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)

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE THE 2011 LITIGATION SURVEY AND LIMIT DEFENDANTS' EXPERT REPORT

REDACTED VERSION FOR PUBLIC FILING*

*The United States files this non-confidential redacted version pursuant to the Protective Order entered on June 15, 2011.

I. Defendants Fail to Address the Relevant Evidentiary Question and Concede that the 2011 Litigation Survey is Inadmissible

Defendants' expert, Dr. Christine Meyer, relied on a 2011 survey prepared in anticipation of litigation to support her opinion that pen-and-paper tax preparation competes with TaxACT's digital do-it-yourself ("Digital DIY") products. The sole issue raised by this Motion is whether that survey satisfies Rule 702 of the Federal Rules of Evidence, which requires that an expert's testimony be "the product of reliable principles and methods," and Rule 703, which permits expert testimony regarding otherwise inadmissible evidence *only* if the evidence is the type "reasonably relied upon" by experts in the field. As explained in our opening memorandum, Plaintiff's survey expert, Dr. Ravi Dhar, has examined the survey and concluded, for the reasons set forth in his report and summarized in our memorandum, that the survey is not reliable to answer any questions relevant to this case.

Remarkably, in their entire 25-page brief, Defendants fail to address the evidentiary question raised by this Motion — they never even cite Rule 702 or Rule 703, and offer no competent testimony or evidence that the actual survey at issue here is "the product of reliable principles and methods" or is the type of survey "reasonably relied upon by experts." Instead, Defendants offer only their counsel's argument about the survey (which they have re-christened as a "Marketing Survey") and cannot even cite their own expert's report or deposition testimony that the survey is the type reasonably relied upon by experts. Citing general texts for the proposition that surveys may be reliable for some purposes is no substitute for competent evidence establishing the reliability of this specific survey in this case.

Even more remarkably, Defendants have essentially admitted that Dr. Dhar's critique is correct. Dr. Dhar explained in his report that the survey question relied on by Dr. Meyer fails to provide any basis for determining what TaxACT customers would do in response to a *change* in

the price, functionality or quality of TaxACT products.[1] Defendants know that this criticism is right, so they simply chose not to include the actual text of the survey question anywhere in their brief. Instead, they made up a new question and pretended that it is the question in the survey.[2] The actual survey question asked:

> "If you had become dissatisfied with TaxACT's price, functionality or quality, which products or services would you have considered using to prepare your federal taxes?"[3]

On its face, and as a matter of logic, the question has nothing to do with any *change* in the TaxACT product — which is the issue relevant to this matter.[4] As Dr. Dhar has explained, the question "most likely communicated to respondents to consider how they might respond if they were dissatisfied with the *current* price or quality of TaxACT."[5]

In response, Defendants actually rewrote the question in their brief and falsely recast it as having "focused generally on dissatisfaction based on a *change* on any one of three factors."[6] Defendants' implicit acceptance of Dr. Dhar's critique concedes the survey's inadmissibility.[7]

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[1] *See* GX 623 (Expert Report of Dr. Dhar at ¶¶ 14-16).

[2] Defs.' Opp. Memo. at 4.

[3] GX 604 at 7-8.

[4] *See* GX 623 (Expert Report of Dr. Dhar at ¶¶ 14-16).

[5] *See* GX 623 (Expert Report of Dr. Dhar at ¶ 15).

[6] Defs.' Opp. Memo. at 4 (emphasis added).

[7] Defendants contend that any flaws associated with the survey should go to weight rather than admissibility. *See* Defs.' Opp. Memo. at 16-17. This is incorrect. The surveys in the cases cited by Defendants for this proposition did not rely on Rule 703 for admissibility because the surveys in those cases were admissible under Rule 803(3) as "[t]hen existing mental, emotional, or physical condition." Fed. R. Evid. 803(3). Here, Defendants seek to offer the 2011 Litigation Survey as evidence of what consumers *would do* in the event of a hypothetical future price increase, which is hardly the same purpose as whether consumers are confused about the origin of a good or service, as in the trademark disputes cited by Defendants. *See, e.g., Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 227 (2d Cir. 1999) (noting that surveys used in cases involving trademark disputes "poll individuals about their presently-existing states of mind to establish facts about the group's mental impressions"). Moreover, the survey at issue in the only *antitrust* case Defendants cite was excluded. *See* Defs.' Opp. Memo. at 16-17 (discussing *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387, 436 (D. Del. 2003)).

The testimony of Defendants' own expert, Dr. Meyer, also supports the exclusion of the 2011 Litigation Survey. In her deposition, Dr. Meyer stated that changes to a TaxACT user, such as changes in tax complexity or income, could affect that user's satisfaction with TaxACT products.[8] In other words, Dr. Meyer has acknowledged that a question aimed at product selection based on "dissatisfaction" with TaxACT products does not necessarily contemplate *any* change to TaxACT products. Given Dr. Meyer's contention that "there is no reason to assume that the switching in response to a price increase, i.e., the type of switching that matters for market definition or unilateral effects analysis, is either similar to or different from general switching between products,"[9] the survey has no logical place in her testimony.

Contrary to Defendants' insinuations, this motion is not about the strength or weakness of the parties' market definition positions. It is simply about the rules that govern the truth-seeking function of the trial court. These rules mandate that certain requirements must be met before evidence may be admitted through, or be relied upon by, experts. This issue cannot be decided on the basis of what Defendants' lawyers, in retrospect, wish their survey had asked. Nor can the clear methodological faults of the survey be ignored simply because Defendants' lawyers hope and suggest that those flaws do not alter the survey's results. Based on the evidence and the relevant caselaw, this survey is inadmissible, and hence has no place in Dr. Meyer's testimony or the upcoming hearing.[10]

[8] Selection from GX 666 (Dep. of Dr. Christine Siegwarth Meyer at 223:13-22 (August 22, 2011)).

[9] Expert Report of Dr. Meyer at ¶ 130.

[10] Defendants' contention that Plaintiff's Motion is not timely (Defs.' Opp. Memo. at 5) is another attempt to distract the Court from reaching the relevant issue. Plaintiff filed its Motion on August 19, 2011, the deadline for filing motions concerning Defendants' expert. Joint Scheduling and Case Management Order at ¶ 31 (July 6, 2011). Prior to receiving Dr. Meyer's report on August 12, Plaintiff could not know whether Defendants were seeking to rely on the litigation survey in this case. Indeed, Defendants' argument makes little sense, given that they have sought to introduce the 2011 Litigation Survey solely through Rule 703, firmly anchoring it to Dr. Meyer's expert report.

II. Defendants Incorrectly Dismiss Non-Response Bias

Defendants' dismissal of Plaintiff's and Dr. Dhar's concerns regarding non-response bias is contrary to law and common sense.[11] Defendants implausibly argue, without any evidentiary basis, that this Court should draw no conclusion from a response rate of 2 percent.[12] Yet, Defendants cite no case in which a court approved a response rate even approaching 2 percent,[13] and point to no authority that contravenes the opinion of Dr. Dhar, the only survey expert in this case,[14] that the extremely low response rate here will result in non-response bias.[15] Defendants' limited point is that bias may not always be present simply because a response rate is low.[16] But such reasoning assumes that non-respondents, 98 percent of those surveyed, would give the same responses to the hypothetical choices presented as those few who chose to answer the question. Dr. Dhar posits that there is significant reason to think that they do not.[17] Defendants' only response is a confusing analysis suggesting that perhaps the survey was done of the wrong

[11] Defendants take issue with the publication dates of certain exhibits cited by Plaintiffs. Defs.' Opp. Memo. at 10-12. Such criticism is nonsensical. Non-response bias was, in fact, well understood long before 1969 (the earliest date noted by Defendants). *Id.* at 12. The date of a particular reference is far less important than the stubborn fact that non-response bias is indeed real and has been recognized for decades.

[12] Defs.' Opp. Memo. at 7-8.

[13] *Id.* The two cases cited by Defendants hardly support their case. *See Univ. of Kan. v. Sinks*, No. 06–2341-JAR, 2008 WL 755065, at *4 (D. Kan. Mar. 19, 2008) (noting that a 2.16% response rate is "by any standard . . . quite low" and implicitly adopted an expert opinion that it was "extremely likely that the non-response bias exerted a bias on the results" (citation omitted)); *Kinetics Concepts, Inc. v. Bluesky Med. Corp.*, No. SA-03-CA-0832, 2006 WL 6505346, at *6 (W.D. Tex. Aug. 11, 2006) (having a response rate of 10 percent, *five times greater* than the response rate here).

[14] Defendants have cited the Declaration of Tina Ruddy to support many doctrinal points regarding appropriate survey methodology. *See, e.g.*, Defs.' Opp. Memo. at 7-8. Plaintiff observes that Defendants have not offered Ms. Ruddy as an expert witness (nor contend that they could). Plaintiff urges the Court not to consider paragraphs 16 to 20 of Ms. Ruddy's declaration to the extent that they stray from her personal knowledge and constitute an expert opinion. *See* Fed. R. Civ. P. 26(a)(2); Fed. R. Evid. 701(c).

[15] GX 623 (Expert Report of Dr. Dhar at ¶ 25).

[16] Defs.' Opp. Memo. at 7-8.

[17] GX 623 (Expert Report of Dr. Dhar at ¶ 25).

population (TaxACT online users).[18] But this analysis is pure speculation, makes no sense,[19] and falls far short of Defendants' responsibility to "address non-response bias."[20]

III. The Remainder of Defendants' Argument is Irrelevant to the Issue at Hand

While Defendants do not devote even eight lines of text to address the fundamental flaw with their litigation survey, they do devote eight pages of their brief to arguing a point not at issue in this motion — whether manual filing (*i.e.*, not using any product) competes with Digital DIY products.[21] While Plaintiff will address this issue at the hearing, we note in the interim that Defendants ignore the testimony of H&R Block's current head of its Digital Group, as well as its former CEO, both of whom testified that they did not believe manual filing competes with Digital DIY,[22] in favor of the testimony of Robbie Edwards, a third-party whose products were used to file [redacted] returns last year.[23]

[18] Defs.' Opp. Memo. at 15-16.

[19] The 2011 Litigation Survey was sent only to TaxACT online users. Defs.' Opp. Memo. at 15. Thus, they were *all* "comfortable using the Internet." *Id.* The respondents were simply a biased subset with spare time.

[20] *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387, 437 (D. Del. 2003) ("It is incumbent upon the survey's proponent to prove that non-response bias does not exist where the response rate is below 70 percent."); *see also* GX 622 (Christine Meyer, *Designing and Using Surveys to Define Relevant Markets*, in Economics of Antitrust: Complex Issues in a Dynamic Economy 101, 103 (Lawrence Wu, ed. 2007)) ("the survey should address nonresponse bias").

[21] Defs.' Opp. Memo. at 18-25.

[22] *See* Plaintiff's Reply Memorandum of Points and Authorities in Further Support of its Motion for a Preliminary Injunction at 7-9.

[23] GX 155 (Declaration of Robbie Edwards).

Dated this 26th day of August, 2011.

Respectfully Submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

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