UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

H&R BLOCK, INC.;
2SS HOLDINGS, INC.; and
TA IX L.P.,

Defendants.

Civil Action No. 11-00948 (BAH)
Judge Beryl A. Howell

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION *IN LIMINE* TO PRECLUDE ADMISSION OF DEFENDANTS' PROPOSED REMEDIES

The United States of America ("United States" or "Plaintiff") respectfully moves this Court for an order precluding H&R Block, Inc. ("HRB"), 2SS Holdings, Inc. ("TaxACT") and TA IX L.P. (collectively, "Defendants") from presenting at the preliminary injunction hearing evidence of any offer by Defendants not to raise prices or alter product offerings post-acquisition.

INTRODUCTION

Based on their Answer, public statements, recent discovery and opposition to Plaintiff's Motion for a Preliminary Injunction, it is apparent that Defendants will seek at the September 6 hearing to argue that this transaction should not be enjoined because, *inter alia*, HRB has "committed to the DOJ that they would not raise any prices on 2SS' ["TaxACT"] tax preparation products for at least three years and would continue offering 2SS' free tax preparation product to all taxpayers for at least three years."[1] Under established caselaw, Defendants' offer to fix TaxACT's prices and product offerings for three years, as a "cure" for the likely competitive harm arising from the proposed acquisition, is irrelevant and, therefore, inadmissible. Courts, including those in this district, have rejected such proposals from antitrust defendants and have declined to afford them any weight whatsoever. This time should be no different.

First, in order to establish a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, Plaintiff need only establish that the proposed transaction creates an appreciable danger of anticompetitive effects; it does not require an analysis of how Defendants may seek to remedy that danger. *Second*, even if properly part of a Section 7 analysis, Defendants' proposal does not alleviate many of the transaction's likely anticompetitive effects, including the potential reductions in innovation and product quality, and the increased likelihood of tacit or express

[1] *See* Docket Entry 31 (Defendants' Answer) at p. 4.

coordination amongst the remaining firms in the market. *Third*, were Defendants' proposal considered as part of a Section 7 analysis, it would necessarily thrust the Department of Justice and the Court into the position of regulators — monitoring each and every product offering by Defendants over the next three years to ensure that those offerings do not effectively raise prices.

Accordingly, the United States moves *in limine* to preclude Defendants from presenting at the preliminary injunction hearing any evidence regarding their promises not to raise certain prices or change certain product offerings post-acquisition. Such evidence is irrelevant to the issue of whether the acquisition will substantially lessen competition.

BACKGROUND

On October 13, 2010, HRB agreed to purchase TaxACT for $287.5 million. Prior to the acquisition, TaxACT had, in its own words, been a "tax industry maverick" and a "catalyst for change"[2] in the digital do-it-yourself tax preparation market ("Digital DIY"). By its competitors, TaxACT is a viewed as having had a "disrupt[ive]" effect on the Digital DIY market,[3] with aggressive pricing strategies that have caused "price compression" across the entire Digital DIY market.[4] TaxACT also has "raise[d] the bar higher" in the Digital DIY market through the quality of its offerings, for example, by providing taxpayers the ability to use all federal e-fileable forms with its free federal product.[5]

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[2] Plaintiff's Exhibit to its Memorandum of Points and Authorities in Support of its Motion for a Preliminary Injunction ("PX") 3 at –83; PX 4 at 18.

[3] PX 57 at 6; PX 35 at –71.

[4] PX 20 at 11-12.

[5] PX 56 (Press Release, *TaxACT 2009 Raises the Bar Higher on Free and Affordable Tax Preparation Solutions*, dated Jan. 7, 2010, available at http://www.taxact.com/press/2010/press-release-01-07-2010-affordable.asp (last visited Aug. 12, 2011)).

After a thorough investigation, Staff from the Antitrust Division of the Department of Justice informed Defendants that it believed the proposed acquisition violated Section 7 of the Clayton Act because it was likely to substantially lessen competition in the Digital DIY market, diminishing product quality and innovation, and enabling tacit or express coordination between the two remaining large firms in the Digital DIY market — HRB and Intuit.

At a final meeting with the Department of Justice before the Complaint in this matter was filed, Defendants offered to "remedy" those likely anticompetitive effects by committing to keep TaxACT's maximum pricing the same for three years and by continuing to offer "2SS' free tax preparation product to all taxpayers for at least three years."[6] The United States did not make any reference to Defendants' offer in its Complaint. However, in public statements as well as in their Answer, Defendants have asserted that the United States' characterization of the transaction as potentially anticompetitive was "wrong" and "contrary to logic and the evidence" in light of their proposed post-acquisition remedy.[7] Last month, Defendants issued an interrogatory seeking information on why Plaintiff does not believe Defendants' offer would cure the likely anticompetitive effects of the transaction, and in recent deposition testimony have asserted that their proposal should alleviate any anticompetitive concerns the Court may have. Today, Defendants filed an opposition to Plaintiff's Motion for a Preliminary Injunction in which they reiterated their same post-acquisition proposal.

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[6] *See* Docket Entry 31 at p. 4.

[7] Docket Entry 31 at p.4; *see also* News Release, *H&R Block Responds to DOJ Decision on TaxACT Merger*, dated May 23, 2011 available at *http://phx.corporate-ir.net/phoenix.zhtml?c=76888&p=irol-newsArticle&ID=1566949&highlight*=. (last visited Aug. 11, 2011) ("We're especially disappointed with this decision knowing that the DOJ rejected guarantees that we would not raise TaxACT's prices.").

ARGUMENT

I. Defendants' Proposal to Maintain Certain Prices and Product Offerings Post-Acquisition is Irrelevant to the Only Issue at the Hearing: Whether the Transaction Violates the Clayton Act.

It is well established that an offer by Defendants to "cure" the anticompetitive effects of a proposed acquisition is not a permissible defense to liability under Section 7 of the Clayton Act. To prove a violation, the United States need only show "that the merger create[s] an *appreciable danger* of [anticompetitive] consequences in the future." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001) (emphasis added).

Indeed, once the government makes a showing that competition in a particular market will be substantially lessened, anticompetitive effects are presumed. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 365-66 (1963); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 166-67 (D.D.C. 2000). Thus, courts have rejected antitrust defendants' attempts to use offers to refrain from anticompetitive conduct as defenses under Section 7. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 65 (D.D.C. 1998) (rejecting offer by defendants to maintain prices as cure for violation of Section 7); *Consol. Gold Fields, PLC v. Anglo Am. Corp. of S. Africa*, 698 F. Supp. 487, 502 (S.D.N.Y. 1988) (offer by defendants to cure post-merger an illegal acquisition should be "accorded no weight in a preliminary injunction hearing"), *rev'd on other grounds sub nom., Consol. Gold Fields, PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989).

In effect, Defendants are raising a potential (flawed) *remedy* as a defense to the claim that their acquisition constitutes a Clayton Act *violation*. This is putting the cart before the horse. If Defendants are willing to stipulate to liability, the appropriate next step would be a hearing on remedies. Absent such a stipulation, the focus of the Court's inquiry is limited to the question of

whether the proposed acquisition creates an appreciable danger that the merger will result in future anticompetitive consequences, and thus violates Section 7.

Thus, Defendants' offered remedy does not bear on any fact of consequence to the determination of this action and is irrelevant. *Fed. R. Evid*. 401. Where the relevance of evidence is "tenuous at best" to the issue before the court, granting a motion *in limine* is proper. *Jennings v. Thompson*, --- F. Supp. 2d ----, 2011 WL 1460431, at *3 (D.D.C. Apr. 18, 2011).

II. As a Proposed Remedy, Defendants' Offer is Plainly Insufficient

Even if the case were at the remedy stage, Defendants' proffered cure would be irrelevant. Divestiture is the preferred remedy for an illegal merger or acquisition "[because it is] the remedy best suited to redress the ills of an anticompetitive merger." *California v. Am. Stores Co.*, 495 U.S. 271, 285 (1990).

In contrast, Defendants' offer fails to address many of the likely anticompetitive effects from the acquisition. For example, customers would lose the greater innovation and improved quality that they received due to the competition from an aggressive, independent TaxACT, including the competition between HRB and TaxACT. Additionally, the elimination of TaxACT as a competitor increases the likelihood of coordination between HRB and TurboTax. None of these issues are addressed at all by the Defendants' offer. *See United States v. Pennzoil Co.*, 252 F. Supp. 962, 984 (W.D. Pa. 1965) (court cannot rely on a promise by antitrust defendant to permit acquired company to "continue to function in the future as it has been doing heretofore" where acquired company had served as deterrent to coordination in market).

Defendants' offer also proves too much. TaxACT has had a *downward* effect on Digital DIY pricing. Pledging not to raise prices above their current level for three years does nothing more than set an absolute price for the next three years. In rejecting a similar offer by antitrust

defendants, the Court in *Cardinal Health* stated that "fierce competition" among the merging parties had been responsible for "falling prices." 12 F. Supp. 2d at 65. An offer to preserve prices at their current levels, by contrast, "fails to ensure that prices will continue to fall." *Id.*

Similarly, Defendants' pledge not to discontinue TaxACT's free federal product for three years says nothing about whether that product will continue to be aggressively updated and improved as it has been, in the face of competition, over the past several years. Indeed, were this remedy implemented, HRB's incentives would be to weaken the quality of TaxACT's products. TaxACT has been a disruptive maverick precisely because it continuously comes up with innovative, high quality products. If HRB weakens the quality of TaxACT's products and maintains the current TaxACT price point, the net result is a price increase for consumers. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1769 ("diminished quality represents a price increase even when nominal prices remain constant") (3d ed. 2010).

The fact that Defendants are willing to make such an offer "strongly supports the fears [that the proposed acquisition will result in] impermissible [anticompetitive effects]." *Cardinal Health*, 12 F. Supp. 2d at 67. The inescapable conclusion is that Defendants' offer is not a cure at all. Instead, it is nothing more than an attempt to distract the Court from the fact that this proposed acquisition will substantially lessen competition. Accordingly, the proposal is irrelevant to the issue of liability under Section 7.

III. Defendants' Offer to Fix TaxACT's Prices Would Place an Undue Administrative Burden on the Department of Justice and this Court

The only remedy available at the preliminary injunction hearing is a preliminary injunction preventing consummation of the deal. The Supreme Court has held that divestiture is the preferred remedy for Section 7 violations because other remedies "involve the courts and Government in regulation of private affairs more deeply than the simple order of divestiture."

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961). Defendants' proposed cure falls short of divestiture and would require constant monitoring by the Department of Justice and this Court. Indeed, there is evidence that the merged firms already are considering evading their proposed remedy by less aggressively marketing TaxACT after the acquisition.[8] Moreover, were Defendants to violate the terms of their offer — assuming the violation were even detected — the Government would be forced to initiate a contempt proceeding. Such a remedy might then "take years to obtain." *Id*. at 334.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court preclude Defendants from presenting at the hearing any evidence of any offer by Defendants not to raise prices or alter product offerings post-acquisition.

[8] PX 55.

Dated this 12th day of August, 2011.

Respectfully Submitted,

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