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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. 1:11-cv-00948 (BAH) Judge Beryl A. Howell

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE

On August 12, 2011, Plaintiff filed a motion *in limine* to preclude the Court from considering Defendants' guarantee to continue offering TaxACT's brand and TaxACT's current free online offers at no more than TaxACT's current prices for the next three years.[1] In other words, Plaintiff seeks to have this Court ignore Defendants' guarantee to have the TaxACT

[1] H&R Block's guarantee was originally made in the form of a written settlement that William Cobb, current CEO of H&R Block, presented to the Department of Justice. It is attached as Exhibit A. The written settlement also offers to continue and even extend TaxACT's contract with Avanquest, which allows Avanquest to sell TaxACT-branded software.

brand and business model continue for at least three years without any increase in price (but with potential decreases) regardless of industry conditions or other economic developments. The motion is groundless. Defendants' promise to maintain the status quo is highly-probative of the merits inquiry as well as the equitable considerations that the Court will be making in ruling on Plaintiff's preliminary injunction motion. As a result, the motion should be denied.

INTRODUCTION

On October 13, 2010, after significant investigation into the synergies H&R Block could achieve and the strategic benefits it could derive from having a "low end, discount online fighter brand,"[2] H&R Block signed an agreement to purchase 2SS Holdings, Inc. ("TaxACT"). After H&R Block and TaxACT completed their Hart-Scott-Rodino Act filings, the Department of Justice ("Plaintiff") began an investigation into the proposed acquisition.

Throughout Plaintiff's investigation, H&R Block consistently and continuously confirmed its intention to 1) maintain the TaxACT brand as a leader in the online value market; 2) aggressively acquire market share through adherence to TaxACT's marketing strategy of "free;" 3) place the TaxACT management team in charge of TaxACT as well as H&R Block's entire Digital business; and (4) integrate H&R Block's Digital IT platforms into TaxACT's platform in order to achieve significant efficiencies.[3] Relying primarily on draft documents dating significantly prior to the actual purchase, Plaintiff nonetheless brought suit to block the transaction claiming that the transaction would eliminate TaxACT as a competitor and lead to

[2] DX0344-014; *see also* DX0235-014-017 (describing H&R Block's "fighter brand" strategy).

[3] *E.g.*, DX0001-96 ("Strategy Recommendation . . . [c]ontinue to run TaxACT with its pre-existing brand (outside Block) in order to aggressively acquire share in the FREE low price/value space."); DX1008-003 ("The TaxACT team will lead the combined digital business."); DX1002-005 (displaying strategy to have TaxACT "aggressively target[] the low ground"); DX1004-002 (stating plan to "aggressively market free and online value pricing through TaxAct brand . . . leverage TaxAct platform to serve H&R Block at Home Online clients in FY12"); DX-0800-003 (projecting to "use TA as the primary outward facing customer acquisition tool").

higher prices.[4] To convince Plaintiff of its sincere intent to use the TaxACT brand as a "fighter" brand competing aggressively on price, H&R Block translated its already-stated business plan into a *guarantee* that it will continue to offer and market the TaxACT products (including all current offerings) at no higher than current prices for at least three years (hereinafter the "Guarantee"). Defendants' offer was not and is not offered as a defense. Rather, it is highly-probative (and entirely non-prejudicial) evidence that 1) the transaction is not likely to lead to anti-competitive effects and 2) there is no risk of irreparable harm. It is, thus, evidence that directly supports Defendants' position that a preliminary injunction is unnecessary.

ANALYSIS

A motion *in limine*, defined broadly, is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 & n.2 (1984). Plaintiff's filing fails to meet this expansive definition because Plaintiff fails to assert any prejudice whatsoever from the admission of the Guarantee into evidence. This alone compels the conclusion that the Guarantee should be admitted if it has "any tendency" to make a fact that is of consequence more or less probable. Fed. R. Evid. 401, 402.

Moreover, Plaintiff's failure to provide a single case precluding a defendant from offering evidence of its post-acquisition intentions amplifies the meritlessness of the motion, particularly in an antitrust case where one of the primary issues is the likely future behavior of the Defendants post-acquisition. Indeed, the post-acquisition intentions evidenced by the Guarantee are directly probative of competitive effects analysis—a required showing in every Section 7 case. *United States v. Sungard Data Sys. Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001)

[4] *See* Compl. at ¶¶ 44-45.

("To establish a Section 7 violation, plaintiff must show that a pending acquisition is reasonably likely to cause anticompetitive effects."). Plaintiff attempts to avoid the clear relevance of the Guarantee by mischaracterizing it as a defense. It is not; instead, the Guarantee demonstrates that competition in the market will at a minimum remain the same post transaction, that irreparable harm will not occur, and that a preliminary injunction is not warranted. For these reasons, Defendants' Guarantee is admissible.

A. The Guarantee is Not a Defense

Defendants' Guarantee that H&R Block will continue to offer TaxACT's same product lineup at the same prices for the next three years is neither a remedy nor a defense. It is valid support for Defendants' position that the merger will not lessen competition. The Guarantee was not raised as an affirmative defense in Defendants' Answer. *See Defs'. Answer* at 4. While the Guarantee has now become a public promise to this Court and taxpayers, it originated as a settlement offer of a potential remedy. The Court has broad discretion to admit such settlement offers for any purpose other than to prove liability. *See* Fed. R. Evid. 408.

B. The Commitment is Relevant to Multiple Issues and Should Be Considered

Defendants' Guarantee is probative, and therefore admissible, for three reasons. First, it directly minimizes the likelihood that anticompetitive effects will result from the transaction. Second, it suggests that the transaction will not cause irreparable harm to the public. Third, it ensures at a minimum that the status quo will continue for three years, obviating the need for a preliminary injunction.

Antitrust defendants routinely argue, and courts routinely consider, evidence of defendants' post-acquisition intentions because such evidence is probative of the competitive effects a transaction will have. *E.g., FTC v. Butterworth*, 946 F. Supp. 1285, 1298 (W.D. Mich.

1996) (stating that evidence of the defendants' commitment to freeze prices "bespeaks a serious commitment by defendants—a commitment to which they can be held accountable—. . . corroborates other evidence . . . and further undermines the predictive value of the FTC's prima facie case"). The cases cited by Plaintiff actually support this point. In *FTC v. Cardinal*, the Court spent an entire subsection of the opinion explicitly considering whether Defendant's proposed post-acquisition divestiture would alleviate the anti-competitive concerns that the court had. *See FTC v. Cardinal*, 12 F. Supp. 2d 34, 64-65 (D.D.C. 1998). That the Court was ultimately unconvinced that the divestiture would be sufficient is irrelevant to this motion *in limine* (and quite different from the facts of this case). In *Consolidated Gold Fields v. Anglo American Corporation of South Africa*, another case that Plaintiff relies on, the court "accorded no weight" to a divestiture argument *that it considered at the preliminary injunction hearing*. *Consol. Gold Fields v. Anglo am. Corp.*, 698 F. Supp. 487, 502 (S.D.N.Y. 1988). Indeed, *United States v. Atlantic Richfield Co.*, the precedent relied upon in *Consolidated Gold Fields*, makes clear that proposed post-acquisition intentions are not only valid but are "entitled to serious consideration." *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1073-74 (S.D.N.Y. 1969) ("The factors to which defendants refer [including a potential "decree of divestiture"] cannot be ignored and are entitled to serious consideration.").

In this case, the evidentiary value of Defendants' Guarantee goes even further. Plaintiff has the burden of proving irreparable harm, "an imminent injury that is both great and certain . . . [and] is going to take place in the near future." *City of Moundridge v. Exxon Mobile Corp.*, 429 F. Supp. 2d 117, 127 (D.D.C. 2006). Because Defendants' Guarantee is a three-year commitment to pursue TaxACT's current business model—gaining market share by providing free online federal filings for all customers—it directly refutes any claim of irreparable harm, an essential

element of the preliminary injunction analysis.

C. Defendants Are Not Reducing Quality or Marketing

Though irrelevant to the motion *in limine*, the remainder and majority of Plaintiff's motion discusses the effect of the Guarantee and not the relevance or propriety of having the Court consider it. Plaintiff, thus, erroneously and improperly uses its motion to argue the merits of the Guarantee. While irrelevant to this motion, Defendants are compelled to respond to Plaintiff's arguments.

Plaintiff suggests that the Guarantee is insufficient because it will only create an incentive to diminish the quality of TaxACT's products. This is simply wrong. Defendants' incentive, as has been reiterated in internal business documents,[5] public statements,[6] and court filings, is to benefit from the TaxACT brand and business strategy the same way TaxACT did—by lowering IT cost structure and increasing market share through vigorous marketing of "free." Contrary to Plaintiff's assertions, Defendants have been willing to make such a far-reaching voluntary commitment because their motivation is exactly as they say: to "run TaxACT with its pre-existing brand (outside Block) in order to aggressively acquire share in the FREE low price/value space."[7]

Plaintiff's further implication that absent the transaction TaxACT is likely to have a downward effect on pricing is empirically and logically unsupportable. Indeed, Plaintiff provides no citation for this proposition. TaxACT's "free product" is already free, and there are

[5] *See e.g.*, DX1008-0009.

[6] http://seekingalpha.com/news-article/1325196-h-r-block-says-feds-have-it-all-wrong-on-taxact-merger (providing quotes from an investor conference call with William Cobb) (last visited Aug. 12, 2011).

[7] DX0001-096.

over a dozen similar online free products to which customers can, and will, turn.[8] It is difficult to envision greater downward pricing pressure than the "free" products and marketing offers that already exist and that will continue to exist after the transaction. The facts simply do not support Plaintiff's contentions.

Plaintiff also argues that such a conduct remedy would place an administrative burden on the Department of Justice. This argument again confuses the Guarantee as a relevant fact with what would happen if the Department of Justice and Defendants entered into a formal settlement or this Court ordered such a remedy. Nevertheless, Defendants note that arguments regarding divestiture being the "preferred remedy" and focusing on the "undue administrative burden" that a conduct remedy would impose are disingenuous. Plaintiff routinely enters into behavioral settlements similar to the Guarantee. Indeed, just two months ago, Plaintiff agreed to a settlement with George's Inc. that "requires George's to make important capital improvements."[9] According to the June 23, 2011 Department of Justice press release, the settlement requires Plaintiff to "monitor George's efforts to improve the plant until the new equipment is installed and operational." Clearly, Plaintiff is amenable to alternatives to divestiture and is willing and able to take on the "administrative burdens" associated with such remedies. That said, neither Plaintiff nor the Court would need to monitor Defendants' compliance with the Guarantee because the Guarantee has not been accepted by Plaintiff or ordered by the Court. Defendants will nonetheless abide by the Guarantee as it is an integral part of their strategic business plan.[10]

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[8] *See* Defs'. Br. in Opp'n. to Prelim. Inj. at 34-38 (discussing several other providers of free online products and offers, including TaxSlayer and TaxHawk).

[9] Press Release, Dep't of Justice, Justice Department Reaches Settlement with George's Inc. (June 23, 2011) (available at http://www.justice.gov/atr/public/press_releases/2011/272510.htm).

[10] Plaintiff concludes its motion by cryptically asserting that "there is evidence that the merged firms already are considering evading their proposed remedy by less aggressively marketing TaxACT after the acquisition." Pl's. Mot. *in limine* at 7. The only citation for this "evidence" is to the deposition of

CONCLUSION

Defendants do not present the Guarantee as a defense in this case. They proffered the Guarantee as one of many indices that anti-competitive effects will not inure from the transaction. Defendants also submit the Guarantee as evidence that there will be no irreparable harm to the public and that a preliminary injunction is unwarranted. These arguments are not only relevant, they are central to the Court's ultimate determination of the issues before it on Plaintiff's preliminary injunction motion. For these reasons, Plaintiff's motion *in limine* should be denied.

Dated: August 18, 2011

Respectfully Submitted,

_s/ Corey W. Roush___

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TaxACT's co-founder Camela Greif's 338-page Investigational Hearing transcript without any reference to a specific page. Defendants disagree with the characterization of Ms. Greif's deposition testimony as saying or implying any such thing. Regardless, Defendants have attached a declaration from Ms. Greif making clear her views on how TaxACT will be marketed post-transaction. *See* Exhibit B.