the victims of
6 some kind of identity theft, then you're going to have costs
7 associated with that also.

8 Going back to this notice issue, they have filed
9 a motion to supplement the record and provided a copy of the
10 letter. I am uncertain as to how they determined who to send
11 this letter to. They don't explain it in their brief. They
12 represent to the Court that they have given everyone notice. I
13 am uncertain as to whether that's true.

14 I have concerns because if you look at these tax
15 returns, we are not just talking about the individual who filed
16 the return. We are talking about information relating to these
17 individuals' children, their social security numbers, their
18 dates of birth, their addresses. You really have to review the
19 document to understand the scope of the information that is put
20 in these documents. So there are a number of individuals that
21 are just identified on the documents, which it's our belief
22 they need to be notified that their personal information has
23 been put on the street.

24 **THE COURT:** Let's get back to the discussion of
25 whether or not you stated a claim.

1 **MR. SHARTLE:** Stated a claim for which cause of
2 action, Your Honor?

3 **THE COURT:** They have moved on all of them, so take
4 your pick.

5 **MR. SHARTLE:** Sure. Well, as to the security breach
6 statute, again, I have addressed the fact that I think the
7 *Ponder* decision is incorrect. We have stated a cause of
8 action, brought a motion to dismiss. We have alleged they
9 haven't given notice timely because they only gave it last week
10 according to their testimony.

11 **THE COURT:** But you haven't alleged anything about a
12 compromise of the computer system.

13 **MR. SHARTLE:** Their interpretation of the statute is
14 incorrect on that point. You don't have to have any
15 compromising of the system; all you have to have is
16 computerized data which has been disclosed.

17 **THE COURT:** You haven't alleged that either.

18 **MR. SHARTLE:** Well, I disagree. To the extent we
19 haven't, Your Honor, then I would ask for leave to --

20 **THE COURT:** How can you disagree and "to the extent"?
21 Tell me where you allege --

22 **MR. SHARTLE:** Because these are documents which are
23 generated from a computer. These returns, the information on
24 there is typed into a computer and the data is spit out on
25 these documents.

1 **THE COURT:** There's so many documents in this world
2 that are on paper that at one time were printed by a computer.
3 I'm not sure that that's what that statute is talking about.
4 The statute is talking about getting into a computer and
5 getting the information, not some generation of documents that
6 came off of a computer.

7 **MR. SHARTLE:** Well, Your Honor, I understand your
8 point and I agree there's got to be a line somewhere. You
9 can't say that, for example, every Word document that any
10 individual maintains that is printed could fall within the
11 scope of this statute. We are dealing with something more
12 complex than just some Word document. We are dealing with a
13 program that they utilize where they input this information and
14 it spits out data which creates a hard document.

15 It's other documents, Your Honor. It's not just
16 tax returns either. They mentioned they had manuals in there.
17 It is a host of materials. There are many other confidential
18 documents in addition to the tax returns, lists of -- God, I
19 don't know, Justin -- thousands of local businesses, tax ID
20 numbers, and addresses. It's more than just tax returns. I
21 understand there has to be a line somewhere. It's our position
22 that these type of documents would fall within the framework of
23 the statute.

24 **THE COURT:** Okay. I hear you.

25 **MR. SHARTLE:** I want to address an issue that

1 Your Honor raised regarding 1958, and this might clear up some
2 of the discussion earlier. Your Honor is correct that under
3 1958 you get rescission, and we are seeking rescission of the
4 contract. But you also, in addition to getting rescission, can
5 recover damages. So if the fraud vitiates the consent, you get
6 back whatever you paid to enter into the contract, but you're
7 also entitled to any damages that flow from the fraud.

8 So it's our position that they misrepresented
9 what their policy and practice was, so we get our money back
10 based upon rescission, and their actions have caused damages:
11 Emotional distress; these other items that we discussed
12 regarding how they have to take the protective measures; and to
13 the extent there are any other proveable damages.

14 The unfair trade practice claim, the deceptive
15 act that's at issue is the misrepresentation, so we are not
16 dealing with just some fear. We are dealing with a
17 misrepresentation, a deception, which resulted in them entering
18 into the contract. So the contract gets undone under the
19 unfair trade practice claim, we get our money back we paid for
20 the contract, and also any resulting damages that, again, flow
21 from the deceptive act, the misrepresentation.

22 The invasion of privacy -- and you touched on
23 this, Your Honor. First of all, they are not relying upon just
24 the restatement. They are relying upon a comment in the
25 restatement, so I want to clarify that point. I don't know of

1 any Louisiana case -- they certainly didn't cite one, and I
2 haven't been able to find one, whether federal or Louisiana
3 state court decision -- that cites or relies upon this comment,
4 but the Louisiana Supreme Court has been very clear on the
5 scope of an invasion of privacy claim. The court has said the
6 determination of whether a person's conduct constitutes the
7 tort of invasion of privacy depends on the facts and
8 circumstances of each case.

9 So we think this is a case where there has
10 certainly been damages. There certainly has been sufficient
11 publicity and publication of this material. Not only did
12 Ms. Walker, who retrieved the documents from the dumpster, see
13 the documents, Channel 6 saw the documents, staff members at
14 Channel 6 saw the documents, the Jefferson Parish Sheriff's
15 Office saw the documents, opposing counsel has seen the
16 documents --

17 **THE COURT:** How did Jefferson Parish get the
18 documents?

19 **MR. SHARTLE:** What happened is there's a criminal
20 investigation that's ongoing right now, so Channel 6 was
21 approached by the Jefferson Parish Sheriff's Office and they
22 requested that the documents be produced to the Jefferson
23 Parish Sheriff's Office.

24 The one claim that you didn't discuss with
25 opposing counsel that I think is due some discussion is the tax

1 claim. 26 U.S.C. §6103 generally prohibits the unauthorized
2 disclosure of returns and return information, so there are two
3 questions. Who is subject to the statute? The answer is in
4 §6103(a)(3) and Subsection (n).

5 Subsection (n) extends the reach of the statute
6 to persons beyond the IRS. Generally, the statute was passed
7 to prohibit the IRS from disclosing tax returns and tax return
8 information, but it's been extended to others beyond the IRS.
9 It also applies to companies processing, storing, and
10 transmitting returns or return information or providing other
11 services for purposes of tax administration. Jackson Hewitt is
12 not only a tax preparer; they are a government-contracted
13 e-filer. They are transmitting tax returns to the IRS. They
14 are a covered entity.

15 The next question is: What information and
16 documents are subject to the statute? I mentioned that the
17 statute regulates *returns* and *return information*. Those terms
18 are defined in the statute. A *return* means any tax or
19 information return, generally a tax return. These tax returns
20 were thrown in the dumpster.

21 **THE COURT:** Doesn't Subsection (c) indicate that the
22 statute only applies to persons who have been granted access to
23 returns or return information by the IRS?

24 **MR. SHARTLE:** Subsection (c)?

25 **THE COURT:** Yes.

1 **MR. SHARTLE:** I don't have that in front of me,
2 Your Honor. I don't have that in front of me. I can't respond
3 to that now. I don't know of any limitations in any
4 subsection. Subsection (n) is what extends the statute to
5 other entities besides the IRS.

6 **THE COURT:** I think they have to get the information
7 from the IRS.

8 **MR. SHARTLE:** That's their contention. I don't see
9 that and, again, I don't have Subsection (c) in front of me
10 right now. I don't know of any limitation in the statute --

11 **THE COURT:** The statute establishes a comprehensive
12 scheme -- this is citing a Ninth Circuit case -- for
13 controlling the release by the IRS of information received from
14 taxpayers to discrete identified parties.

15 **MR. SHARTLE:** I acknowledge there is at least one
16 case -- I think the *Hrubec* case -- which says that, but that's
17 not stated anywhere in the statute. That is a summary as to
18 what the Ninth Circuit believes the law is on this issue. Even
19 if that is the law -- and I don't believe it is, Your Honor,
20 because if you are dealing with a remedial statute here, which
21 has to be applied very broadly, again you have two questions.
22 Who is a covered entity? The question is answered by looking
23 at the statute itself.

24 **THE COURT:** The statute was designed to get at the
25 IRS and to stop the IRS from spreading tax information.

1 **MR. SHARTLE:** Or to stop government contractors or
2 other covered entities from disclosing information that is
3 provided to them --

4 **THE COURT:** From the IRS.

5 **MR. SHARTLE:** Well, I don't think so, Your Honor,
6 because how, then, do you respond to the statute which says
7 companies transmitting returns? Remember, these are IRS
8 e-filers. A taxpayer goes to Jackson Hewitt to get his or her
9 tax returns done. Jackson Hewitt takes that information as an
10 IRS e-filer. They transmit that information to the IRS.

11 To some extent they are acting on behalf of the
12 IRS by facilitating the transfer of the information, so the
13 question becomes: Where do you want to start the protection?
14 Do you want to start it at where the IRS approved e-filer
15 transmits the information to the IRS or only after the IRS
16 receives the information and then transmits information back to
17 the IRS approved e-filer?

18 I think the statute is written in such a way
19 that it requires that entities who transmit the information to
20 the IRS -- again, the only entities that are going to be doing
21 that are IRS approved e-filers. Even if that's the rule,
22 Your Honor -- and I don't believe it is, and there's certainly
23 no statutory authority which would support that position. I
24 understand there's a case that mentions that.

25 **THE COURT:** Do you have any cases applying this to

1 commercial tax --

2 **MR. SHARTLE:** There are none. There are no cases at
3 all except for one case that discuss Subsection (n) at all. So
4 we are dealing with a new issue, and I understand that. But
5 even if that interpretation is correct, Your Honor, many of
6 these documents contain information -- when I get to the second
7 definition, the definition of *return information*, many of these
8 documents contain return information, information received from
9 the IRS.

10 Once the return is transmitted to the IRS for
11 filing, then information is sent back to Jackson Hewitt and
12 that information is contained on some of those documents. Now,
13 we have just begun discovery and we have already had some
14 issues with discovery, but we believe that there's going to be
15 more on that during the discovery process.

16 **THE COURT:** Okay. I have your argument. Thank you.

17 **MR. SHARTLE:** Thank you, Your Honor.

18 **MS. WILSON:** Your Honor, if I can make three quick
19 points?

20 **THE COURT:** Okay.

21 **MS. WILSON:** First, with respect to the §6103 claim,
22 most of the facts that were just stated just don't appear in
23 the complaint. In any event, had Congress wanted to mention or
24 have the statute apply to tax preparers -- this is about a
25 one-inch thick statute, 20, 25 different categories -- they

1 simply would have said so. It doesn't say that.

2 Also, in the *Hrubec* case in the Seventh Circuit,
3 Judge Easterbrook did look at the situation and said, look, if
4 your accountant at a cocktail party discloses some tax
5 information of yours, it is inappropriate, but it doesn't
6 constitute a violation of §6103.

7 **THE COURT:** Which case is that?

8 **MS. WILSON:** *Hrubec*.

9 **MR. SHARTLE:** I have to object. That case did not
10 involve a tax return preparer. It involved a school. The
11 school --

12 **MS. WILSON:** Your Honor --

13 **THE COURT:** Wait. Let her finish.

14 **MS. WILSON:** Let me get you the citation, Your Honor.
15 I didn't actually say that the case involved that, but I did
16 say that the court looked at specifically this example and
17 spent a great deal of time saying this does not constitute a
18 claim.

19 **THE COURT:** What if this stuff contains information
20 from the IRS instead of just information that the tax preparer
21 got from the customer?

22 **MS. WILSON:** We still don't fall within the narrow
23 definition of the categories of people who are subject to
24 §6103. In fact, Your Honor, we cited this in our briefs, but I
25 want to pay special attention to this. Subsection (n) refers

1 to and is basically caveated with references to the IRS
2 regulations. What the IRS regulation does -- let me give you
3 this.

4 It's 26 C.F.R. §301.6103(n)-1. What it does
5 is -- and, again, Subsection (n) is subject to this in this
6 regulation and it's captioned: "Disclosure of returns and
7 return information in connection with written contracts or
8 agreements for the acquisition of property or taxes for tax
9 administration purposes."

10 When you look at this regulation, Your Honor,
11 it's clear. This is about --

12 **THE COURT:** Wait. Read that again.

13 **MS. WILSON:** It is captioned: "Disclosure of returns
14 and return information in connection with written contracts or
15 agreements for the acquisition of property or services for tax
16 administration purposes."

17 When you look at the different categories,
18 there's nothing about tax preparers in here. In fact, when you
19 look at this, all it's really talking about is third-party
20 vendors that IRS may use. In fact, Your Honor, Subsection (n)
21 refers to reproductive services, copy services. Under their
22 interpretation Kinko's could be subject to this. If I utilize
23 Kinko's to copy my tax return, it's involved in --

24 **THE COURT:** Okay.

25 **MS. WILSON:** Then, with respect, Your Honor, to the

1 restatement with respect to the breach of privacy claim, we do
2 have a citation -- let me back up.

3 With respect to 1958 and talking about the need
4 to show damages apart from rescissionary damages, this is a
5 case that was not in our briefs but we gave to opposing counsel
6 before the hearing. It's called *C&B Sales & Services*. It's a
7 Fifth Circuit case, 95 F.3d 1308. In that case it states:

8 "According to the Louisiana Supreme Court, 'Two
9 elements are essential to constitute legal fraud'" -- and
10 that's under 1958 -- "'the intention to defraud and loss or
11 damage or a strong probability of loss or damage. It is well
12 settled that one who alleges fraud has the burden of
13 establishing it by legal and convincing evidence since fraud is
14 never presumed, and that to establish fraud exceptionally
15 strong proof must be adduced.' C&B is wrong that fraud follows
16 merely from demonstrating a material omission and intent to
17 obtain an unjust advantage. C&B still bears a heavy burden of
18 showing actual damage: 'Because charges of fraud carry an
19 almost criminal connotation in Louisiana, the jurisprudence has
20 interpreted the language of 1953 with great strictness. There
21 must be an intention to defraud causing damage to the victim.
22 Both elements must be proved by clear and convincing
23 evidence.'"

24 **THE COURT:** Okay.

25 **MS. WILSON:** That's all I have, Your Honor.

1 **THE COURT:** Thank you. Is there one thing you want
2 to say?

3 **MR. SHARTLE:** I do, Your Honor. This scare tactic
4 that if we apply the statute here to an IRS approved e-filer
5 that it's going to apply to everyone is meritless. The statute
6 very specifically says who it applies to. It's not going to
7 apply to Kinko's because it only applies to companies
8 processing, storing, and transmitting returns or return
9 information. It's not going to apply to the Postal Service.
10 They are not involved in storing, processing, or transmitting
11 returns.

12 This is the statute as to how you become an IRS
13 approved e-filer, which by the way contains a provision
14 regarding the obligation of all IRS approved e-filers to
15 maintain the security of information they are transmitting
16 during the e-filing process. There's only one decision out
17 there that I know of which addresses Subsection (n) and it's
18 the *Hrubec* case. I think I kept saying it was a Ninth Circuit
19 case. It's a Seventh Circuit decision.

20 That case involved an employer who disclosed --
21 I think it was a tax return of an employee, and the court said
22 the employer is not a covered entity. That makes sense because
23 they're not involved in the transmitting, storing, or
24 processing of a return or return information.

25 So there's no question, from my view, that

1 Jackson Hewitt is a covered entity. The question becomes
2 whether or not, as Your Honor has pointed out, the information
3 that is disclosed has to come from the IRS or if the
4 information can merely come from the taxpayer and be involved
5 in the transmission. I think, if you read the statute, there's
6 no requirement in the statute that that information come
7 directly from the IRS, but I acknowledge there is a Seventh
8 Circuit decision which suggests that it does have to come from
9 the IRS.

10 Thank you, Your Honor. That's it.

11 **THE COURT:** All right. Thank you. I'm not going to
12 hear argument on class certification because I think it is
13 premature to take that up until we determine what the claims
14 are going to be, if any, that are left in the case because some
15 of them are going to get dismissed. I just haven't determined
16 how many and which.

17 So I think rather than taking up class
18 certification now, it is really premature. I will get an order
19 out ruling on the motion to dismiss. Then, once that's out, we
20 will issue an order to you to come up with a schedule for class
21 certification, to brief that and do whatever discovery you need
22 to do on that, and then we will take up class certification
23 after that. Okay?

24 **MS. WILSON:** Thank you, Your Honor.

25 **MR. SHARTLE:** Thank you, Your Honor.

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THE DEPUTY CLERK: All rise, please.

THE COURT: Very good job on your arguments.

(WHEREUPON the Court was in recess.)

* * *

CERTIFICATE

I, Toni Doyle Tusa, CCR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter