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 RECONSIDERATION

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[1] All unreported cases hereto, *in globo*, are attached as Exhibit B.

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 Reconsideration ("Motion").

I. PRELIMINARY STATEMENT

In a backdoor attempt by Plaintiff Vicki L. Pinero ("Plaintiff") to amend her complaint for a fourth time,[2] Plaintiff seeks for this Court to reverse itself, and reinstate her claim under 26 U.S.C. § 6103. This Court dismissed that claim, as well as five other claims, in a 29-page well considered opinion after voluminous briefing and extensive argument. *See* Order and Reasons, dated January 7, 2009, Docket Entry No. 54 ("Order"). Plaintiff fails to meet, or even attempt to meet, her obligations under Rule 60(b) to establish her entitlement to such extraordinary relief, and accordingly Plaintiff's motion should be denied.

As a threshold matter, Plaintiff's Motion appears to hinge on a misstatement of the applicable legal standard under Rule 60(b). *See* Plaintiff's Memorandum in Support ("Pl. Memo") at 4 (omitting from her quotation of Rule 60(b) any reference to Plaintiff being required to establish that she acted with "reasonable diligence"). In any event, Plaintiff's motion should be denied for three principal reasons.

- First, rather than presenting "new" evidence, Plaintiff's Motion merely rehashes arguments that she made to this Court in opposition to Jackson Hewitt's original

[2] In addition to the instant Motion, currently pending before this Court is Jackson Hewitt's Motion to Dismiss Plaintiff's Second Amended Complaint. Currently pending before Magistrate Judge Knowles is Plaintiff's Motion for Leave to Amend her Second Amended Complaint, which Plaintiff filed only *after* Jackson Hewitt filed its Motion to Dismiss Plaintiff's Second Amended Complaint. All told, Plaintiff has filed or currently seeks leave to file four different versions of her complaint, plus this Motion for Reconsideration which essentially seeks to craft a fifth version of the complaint.

Motion to Dismiss, and which this Court rejected. *See* Plaintiff's Memorandum in Opposition to the Motion to Dismiss ("MTD Opp.") at 31 (wherein Plaintiff's counsel stated, "[a]s tax return preparers and IRS approved e-filers, Defendants are covered entities. Further, and again contrary to Defendants' position, the documents and information disclosed here are covered by the statutes."); Transcript of Oral Argument, December 3, 2008, annexed hereto as Exhibit A ("Tr.") at 34:9-34:14 (wherein Plaintiff's counsel stated "Jackson Hewitt is not only a tax preparer; they are a government-contracted e-filer. They are transmitting tax returns to the IRS. They are a covered entity."); *compare* Order at 25 ("The Court finds that this category does not include commercial tax preparers.")

- Second, the exhibits that Plaintiff refers to as "newly discovered documents" were documents that Plaintiff possessed prior to the hearing, and accordingly they cannot be "newly discovered evidence that, with reasonable diligence, could not have been discovered in time" under the meaning of Rule 60(b). Fed. R. Civ. P. 60(b); *see also* Order dated October 28, 2008, Docket Entry No. 31 (allowing all parties access to the documents); MTD Opp. at 32.

- Third, the documents Plaintiff highlights are irrelevant to the legal issue decided by the Court – namely, that Jackson Hewitt is not a proper defendant under § 6103, as it did not receive the Plaintiff's information "in the course of public business."

For these reasons, and as further detailed below, Plaintiff's Motion for Reconsideration should be rejected.

II. PROCEDURAL HISTORY

Plaintiff filed her original Complaint on May 22, 2008, and then, on July 15, 2008, filed an Amended Complaint. Docket Entries Nos. 1 and 9. Jackson Hewitt filed its Motion to Dismiss the Amended Complaint on August 4, 2008. Docket Entry No. 20. Plaintiff filed her opposition to the Motion to Dismiss on October 22, 2008. Docket Entry No. 29. 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 the Motion to Dismiss on November 10, 2008. Docket Entry No. 37.

Following voluminous briefing and an hour of oral argument, on January 7, 2009, this Court issued its ruling, dismissing six of the seven counts in Plaintiff's Amended Complaint, including the count under 26 U.S.C. § 6103 for which Plaintiff seeks reconsideration in this Motion. *See* Order at 25-26. On January 27, 2009, Plaintiff filed its Second Amended Complaint, which attempted to revive her fraudulent inducement and unfair trade practice claims.[3] Docket Entry No. 57. On February 9, Jackson Hewitt moved to dismiss the Second Amended Complaint on the grounds that Plaintiff still had not satisfied Rule 9(b) and that her amendments fatally undermined the sole surviving count for invasion of privacy. Docket Entry No. 59. On February 10, Plaintiff filed the instant Motion. On February 26, 2009, Plaintiff then moved for leave to file a *Third* Amended Complaint, which motion is currently pending before Magistrate Knowles. Oral argument on that Motion is scheduled for April 1, 2009 – the same day as Jackson Hewitt's Motion to Dismiss.

III. STANDARD OF REVIEW AND PLAINTIFF'S BURDEN UNDER RULE 60(B)

Plaintiff seeks reconsideration under Federal Rule of Civil Procedure 60(b) on the basis of "newly discovered evidence." *See* Pl. Memo at 4. Plaintiff's Memorandum, however, selectively quotes from Rule 60(b) in order to relieve herself of the obligation to establish reasonable diligence:

> the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *

[3] As to two of the counts in the Amended Complaint, the claims for fraudulent inducement and under the Louisiana Unfair Trade Practices Act, Plaintiff was granted leave to amend her complaint to comply with Rule 9(b) of the Federal Rules of Civil Procedure. *See* Order at 19-22.

> (2) newly discovered evidence *that, with reasonable diligence, could not have been discovered in time . . ..*

Fed. R. Civ. Proc. 60(b) (emphasis added); *compare id. with* Pl Memo. at 4 (omitting the reference to "reasonable diligence").

Reconsideration under Rule 60(b) is an extraordinary remedy, one not justified by the circumstances of this case. "[Reconsideration] is appropriate only in an extraordinary situation or if extraordinary circumstances are present." *See U.S. ex rel. Garibaldi v. Orleans Parish School Bd.*, 397 F.3d 334, 337 (5th Cir. 2005) (reversing a district court's decision to grant relief under Rule 60(b), finding no "extraordinary circumstances") (internal quotations and citations omitted).

Plaintiff, as the moving party, must establish that, in the exercise of reasonable diligence, she could not have previously introduced this purportedly "new" evidence to this Court. *See, e.g., Teal v. Eagle Fleet, Inc.*, 933 F.2d 341 (5th Cir 1991); *O'Daniel v. Stroud NA*, No. 05-5089, 2008 WL 5192457 at *2 (D.S.D. Dec. 9, 2008) (holding that "a 'motion to reconsider' pursuant to Rule 60(b) is properly denied where the movant 'd[oes] nothing more than reargue, somewhat more fully, the merits of their claim.'") (citing to *Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir. 1999)); *cf. Schiller v. Physicians Resource Group Inc.*, 342 F.3d 563 (5th Cir. 2003) (affirming denial of a motion for reconsideration under Fed. R. Civ. Proc. 59(e)[4] where the movant failed to show why the new evidence was not available prior to the ruling).

[4] Courts generally interpret the substantive requirements for reconsideration under Rule 60(b) as being more stringent than those under Rule 59(e). *See, Dorsey v. Northern Life Ins. Co.*, No. 04-342, 2005 WL 3541141 at *1 n. 4 (E.D. La. Nov. 8, 2005) (citing *Lavespere v. Niagara Mach. and Tool Works, Inc.*, 910 F.2d at 167, 173-74 (5th Cir. 1990)) (denying a motion for reconsideration under Rule 59(e) and pointing out that the 59(e) requirements are actually more liberal than 60(b)).

Because the documents that Plaintiff proffers in support of her Motion were referenced in Plaintiff's opposition to Jackson Hewitt's original Motion to Dismiss – and *ipse dixit* cannot be newly discovered – and because they do not affect this Court's legal analysis in any event, Plaintiff's Motion for Reconsideration should be denied.

IV. ARGUMENT

A. Plaintiff Fails to Establish That The Documents Are "Newly Discovered" Under The Meaning Of Rule 60(b).

Plaintiff's Motion for Reconsideration should be denied because there is nothing new about her arguments or factual allegations. To the contrary, the documents she references in this Motion for Reconsideration were already referenced in her prior opposition to the Motion to Dismiss.

For example, Plaintiff, in support of her Motion for Reconsideration, argues that, as an IRS "e-filer", the Defendants are covered within the purview of 26 U.S.C. § 6103(n). Pl. Memo. at 2 ("Considering Defendants [sic] status as government-approved and 'Authorized IRS e-file Providers,' Defendants are covered entities under 26 U.S.C. § 6103(n)."); *see also id.* at 4-6. Plaintiff urges this Court to reconsider its prior ruling because of this allegedly new fact:

> In its January 7, 2009 order, the Court ruled § 6103(n) "does not include commercial tax preparers." Assuming the Court's ruling is correct, the ruling does *not* address whether Defendants are covered entities. As noted, Defendants are *not* merely "commercial tax preparers"—Defendants are *government-approved and "Authorized IRS e-file Providers."* As such, Defendants are covered entities under § 6103(n) because they transmit "returns and return information."

Id. at 6 (citation omitted, emphasis in original).

However, this argument is not based on newly discovered evidence. To the contrary, it was raised, unsuccessfully, in Plaintiff's opposition to the Motion to Dismiss:

> Contrary to Defendants' argument, these statutes broadly protect consumers from unlawful disclosures of tax returns and tax return information by discrete persons, including persons responsible for "processing" or "transmi[tting]" tax returns. 26 U.S.C. § 6103(n). *As tax return preparers and IRS approved e-filers, Defendants are covered entities.* Further, and again contrary to Defendants' position, the documents and information disclosed here are covered by the statutes.

MTD Opp. at 31 (emphasis added); *see also* Tr. at 34:9 – 34:14 (wherein Plaintiff's counsel argued that "[section 6103(n)] also applies to companies processing, storing, and transmitting returns or return information or providing other services for purposes of tax administration. Jackson Hewitt is not only a tax preparer; they are a government-contracted e-filer. They are transmitting tax returns to the IRS. They are a covered entity."); *id.* at 41:12-16 (wherein Plaintiff's counsel showed this Court the statute governing the e-file program, and stated, "[t]his is the statute as to how you become an IRS approved e-filer, which by the way contains a provision regarding the obligation of all IRS approved e-filers to maintain the security of information they are transmitting during the e-filing process").[5]

Similarly, Plaintiff was already aware of, and in fact highlighted in her arguments, that the IRS transmits receipt confirmations back to Jackson Hewitt. While Plaintiff contends that this evidence is "newly discovered" (*see* Pl. Memo. at 4), she referenced this factual assertion in her original opposition papers, filed on October 22, 2008, well before the court's ruling, or even argument, on the Motion to Dismiss: "Upon e-filing the tax returns, the IRS notifies the Defendants of receipt of the tax return, which information was marked on many of the

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[5] The mere fact that Plaintiff failed to formally cite to or attach the IRS handbook for the e-file program or any other document she references in her prior briefs does not make them "newly discovered evidence", as they were available to the Plaintiff at the time of her original opposition, and Plaintiff referenced provisions of the e-file program in her briefs and argument. *See, e.g., Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990) (holding that "[motions for reconsideration] cannot be used to raise arguments which could, and should, have been made before the judgment issued.")

improperly disclosed documents." MTD Opp. at 32; *see also* Tr. at 37:4-16 (wherein Plaintiff's counsel argued that certain documents contain confirmation of the filing status).

It is axiomatic that documents and facts referenced by Plaintiff in a brief in October of 2008 cannot be considered "newly discovered" in February of 2009. Instead, Plaintiff is merely rehashing failed arguments that she had previously raised in her prior briefs. However, "[a motion for reconsideration] is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Dorsey v. Northern Life Ins. Co.*, 2005 WL 3541141 at *1 (citation omitted); *see also Simon v. United States*, 891 F.2d at 1159. Accordingly, Plaintiff's Motion should be denied.

B. Plaintiff Has Not Even Attempted to Establish That She Acted With Reasonable Diligence.

Under the correct legal standard applicable to Rule 60(b), it is Plaintiff's burden to establish that she exercised "reasonable diligence." *Compare* Rule 60(b) *with* Pl. Memo. at 4 (omitting the requirement of "reasonable diligence" in quoting the standard.) However, Plaintiff has not even attempted to credibly argue that she did so, or cite to facts and law that meet her burden, other than to vaguely assert that "the sealed documents were recently identified." Pl. Memo. at 3.

Such a conclusory assertion, particularly without offering an affidavit in support, is insufficient to meet Plaintiff's burden. *See, e.g., Government Fin. Servs. One Ltd. Partnership v. Peyton Place*, 62 F.3d 767, 771 (5th Cir. 1995) (affirming a denial of a motion for reconsideration under Rule 60(b) where, although a particular document was not brought to the court's attention previously, it was clear that the movant had access to the document prior to the judgment). Plaintiff not only had possession of these documents in the prior round of briefing, but had analyzed them sufficiently to comment about their nature in her briefs and at oral

argument. *See, supra*, IV(A). In sum, Plaintiff's Motion for Reconsideration provides no information or facts from which the Court could conclude that she acted with reasonable diligence.

But even putting that aside, a simple analysis of the timeline, as asserted by Plaintiff herself, shows that she could not have exercised reasonable diligence. Plaintiff has repeatedly alleged – in all iterations of her complaint – that her documents were returned to her in May of 2008 – documents which presumably contained information allegedly reflecting receipt confirmation by the IRS, since Plaintiff referenced that purported fact in her brief filed on October 22, 2008. *See* Complaint ¶ 30; MTD Opp. at 32. All other documents at issue in this case were made available for Plaintiff's inspection pursuant to this Court's Order on October 28, 2008, and indeed, upon information and belief, Plaintiff's counsel copied and/or reviewed those documents. Under these circumstances, Plaintiff has failed, as a matter or law and fact, to establish reasonable diligence. *See Provident Life and Accident Ins. Co. v. Goel*, 274 F.3d 984, 999-1000 (5th Cir. 2001); *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir. 1991).

C. The So-Called "New" Evidence Is Not Material Or Controlling On The Issue Decided By This Court's Order and Reasons.

In order for "new" evidence to justify reconsideration of a prior ruling, the new information must be both material and controlling. *See Bryant v. Salvi*, 2005 WL 1625319, *4, 141 Fed. Appx. 279 (5th Cir. 2005); *Alegria v. Texas*, 2008 WL 686161, *6 (S.D. Tex. Mar. 7, 2008). Aside from not being "new" in any meaningful way, the "facts" cited by Plaintiff are irrelevant to the legal issues that this Court resolved in its prior decision, and accordingly Plaintiff's Motion should be denied.

This Court's ruling was based on Congress' clear intent to draft § 6103 to restrict the IRS from sharing information with uninvolved third-parties – not parties who *already* were in

possession of taxpayers' confidential information, such as Jackson Hewitt. The case law uniformly supports that ruling, and Plaintiff has been unable to cite any case law to the contrary. *See, e.g.*, *Baskin v. United States*, 135 F.3d 338, 340 (5th Cir. 1998) (discussing the purpose of §§ 7431 and 6103); *Stokwitz v. United States*, 831 F.2d 893, 895 (9th Cir. 1987) (holding that "Section 6103 establishes a comprehensive scheme for controlling the release ***by the IRS*** of information received from taxpayers") (emphasis in original); *Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230, 1233 (7th Cir. 1993) (stating that "all [§ 6103] prevents is the IRS's sharing tax returns with other government agencies").

As the court in *Hrubec* recognized, and as this Court agreed, § 6103 reflects an effort by Congress "to limit disclosure by person who get tax returns *in the course of public business* – employees of the IRS, state employees to whom the IRS makes authorized disclosures, and private persons who obtain return information from the IRS with strings attached." *Hrubec v. Nat'l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995) (emphasis added); *see also* Order at 26. Defendants could not be involved "in the course of public business" through the e-filing of Plaintiff's tax returns – to the contrary, when they e-file tax returns they are merely performing a service for a customer, not supporting the public missions and objectives of the Internal Revenue Service.

Jackson Hewitt is no more engaged in "public business" than an individual who e-files her own tax returns. None of the documents Plaintiff seeks to belatedly introduce in connection with this Motion speak to that dispositive legal issue, and accordingly, none of them provide a

basis for the Court to reconsider its prior ruling.[6] *See* Order at 26 ("Defendants here have not received tax returns 'in the course of public business.'")

V. CONCLUSION

Plaintiff's Motion for Reconsideration should be denied.

Respectfully submitted,

Dated: March 23, 2009

/s/ Veronica D. Gray

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[6] In addition, Plaintiff fails to carry her burden to explain how any of these documents satisfy the definition of "return information" in anything other than conclusory language. *See* Pl. Memo. at 8. The mere confirmation of receipt status, contained on what appear to be internal Jackson Hewitt documents, does not reflect a communication from the IRS as to "whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing." *See* 26 U.S.C. § 6103(b)(2)(A).

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