

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

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

Plaintiff,

v.

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

Defendants.

CASE NO.: 08-3535

SECTION R

**JUDGE
SARAH VANCE**

**MAGISTRATE JUDGE
DANIEL E. KNOWLES**

**MEMORANDUM IN OPPOSITION TO PLAINTIFF VICKI L. PINERO'S
MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT**

TABLE OF CONTENTS

	PAGE
I. PRELIMINARY STATEMENT	1
II. PROCEDURAL HISTORY	2
III. STANDARD OF REVIEW AND PLAINTIFF'S BURDEN	4
IV. ARGUMENT	5
A. Plaintiff's proposed amendments would be futile and therefore leave to Amend should be de denied	5
B. § 9:3572 does not provide for a private right of action.....	6
C. To the extent this Court concludes that a private cause of action exists, it would be governed by § 9:3552	7
1. Plaintiff has not satisfied the notice requirements under § 9:3552.....	8
2. Plaintiff's proposed claims are time-barred	8
D. Plaintiff's proposed amendment should be denied because it fails to adequately plead that Defendant Jackson Hewitt collected a loan fee from Plaintiff	9
E. Plaintiff's motion should be denied because it reflects a dilatory motive and prejudices Jackson Hewitt.....	10
V. CONCLUSION.....	12

TABLE OF AUTHORITIES¹

CASES

<i>Associated General Contractors of CA, Inc., v. CA State Council of Carpenters</i> , 459 U.S. 519 (1983).....	4-5
<i>Bell Atlantic Corp., v. Twombly</i> , 550 U.S. 544, 127 S. Ct. 1955 (2007).....	4, 5
<i>Deliberto v. Wyndham Canal Place, Inc.</i> , No. Civ A03-3271, 2004 WL 1290774 (E.D. La. Jun. 10, 2004).....	5
<i>Fidelity Funds, Inc., v. Price</i> , 491 So. 2d 681 (La. Ct. App. 1986).....	7, 8
<i>Financial Acquisition Partners LP v. Blackwell</i> , 440 F.3d 278 (5th Cir. 2006)	10, 11
<i>Landavazo v. Toro Co.</i> , 301 Fed. Appx. 333 (5th Cir. 2008).....	4, 9
<i>Ordemann v. Unidentified Party</i> , No. Civ 06-4796, 2008 WL 695253 (E.D. La. Mar. 12, 2008).....	11
<i>Parish v. Frazier</i> , 195 F.3d 761 (5th Cir. 1999).....	5
<i>Samford v. Staples</i> , 249 F. App'x 1001 (5th Cir. 2007).....	5
<i>Schiller v. Physicians Resources Group Inc.</i> , 342 F.3d 563 (5th Cir. 2003).....	4, 12
<i>Shivangi v. Dean Witter Reynolds, Inc.</i> , 825 F.2d 885 (5th Cir. 1987)	4
<i>Shoemaker v. Fidelity Finance, Inc.</i> , 464 So. 2d 1005 (La. Ct. App. 1985).....	8
<i>Wimm v. Jack Eckerd Corp.</i> , 3 F.3d 137 (5th Cir. 1993).....	10, 11

STATUTES

Fed. R. Civ. P. 12(b)(6).....	<i>passim</i>
Fed. R. Civ. P. 15(a)	<i>passim</i>
La. C.C. Art. 3492.....	8
La. Rev. Stat. § 51:1049(A)	6, 7
La. Rev. Stat. § 51:3075.....	6, 7
La. Rev. Stat. § 9:3552	<i>passim</i>
La. Rev. Stat. § 9:3572.....	<i>passim</i>

¹ All unreported cases hereto, *in globo*, are attached as Exhibit A.

Defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (collectively “Jackson Hewitt”) hereby submit this memorandum in opposition to Plaintiff Vicki L. Pinero’s Motion for Leave to file the Third Amended Complaint (“Motion”).

I. PRELIMINARY STATEMENT

Plaintiff’s Motion for Leave to Amend is the latest in a string of unsuccessful attempts by Plaintiff to assert a sustainable claim against Jackson Hewitt. Having amended her Complaint twice before, and moved for reconsideration of Judge Vance’s January 7, 2009 Order (“Order”) dismissing six of the seven claims in her First Amended Complaint, and then waiting until *after* Jackson Hewitt filed its dispositive Motion to Dismiss her Second Amended Complaint, Plaintiff now seeks to amend her Complaint yet again.² *See* Docket Entries Nos. 57, 59 and 77.

As established below, Plaintiff’s Motion should be denied for two independent reasons. First, Plaintiff’s proposed amendment is futile because it fails to state a claim and therefore cannot satisfy a Rule 12(b)(6) standard. Specifically, the statute on which Plaintiff relies does not create a private cause of action, her claim under La. Rev. Stat. § 9:3552 of the Louisiana Consumer Credit Law is barred due to Plaintiff’s failure to comply with its notice provisions and statute of limitations, and Plaintiff fails to allege that Jackson Hewitt violated La. Rev. Stat. § 9:3572 with regard to Plaintiff’s individual transaction – in fact, the Proposed Complaint fails to allege that Plaintiff was charged any loan fees at all.

Second, Plaintiff’s inexcusable delay in asserting these claims, notwithstanding her previous amendments and her possession of documents and information sufficient to put her on

² In addition to the instant Motion, currently pending before this Court is Jackson Hewitt’s Motion to Stay Discovery pending the resolution of the Motion to Dismiss. Currently pending before District Judge Sarah Vance are Jackson Hewitt’s Motion to Dismiss the Second Amended Complaint and Plaintiff’s Motion for Reconsideration. The Motion to Dismiss is scheduled for argument on April 1, 2009 – the same day as the instant Motion is scheduled to be heard – and Judge Vance has declined to hear argument on the Motion for Reconsideration.

notice of the claims, does not comport with the good faith required for amendment under Rule 15(a). Indeed, granting leave to amend Plaintiff's complaint yet again would prejudice Jackson Hewitt and impose an undue burden on this Court, as it would force Jackson Hewitt to file motion to dismiss after motion to dismiss, and litigate this action in an improper and unjustifiable piecemeal fashion.

II. PROCEDURAL HISTORY

Plaintiff filed her original Complaint on May 22, 2008. Shortly thereafter, Plaintiff filed her First Amended Complaint as a matter of right under the Federal Rules of Civil Procedure, adding new legal claims and factual allegations. Defendant Jackson Hewitt filed its Motion to Dismiss the First Amended Complaint on August 4, 2008. Docket Entry No. 20. Plaintiff filed her opposition to the Motion to Dismiss on October 21, 2008. Docket Entry No. 26. On October 28, 2008, both Plaintiff and Defendants jointly requested an order from this Court allowing them access to certain documents in the possession of the Jefferson Parish Sheriff's Office which were at issue in this case, and the Court issued such an order. Docket Entries Nos. 30 and 31. Jackson Hewitt filed its reply brief in support of its Motion to Dismiss on November 10, 2008. Docket Entry No. 37. Judge Vance heard extensive argument on Jackson Hewitt's Motion to Dismiss, as well as Plaintiff's Motion for Class Certification, on December 3, 2008.

On January 7, 2009, Judge Vance dismissed six of the seven counts in Plaintiff's First Amended Complaint and denied the Motion for Class Certification without prejudice as premature. As to the invasion of privacy claim, it survived the Motion to Dismiss, but Judge Vance questioned whether it could survive scrutiny on the merits. *See Order at 23-24.* As to two of the dismissed counts in the Amended Complaint – the claims for fraudulent inducement and under the Louisiana Unfair Trade Practices Act – Judge Vance granted Plaintiff leave to amend

her complaint to attempt to comply with Rule 9(b) of the Rules of Civil Procedure. *See* Order at 19-22.

Plaintiff filed her Second Amended Complaint on January 27, 2009, which Defendant Jackson Hewitt moved to dismiss on February 9, 2009 on the case-dispositive grounds that Plaintiff continued to fail to satisfy the Rule 9(b) standard, and had modified her allegations so as to fatally undermine the basis for the invasion of privacy claim. *See* Docket Entries Nos. 57 and 59. Thirty days after Plaintiff filed her Second Amended Complaint, and only after Jackson Hewitt moved to dismiss it, Plaintiff filed the instant Motion, seeking leave to file a Proposed Third Amended Complaint (“Proposed Complaint” or “Third Amended Complaint”). Notably, including her motion for reconsideration, this Motion represents Plaintiff’s fourth attempt at amendment.

Plaintiff’s proposed Third Amended Complaint is substantially the same as the Second Amended Complaint except for the addition of Count 10 and related facts. Plaintiff seeks to add the additional legal claim that Defendants violated a subsection of the Louisiana Consumer Credit Law (Title 9, Chapter 2), which requires those who act as loan brokers to be licensed by the state unless they are only brokering to facilitate refund anticipation loans.³ *See* Proposed Complaint at ¶ 31. Plaintiff alleges that by business partners of Jackson Hewitt offering loans to Jackson Hewitt customers, without Jackson Hewitt first being licensed by the state as a loan broker, violates the Louisiana Consumer Credit Law. Plaintiff generally alleges, as to no person in particular, that “upon information and belief, Defendants charge a \$50 fee for [various loans]” and that “[p]ursuant to La. Rev. Stat. § 9:3572.12(D), an unlicensed loan broker is subject to

³ Jackson Hewitt reserves its rights to make any and all arguments regarding the merits of Plaintiff’s claims, including but not limited to the argument that the loans alluded to by Plaintiff are refund anticipation loans and accordingly subject to the carve-out provisions of the statute.

forfeiture of all fees, interest, and charges received, plus damages in the amount of twice the total fee received.” Proposed Complaint at ¶ 35. Plaintiff does not allege that such alleged fees were actually levied on Plaintiff or that she suffered any subsequent damages. *See id.*

III. STANDARD OF REVIEW AND PLAINTIFF’S BURDEN

Under Rule 15(a) of the Federal Rules of Civil Procedure, “[t]he Court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). However, “that generous standard is tempered by the necessary power of [the court] to manage a case.” *Schiller v. Physicians Res. Group Inc.*, 342 F.3d 563, 566 (5th Cir. 2003) (citing *Shivangi v. Dean Witter Reynolds, Inc.*, 825 F.2d 885, 891 (5th Cir. 1987)). In deciding whether to grant Plaintiff’s Motion for Leave to Amend, this Court may consider a variety of factors in exercising its discretion, including undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by the amendments previously allowed, undue prejudice to Jackson Hewitt by virtue of allowance of the amendment, and futility of the amendment. *Id.*

The standard for futility under Rule 15(a) is whether the proposed claims could survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See Landavazo v. Toro Co.*, 301 Fed. Appx. 333, 337 (5th Cir. 2008) (affirming a denial of leave to amend denied because complaint as amended would not have been able to survive a motion to dismiss) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007)). Therefore, when considering whether an amendment would be futile, this Court must “review the proposed amended complaint under ‘the same standard of legal sufficiency as applies under Rule 12(b)(6).’” *Id.*

Under that Rule 12(b)(6) standard, while this Court must accept all factual allegations in the proposed Third Amended Complaint as true, the Court cannot assume that Plaintiff can prove facts that she has not alleged or that Jackson Hewitt has injured Plaintiff in ways that she has not alleged. *See Associated Gen. Contractors of CA, Inc. v. CA State Council of Carpenters*, 459

U.S. 519, 526 (1983). This Court must hold Plaintiff to her “obligation to provide the grounds of [her] entitlement to relief,” which “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*, 127 S. Ct. at 1964-5 (internal quotations omitted); *see also Samford v. Staples*, 249 F. App’x 1001, 1003 (5th Cir. 2007). Plaintiff’s 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, Plaintiff’s complaint fails to satisfy the Rule 12(b)(6) standard when she fails to “nudge[] [her] claims across the line from conceivable to plausible.” *Id.* at 1974.

Furthermore, Plaintiff, as the party seeking leave to amend, bears the burden of establishing that any delay in bringing the amendment was not due to oversight, inadvertence or excusable neglect.” *See Deliberto v. Wyndham Canal Place, Inc.*, No. Civ A03-3271, 2004 WL 1290774 at *1 (E.D. La. Jun. 10, 2004) (citing *Parish v. Frazier*, 195 F.3d 761 (5th Cir. 1999)). As set forth below, Plaintiff has failed to establish her entitlement to this amendment, and therefore her Motion should be denied.

IV. ARGUMENT

A. Plaintiff’s proposed amendments would be futile and therefore leave to amend should be de denied.

As established below, Plaintiff’s proposed amendments are futile and should be disallowed because (a) no independent private right of action exists under La. Rev. Stat. § 9:3572⁴; (b) even if the Court were to find that a private right of action does exist, such a claim would be governed by § 9:3552, the procedural arm of the Louisiana Consumer Credit Law, with its strict notice and statute of limitation provisions – neither of which Plaintiff alleges that she

⁴ All references to sections refer to Louisiana Revised Statutes, unless otherwise indicated.

has complied with, or even mentions; and (c) Plaintiff has failed to allege that Jackson Hewitt actually collected any allegedly unlawful fees from Plaintiff.

B. § 9:3572 does not provide for a private right of action.

In contrast with other similar statutes that expressly create a private right of action, such as the Louisiana Unfair Trade Practices Statute (“LUTPA”) or the Louisiana Database Security Breach Notification Law (“LDSBNL”), § 9:3572 contains no language suggesting, let alone expressly stating, that it creates a private right of action against loan brokers. *See, e.g.*, § 51:3075 (“**[a] civil action may be instituted** to recover actual damages resulting from the failure to disclose in a timely manner to a person that there has been a breach of the security system resulting in the disclosure of a person’s personal information.”) (emphasis added); § 51:1409(A) (“**may bring an action individually but not in a representative capacity** to recover actual damages.”) (emphasis added).

To the contrary, § 9:3572 expressly vests any power to act in the Louisiana Commissioner of Financial Institutions through a hearing pursuant to the Administrative Procedure Act. *See* § 9:3572.12(B) (“The commissioner may maintain a civil action in a court of competent jurisdiction to recover ... a civil penalty.”). As an example of the degree to which Plaintiff is misreading the statute, the forms of relief Plaintiff seeks under § 9:3572.12 are all expressly and specifically reserved for the commissioner. Contrary to Plaintiff’s assertion, the statute’s mere reference to the recovery of amounts paid by aggrieved parties does not create a private cause of action, as such actions can only be brought by the commissioner acting on those persons’ behalf. In addition to monetary relief, Plaintiff’s Third Amended Complaint seeks the following relief under § 9:3572.12: (1) Count 7 – declaratory judgment under § 9:3572.12(D); and (2) Count 8 – injunction under § 9:3572.12(D). However, as § 9:3572.12(E) clearly states, only the commissioner is vested with the rights to seek an injunction or any other relief he deems necessary. *See* § 3572.12(E). (“Whenever it shall appear to the commissioner ... that any person [has violated the Loan Broker Statute], the **commissioner may, in his discretion:** (1)

Issue any order, including but not limited to cease and desist orders ... (2) *Apply to the district court of any parish in this state for an injunction* ... and for such other and further relief as he deems necessary.”) (emphasis added). Moreover, the statute’s repeated references to the commissioner’s power to act, without reference to a private right of action being available to aggrieved parties, clearly demonstrates that § 9:3572.12 was never intended to create a private right of action. *Compare, e.g.,* § 51:3075 and § 51:1409(A) *with* § 9:3572.

C. To the extent this Court concludes that a private cause of action exists, it would be governed by § 9:3552.

Even if the Court concludes that a private right of action exists for violations of § 9:3572.12 – which it does not – such a right is governed by § 9:3552, the Louisiana Consumer Credit Law’s procedural arm. *See Fid. Funds, Inc., v. Price*, 491 So.2d 681 (La. Ct. App. 1986) (holding that § 9:3552 governs any right to a civil remedy under the Louisiana Consumer Credit Law); *see also* § 9:3552 (referencing its application to the entire “chapter” of the Louisiana Consumer Credit Law, of which § 3572.12 is a part.)

§ 9:3552 provides:

If the court finds that the extender of credit has intentionally or as a result of error not in good faith *violated the provisions of this chapter*, the consumer is entitled to a refund of all loan finance charges or credit service charges and has *the right to recover* three times the amount of such loan finance charge or credit service charge...*The right to recover the civil penalty under this subsection accrues only after* [written notice, service of process to agent of a copy of the written notice, and the elapse of thirty days].

See § 9:3552 (A)(1)(a) (emphasis added).

Accordingly, the plain language of § 9:3552 requires that any and all violations of “this chapter,” which includes § 9:3572.12, is subject to the provisions of § 9:3552. As established below, § 9:3552 imposes strict notice and statute of limitations requirements, neither of which Plaintiff alleges she has satisfied and neither of which she can satisfy.

1. **Plaintiff has not satisfied the notice requirements under § 9:3552.**

The claim Plaintiff seeks to assert under the Louisiana Consumer Credit Law is barred because Plaintiff failed to properly and timely notify Jackson Hewitt, as required under § 9:3552. Under § 9:3552, “[t]he right to recover the civil penalty under this subsection *accrues only after* (i) written notice is given to the extender of credit by certified mail addressed to the extender of credit’s place of business in which the consumer credit transaction arose; (ii) a copy of such notice is mailed to the extender of credit’s agent for service of process; and (iii) thirty days have elapsed since receipt of such notice by the extender of credit, and the violation has not been corrected.” § 9:3552(A)(1)(a) (emphasis added).

Plaintiff fails to allege that she notified Jackson Hewitt in compliance with § 9:3552 – indeed her complaint omits any reference to the statute’s notice provisions at all. Therefore, Plaintiff has not satisfied the prerequisites under § 9:3552 and her claim is barred. *See Shoemaker v. Fid. Fin., Inc.*, 464 So.2d 1005, 1007 (La. Ct. App. 1985).

2. **Plaintiff’s proposed claims are time-barred.**

Even if Plaintiff could state a viable cause of action under § 9:3552 – which she cannot – and even if she complied with the notice requirements, such claims are time barred under § 9:3552(E) because more than sixty days have elapsed since Plaintiff’s final payment was due. Under § 9:3552(E), “[a]ny civil action under this section must be brought *within sixty days of final payment* of the consumer credit contract, or in the case of a revolving loan or revolving charge account, within one year of the date of the violation.” *See also Fidelity Funds, Inc., v. Price*, 491 So.2d at 684 (“The very short period provided in LSA-R.S. 9:3552 manifests the legislative intent to have claims arising out of Louisiana Consumer Credit Law dealt with quickly.”)⁵

⁵ Even if Plaintiff were to argue that a different statute of limitations, rather than § 9:3552, applies here, Plaintiff’s claims would still be time barred, as the catch-all statute of limitations for all delictual acts not subject to criminal prosecution is one year. *See* La. C.C. Art. 3492.

Here, three years elapsed between the time Plaintiff made her final payment and the date on which she sought leave to amend her Complaint to include her claims under the Louisiana Consumer Credit Law. *See* Motion at ¶ 17 (alleging that Plaintiff’s loan was due on February 17, 2006 but conceding that she did not seek leave to file her Third Amended Complaint until February 26, 2009.) This three-year lapse clearly exceeds the sixty-day period in which Plaintiff was required to file a claim under § 9:3552, and therefore her claim is time-barred.⁶

D. Plaintiff’s proposed amendment should be denied because it fails to adequately plead that Defendant Jackson Hewitt collected a loan fee from Plaintiff.

Plaintiff’s Motion for Leave to Amend should be denied on the independent ground that Plaintiff has failed to state a claim, even under her incorrect reading of § 9:3572.12, by failing to allege that Jackson Hewitt collected fees or interest from her. As set forth above, Rule 15(a) requires that Plaintiff’s proposed amendments be able to withstand scrutiny under the same standard applicable to a 12(b)(6) motion. *See, supra, citing Landavazo*, 301 Fed. Appx. at 337 (affirming the denial of a motion for leave to amend because complaint as amended would not have been able to survive a motion to dismiss). Since Plaintiff’s proposed claim fails to meet such a standard, leave to amend is futile and Plaintiff’s Motion should be denied.

Under § 9:3572.12(D), “[t]he contracting to receive any fee, interest, or other charge in violation of this Chapter shall result in forfeiture by the loan broker.” However, nowhere in Plaintiff’s proposed complaint does Plaintiff actually allege that *she personally* was charged any fee, interest, or other charge in violation of the Louisiana Consumer Credit Law. Instead, Plaintiff alleges the following, upon information and belief:⁷

⁶ Even if Plaintiff were to argue that her proposed claim “related back” under Rule 15(c) of the Federal Rules of Civil Procedure to the date Plaintiff filed her original complaint (May 22, 2008), Plaintiff’s claims would still be time barred by over two years, assuming that Rule 15(c) even applies.

⁷ Plaintiff’s reliance on “information and belief” as the basis for those allegations is telling. If Plaintiff actually engaged in these alleged transactions, she presumably would have first-hand knowledge of whether she was charged any allegedly improper fees by Jackson Hewitt.

“34. 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. For example, *upon information and belief*, Defendants charge a \$62 fee for a \$550 Pre-File Money Now Loan, which represents 3% of the total loan amount plus \$45. In addition, customers receiving a Pre-File Money Now Loan are also obligated to pay a non-refundable \$50 “tax preparation fee.”

35. Similarly, *upon information and belief*, Defendants charge a \$50 fee for a Holiday or HELP Loan. In addition, customers receiving a Holiday or HELP Loan are also obligated to pay a non-refundable \$25 “year-end tax planner fee.” 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.”

Proposed Complaint at ¶¶ 34-35 (emphasis added).

Plaintiff fails to allege an essential element of her claim – that she is an aggrieved party under § 9:3572.12(D). That is, she fails to allege that Jackson Hewitt actually charged her these alleged fees. Accordingly, her amendment is futile and her motion should be denied.

E. Plaintiff’s motion should be denied because it reflects a dilatory motive and prejudices Jackson Hewitt.

Under Rule 15(a), this Court may, in its discretion, deny Plaintiff leave to amend based upon a finding that she filed her motion in bad faith and with dilatory motive. *See Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139-40 (5th Cir. 1993) (affirming a denial of a motion to amend on the grounds of bad faith and dilatory intent; plaintiffs were aware of facts before filing original complaint and filed new claims in an effort to avoid summary judgment).

Here, Plaintiff seeks leave to make further amendment to her claims only to further delay the resolution of this case and force Jackson Hewitt to expend additional resources defending meritless claims with the apparent motive of leveraging a settlement. Plaintiff fails to justify why she failed to include these claims in her original complaint, or even in her Second Amended Complaint. Due to this deficiency alone, this Court should deny Plaintiff’s request for leave to file her Third Amended Complaint. *See Financial Acquisition Partners LP v. Blackwell*, 440 F.3d 278 (5th Cir. 2006). In *Financial Acquisition*, the Fifth Circuit upheld the district court’s

denial of leave to file a Third Amended Complaint. The Court stated that, “*Plaintiffs never provided the requisite specificity* for leave to file a fourth complaint.” *Id.* at 292 (emphasis in original).

Here, as in *Financial Acquisition*, Plaintiff has failed to explain to this Court why the present claims were not filed in one of her *three prior iterations* of the Complaint. Even were Plaintiff to contend that the documents at the Jefferson County Sheriff’s office were necessary to become aware of this claim, Plaintiff was granted, by an order of this Court, access to those documents months before she filed her *Second Amended Complaint*. See Order granting Joint Motion to Compel Inspection of Documents, Docket Entry No. 31. The fact that Plaintiff did not seek leave to file these claims until after Jackson Hewitt filed its Motion to Dismiss Plaintiff’s *Second Amended Complaint* – a motion that would be dispositive as to the entire case – makes Plaintiff’s failure to explain her delay that much more inexcusable.⁸ See *Wimm*, 3 F.3d at 139-40 (affirming a denial of a motion to amend where Plaintiffs were aware of facts before filing original complaint and filed new claims in an effort to avoid summary judgment).

Plaintiff’s Motion also should be denied because her proposed amendment imposes unfair burdens on this Court and on Jackson Hewitt. Jackson Hewitt and this Court are being prejudiced by the significant and inefficient motion practice that these repeated amendments are requiring.⁹ See *Ordemann v. Unidentified Party*, No. Civ 06-4796, 2008 WL 695253 at *3 (E.D. La. Mar. 12, 2008). In *Ordemann*, the court denied the plaintiff leave to amend, based in part on the finding that defendant would be prejudiced if plaintiff was allowed to file another amended complaint because it would require the defendant to file yet another motion to dismiss.

⁸ At the very least, Plaintiff knew when she filed her *Second Amended Complaint* that she had taken out a loan in January of 2006 and whether she was charged fees in conjunction with such a loan. Furthermore, Plaintiff presumably received the terms and conditions of such loan and had ample opportunity to research Defendants’ compliance with the Louisiana Consumer Credit Law.

⁹ Jackson Hewitt reserves all rights to seek costs, sanctions, or other relief based upon the prejudice and costs it has incurred due to Plaintiff’s dilatory conduct.

In *Schiller v. Physicians Resource Group*, the plaintiff previously had amended the complaint three times, the last of which had resulted in the court granting the defendant's motion to dismiss. *See Schiller v. Physicians Res. Group*, 342 F.3d 563, 565-66 (5th Cir. 2003). The plaintiff then sought leave to amend its complaint a fourth time. The district court concluded that plaintiff [had] "stated their best case after four bites of the apple [and] ... if, after that time, a cause of action has not been established, the court should finally dismiss the suit." *Id.* at 566 (internal quotation omitted). The Fifth Circuit upheld the district court's ruling that, "permitting a fifth pleading attempt would be an inefficient use of the parties' and the court's resources, would cause unnecessary and undue delay, and would be futile." *Id.*

Similarly, here Plaintiff's proposed amendment, if granted, would require Jackson Hewitt to file its *third* motion to dismiss to address these newly-asserted claims. Plaintiff's strategy of piecemeal litigation imposes undue inefficiencies on this Court and places an unfair burden on Jackson Hewitt, who rather than being given the opportunity to address all of Plaintiff's claims in one motion, is being forced to address them *seriatim*.

V. CONCLUSION

For the reasons set forth above, Defendants Jackson Hewitt Tax Service, Inc. and Jackson Hewitt Inc. request that this Court deny Plaintiff's Motion for Leave to File a Third Amended Complaint.

Respectfully submitted,

Dated: March 23, 2009

/s/ Veronica D. Gray

Donna L. Wilson (Admitted *pro hac vice*)
Andrew S. Wein (Admitted *pro hac vice*)
Veronica D. Gray (Admitted *pro hac vice*)
KELLEY DRYE & WARREN LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
Telephone: (202) 342-8400

AND

KEAN, MILLER, HAWTHORNE,
D'ARMOND, McCOWAN & JARMAN, L.L.P.
Glenn M. Farnet (#20185)
Gina D. Banks (#27440)
One American Place, 18th Floor
Post Office Box 3513
Baton Rouge, Louisiana 70825
Telephone: (225) 387-0999

Attorneys for Jackson Hewitt Tax Service Inc.,
and Jackson Hewitt Inc.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 23rd day of March, 2009, a copy of the 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 counsel of record for Plaintiffs. A copy of this filing will also be sent via electronic mail and U.S. mail to counsel for Crescent City Tax Service, Inc.

/s/ Veronica D. Gray