

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES OF AMERICA, | |) | |
| | |) | |
| | <i>Plaintiff,</i> |) | |
| | |) | |
| | v. |) | |
| | |) | Civil Action No. 1:11-cv-00948 (BAH) |
| H&R Block, INC. | |) | Judge Beryl A. Howell |
| 2SS HOLDINGS, INC. | |) | |
| TA IX L.P. | |) | |
| | |) | |
| | <i>Defendants.</i> |) | |
| | |) | |
| <hr/> | |) | |

DEFENDANTS' PROPOSED FINDINGS OF FACT

I. Background

A. Nature of This Action

1. On October 13, 2010, H&R Block, Inc. agreed to pay approximately \$287.5 million to acquire 2SS Holdings, Inc. (Joint Pre-Hr'g Stmt ("Stmt." 14-15) (the "Transaction")).
2. On May 23 2011, the United States brought this action to enjoin the Transaction, contending that it would substantially lessen competition in an alleged market for digital do-it-yourself tax preparation products in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Defendants disagree and believe that the proposed transaction would be good for competition and consumers. (Stmt. 1-2; vol. 23, 49:15-51:20 (Cobb))¹.

B. Parties To The Transaction

3. H&R Block, Inc., through its subsidiaries (collectively "H&R Block" or "the Company"), provides various tax preparation products and services, including tax preparation services at H&R Block offices, as well as products available online and in retail software. (Stmt. 15).
4. Approximately two-thirds of H&R Block's unit sales consist of tax preparation services offered through its H&R Block offices, while approximately one-third are through its digital product offerings. (Vol. 23, 36:6-11 (Cobb)).
5. H&R Block also has franchisees. Indeed, approximately 40% of H&R Block's office locations in the United States are franchise offices. (Vol. 3, 71:19-72:6 (Ernst); DX0358-018).
6. H&R Block's franchisees set their own retail prices and are independent competitors. (Vol. 3, 72:7-13; 79:20-80:6, 81:19-82:19 (Ernst)).
7. 2SS Holdings, Inc. is a corporation organized and existing under the laws of Delaware; it is

¹ Trial transcripts are cited by volume number ("vol.") based on chronological order. A complete list of volume numbers and corresponding hearing dates is in Exhibit K, filed with Defendants Memorandum in Opposition to Plaintiff's Motion for Permanent Injunction.

headquartered in Cedar Rapids, Iowa. 2SS Holdings, Inc., through its subsidiaries (collectively “TaxACT”), provides tax preparation products and services under the brand “TaxACT.”

II. Evolution of the Transaction

8. In July 2009, the parties began discussing the potential acquisition of TaxACT by H&R Block. (Vol. 21, 14:15-22 (Bowen)).

9. In September 2009, an H&R Block team met with TaxACT and identified several synergy opportunities. (Vol. 21, 16:16-19:9 (Bowen); DX9527-088-94).

10. In October 2009, the due diligence team presented those findings to H&R Block’s Executive Management team. The due diligence team reviewed a range of alternative strategies for the transaction and recommended that H&R Block “continue to run TaxACT as a separate brand focused on the low cost segment.” Maintaining separate brands and independent operation of TaxACT were listed as “Keys to Success” of the potential transaction, because, as Tony Bowen described, “continuing to offer both brands in the marketplace seemed like the best strategy and it was one of the keys to moving forward....” (DX0244-008-09; vol. 21, 19:10-21, 20:3-11, 21:4-22, 22:11-20, 23:13-17 (Bowen)).

11. In October 2009, H&R Block and TaxACT had another due diligence meeting. The results of the meeting were presented to the Executive Management team on October 31. At the meeting, they discussed whether to keep TaxACT as a separate brand and, if so, whether TaxACT would operate on a separate IT platform from H&R Block. (DX9527-035; vol. 21, 26:18-25 (Bowen)). Bowen, a member of H&R Block’s due diligence team, advocated to “maintain TaxACT as a separate brand with minimal connection to H&R Block,” in part because “[k]eeping TaxACT separate has value from a fighter brand perspective. The brand name has value within the low end segment.” (DX0002; DX9527-0034-52; vol. 21, 25:14-33:13 (Bowen)).

12. Also in the fall 2009, H&R Block was developing a state-of-the-art technology platform called “Silverlight,” so it saw limited benefit to integrating its platform with TaxACT’s at that time. (Vol. 21, 34:15-35:1, 40:19-41:22 (Bowen)).
13. Negotiations between the parties stalled in December 2009, and the proposed deal died. (Vol. 21, 33:14-16 (Bowen)).
14. Russ Smyth (H&R Block’s CEO) and Lance Dunn (TaxACT’s CEO) continued, however, to discuss a potential acquisition through the spring of 2010. (Vol.21, 34:3-10 (Bowen)).
15. After H&R Block abandoned development of its Silverlight platform, the TaxACT acquisition became even more attractive because of the potential synergy opportunity of integrating the H&R Block platforms with TaxACT’s. Some at the Company, including Bowen, had concerns as to whether TaxACT’s platform could handle all of H&R Block’s customers without compromising its own success. (DX9530; vol. 21, 34:11-35:1, 35:22-36:9 (Bowen)).
16. With this new potential synergy in mind, H&R Block conducted another due diligence trip in April 2010 to evaluate how best to integrate the technologies, market the separate brands post-acquisition, and assess other potential synergy opportunities. At the meeting, TaxACT management explained that H&R Block could utilize TaxACT’s technology to run H&R Block’s digital business and that TaxACT could accomplish the integration with “minimal interruption to [its] existing business.” (DX9527-053; vol. 21, 36:19-38:3 (Bowen)).
17. Alan Bennett replaced Russ Smyth as CEO of H&R Block in June 2010. When the H&R Block Board of Directors (“the Board”) approved active pursuit of a TaxACT transaction, Bennett appointed Bowen to lead the transaction team with instructions to “re-energiz[e] the team to look at TaxACT more seriously.” (Vol. 21, 38:21-39:5 (Bowen)).
18. On July 19-20, 2010, Bowen, Bennett, and others from H&R Block visited TaxACT again

to discuss the details of integrating the technologies. During the meeting, TaxACT laid out its plan for running the two digital brands, a plan later endorsed by both Bennett and Bowen. The plan included keeping two brands, both running from TaxACT's infrastructure, with TaxACT as the "price leader" focused on "low price" and H&R Block as a "premium product" with a "full form" free product. (DX1005; vol. 21, 41:23-42:9, 49:22-51:4 (Bowen)).²

19. Shortly thereafter, Mr. Bennett presented and recommended this approach to the Board of Directors while updating it about TaxACT. (DX1009; vol. 21, 51:24-53:2 (Bowen)).

20. Following the Board meeting, Mr. Bowen and others continued to conduct further due diligence to confirm and refine the potential synergies from the transaction. (Vol. 21, 53:16-54:1 (Bowen); *see* DX9524-001 ("We had the call with the TaxACT team, Jefferies and Greenhill this morning. They walked us through their proposed integration timeline and estimated cost to build out their team to support the HRB digital business.")).

21. In October 2010, the Board approved the transaction after being presented with the same plan to maintain separate brands, use TaxACT as the "low cost value provider focused on free," and to attain significant projected synergies from, among other things, integrating the two brands' platforms. (DX600-13, 14; vol. 21, 59:6-60:17 (Bowen)).

III. The Parties' Rationale For the Transaction

22. H&R Block is acquiring TaxACT to enable H&R Block to add "[m]eaningful synergies . . .

² H&R Block does not plan to raise prices on its premium products to "pricing equal to or above Turbo." (DX1005-001). When asked about DX1005-001, Tony Bowen noted that there is not and never was an intent to raise prices on any products after the Transaction. (Vol. 21, 51:16-19 (Bowen)); *see also* vol. 2, 110:5-11 (Bennett) (a price increase is not something that H&R Block discussed at deal time, and it is "not going to be implemented.")). In a presentation to the Board one week after DX1005 was created, Mr. Bowen outlined the post-transaction plan. (DX1009). There was no reference to "pricing equal to or above Turbo." (*Id.*). The financial documents presented to the Board regarding the Transaction assumed that H&R Block would not raise price for five years. (*E.g.*, DX0347-004).

including [the] ability to utilize the low-cost TaxACT model” and to offer a competitive low-cost product that will better “attract and retain clients using the ‘free’ model.” (DX1008-009, 10; vol. 23, 46:18-47:14 (Cobb); GX657 (Dunn 30(b)(6) Dep.) 90:19-91:2).

23. The Board and CEO approved the Transaction in October 2010 based on (1) the expectation that the Transaction would result in “meaningful synergies” (DX1008-009, DX0600-012, 040; vol. 23, 46:15-47:14 (Cobb); vol. 22, 62:10-63:9 (Bowen)) and (2) the plan to continue to operate TaxACT as a separate brand and a “low cost value provider focused on free.” (DX1008-010; vol. 23, 47:22-48:9 (Cobb)).

A. The Transaction Will Result in Significant Efficiencies.

24. TaxACT has a very efficient and very effective software development and marketing structure, combined with a unique culture focused on cost-cutting and providing the best customer experience possible. (Vol. 4, 107:17-23 (Dunn); vol. 6, 104:2-6 (Dunn)).

25. The efficiencies that will be realized from this Transaction will be invested back into H&R Block’s digital products through “increased features and functions on the product[s], lower prices or increase[d] marketing.” (Vol. 23, 50:6-51:5 (Cobb); DX0348).

B. The Transaction Will Allow H&R Block To Better Compete.

26. H&R Block’s corporate culture has been marred by five CEO transitions in five years, and H&R Block’s digital division has been plagued by inconsistency. (Vol. 23, 53:14-21 (Cobb); GX28 (vol. 2), 428:15-21; vol. 1, 131:7-20 (Bennett)).

27. H&R Block’s current CEO has signed a five year employment agreement. (Vol. 23, 53:17-18 (Cobb)). H&R Block’s business philosophy under his leadership is to: “serve more clients in the way that they want to be served” across any tax preparation method. (*Id.*, 51:2-5 (Cobb); vol. 4, 56:21-24 (Cobb)) (“We’ve made a decision that we want to play against the entire tax

preparation market that I've described. We want to have an offering in the way that consumers want to be served."); vol. 1, 104:22-105:11 (Bennett)).

28. H&R Block is determined to gain market share from TurboTax, the biggest competitor against both its digital products and retail offices. (DX1000-003 (growing market share); DX1008-010 (drive client acquisition); vol. 2, 85:12-19 (Bennett); vol. 24, 57:4-23 (Cobb)).

29. To effectively serve customers where they want to be served and to better compete against TurboTax, H&R Block must develop an effective value brand to compliment its premium H&R Block At Home brand. (DX0601-002 ("To grow in online we must actively market 'free' . . . We believe a 'fighter' brand (unrelated to Block) is the best way to freely market 'free.'")); vol. 2, 88:11-90:14 (Bennett) (describing TaxACT as "fighter" brand that would allow H&R Block "two kicks at the can" to acquire growth across all tax preparation)).

30. The Transaction will enable H&R Block to gain a strong presence in a growing and essential part of the tax preparation market—the value space—where it has not been an effective competitor in the past. (DX0102-001 (noting in March of 2010 that "[w]e would view this acquisition as a stand-alone investment in a piece of the market which we currently don't compete today"); vol. 21, 36:10-18 (Bowen) (same)).

31. **REDACTED**

REDACTED (Vol. 23, 44:6-15, 52:2-6 (Cobb) ("[W]e were uncompetitive in a part of the overall tax preparation market where our cost structure would not enable us to compete effectively."); GX28 (Dunn Dep.) 474:9-475:6 (discussing **REDACTED** **REDACTED**, but at the same time, you have the super premium opportunity with best of both and other Block-branded products and services to compete with Intuit on the upper end, too"))).

32. H&R Block also cannot REDACTED
REDACTED. (DX6147 (predicting that REDACTED
REDACTED); DX6146-021 (predicting that
REDACTED)).

33. Through the Transaction, however, Lance Dunn and the TaxACT founders will be in charge of all H&R Block and TaxACT digital products. (Vol. 21, 57:15-24 (Bowen) (discussing ultimate proposal for TaxACT team to separately manage both digital businesses from Cedar Rapids). They plan to continue to run TaxACT as a separate brand. (Vol. 21, 23:13-17 (Bowen); vol. 23, 49:6-14 (Cobb); DX1014-001 (“Both brands would continue to operate in the marketplace.”); DX1800-001 (same); DX1008-010 (same); DX0244-009 (noting, even in 2009, that a “Key to Success” was to “[m]aintain as a separate brand”); DX1013-007 (same)).

34. In addition, they will continue to market “free” and “online value pricing” and will position TaxACT as a “price leader.” (Vol. 2, 66:5-20 (Bennett); DX0235-017 (noting that H&R Block plans to “Aggressively market FREE and Online value pricing through TaxACT brand”); DX0001-096 (H&R Block will “[c]ontinue to run TaxACT with its existing brand (outside Block) in order to aggressively acquire share in the FREE low price/value space”); DX2101-001 (rationale for the deal is to market “free” heavily outside the Block brand)).³

35. The Company will also continue active promotion of the H&R Block at Home free product. (DX1008-010; vol. 6, 87:1-14 (Dunn) (explaining that Dunn plans to “continue to aggressively

³ While Plaintiff contends that Camela Greif, current head of marketing at TaxACT and future head of marketing for the combined digital entity, suggested in her deposition that she would not market the products as aggressively post-Transaction, she made clear in a declaration that she plans to “continue to aggressively market TaxAct-branded products using active promotions, Free offers, and media advertising among other[] forms of marketing,” while offering TaxACT products at “the same or lower prices.” She also plans to “aggressively market H&R Block’s branded products.” (Greif Decl. in sup. of Defs.’ Opp. to Pl.’s Mot. in Limine ¶¶ 5-7).

use free to attract premium customers to that brand’’)).

36. H&R Block has not considered raising TaxACT prices, raising H&R Block prices, or discontinuing TaxACT products. (Vol. 21, 51:16-23, 59:24-60:10 (Bowen) (stating there was no discussion at the Board meeting about raising H&R Block’s prices or TaxACT’s prices, or decreasing quality or functionality of TaxACT’s products)). Moreover, H&R Block will neither raise prices nor discontinue TaxACT products if the transaction goes through. (Vol. 23, 47:17-21 (Cobb); vol. 2, 73:13-74:2, 74:14-21, 107:18-108:1 (Bennett); DX0348-001(stating H&R Block intent to keep “low prices”); DX0347-004 (H&R Block’s financial projections for the acquisition assume “Flat ASP” (“ASP” is average sales price)); vol. 6, 58:17-59:11, 60:9-61:6 (Dunn) (A price increase for TaxACT would “break the chain reaction that drives the TaxACT engine. It simply does not make sense, does not work, and it would be a bad idea.”)).

37. Raising prices would be counter to the stated and Board-approved rationale for the Transaction and would undermine CEO William Cobb’s foremost goal of increasing H&R Block’s clients. (Vol. 23, 49:11-20, 54:7-22 (Cobb)).

38. H&R Block’s management and Board agree that the current strategy of lowering prices and acquiring customer growth is more effective than the prior strategy of trying to increase profits per customer. (Vol. 23, 54:19-22 (Cobb); vol. 2, 83:23-84:18 (Bennett)).

IV. Competition In The Tax Preparation Market

A. Methods For Filing Taxes

39. “Tax Season” (“TS”) refers to the period of time in which customers typically file taxes for a given year, e.g., Tax Season 2010 spanned from November 2010 to October 2011 (Stmt. 15), and “Tax Year” (“TY”) refers to the year for which taxpayers filed returns. (*Id.*).

40. Approximately 140 million people filed tax returns with the IRS in TS2010. (*Id.*).

41. “[T]axpayers have many choices for preparing and electronically filing their federal income tax returns.” (DX0340-003-4 (statement by the IRS in *Byers v. Intuit*, 564 F. Supp. 2d 385 (E.D. Pa. 2008)).

42. Individuals can prepare and file their federal and state income taxes either on their own (do-it-yourself” or “DIY) or with assistance (“assisted”). Those choosing DIY can file manually or with an online or software product. Those using assisted typically hire an accountant or go to a retail tax office (often called a “tax store”) to have their taxes prepared. (Stmt. 15-16).

43. Individuals who prepare their IRS-provided tax forms manually can do so by hand (with pen or pencil, paper, and a calculator) or can use online forms provided by the IRS. This method may be referred to as unassisted, manual DIY, or pencil-and-paper. (*Id.* at 16).

a. The manual DIY category also includes tax preparers who utilize “Free Fillable Forms,” which are provided by the IRS to all taxpayers at no charge. (DX0340-009).

b. Free Fillable Forms eliminate the need for a calculator by performing mathematical calculations for taxpayers. They also allow free e-filing. (Vol. 3, 52:20-53:5 (Ernst); GX28 (Dunn Dep. vol. 1) 30:13-17).

44. Individuals using commercial online or software products can obtain those products from retail stores, by downloading software, or by using online programs. These products are collectively referred to as “digital” or “digital DIY” products in this case. (Stmt. 16).

45. Entities offering tax preparation products and services include but are not limited to the IRS (Free Fillable Forms); states (*e.g.*, free products offered on state websites); non-profit providers of free tax services (*e.g.*, Volunteer Income Tax Assistance (“VITA”) and AARP); 123 Easy Tax Filing; CCH/Wolters Kluwer (“CompleteTax”); Rt Software Inc. (“Express Tax Refund”); EZTaxReturn.com, FileYourTaxes.com, Free Tax Returns.Com Inc. (“Free 1040 Tax

Returns”); H&R Block (assisted tax preparation offices and an online product); Intuit (TurboTax); Jackson-Hewitt (assisted tax preparation stores and an online product); Liberty Tax (assisted tax preparation stores and an online product called “eSmart”); OnLine Taxes (OLT.com); OnePriceTaxes; Petz Enterprises (“TaxBrain”); Rhodes Financial Services (assisted tax preparation stores and an online product called “Tax Slayer”); TaxACT; TaxHawk (various websites such as “FreeTaxUSA.com” and “TaxHawk.com”); Smokey Software Inc. (“Citizen Tax”); Thomson Reuters (“TaxSimple”); the Free File Alliance (“FFA”), through its seventeen member companies; and numerous independent tax preparers (which include thousands of certified public accountants (“CPAs”) throughout the country). (DX6122-001-2 (2010 letter from former CEO Russ Smyth to former President of H&R Block’s Digital stating that “[w]e have many competitors – Intuit, TaxACT, Jackson Hewitt, Liberty and 100,000 independent tax preparers in the retail space – and need to perform better against all of them.... I expect our digital business to aggressively market their products and services against all retail and digital competitors”); DX6056-023-27 (describing H&R Block’s efforts to compete against online tax preparation products and various non-profit providers of free tax services); GX27 (listing various tax preparation companies); GX127-22 at 14 (Intuit’s Form 10-K lists various competitors and competitive constraints, including “manual tools and processes,” H&R Block’s tax stores, “other tax preparation service providers,” approximately 20 states with Free File Alliance Programs, and approximately 20 other states offering direct government tax preparation and filing services).

46. Tax preparation products and services are differentiated and have different sets of features and prices. (*See* Mem. of Facts and Law in Supp. of Pl.’s Mot. for a Prelim. Inj. at 27 (acknowledging that digital DIY products compete in a differentiated market and “compete along more dimensions than price.”)).

47. Almost all providers of digital products offer some product for free with the hope that the taxpayer will pay for additional products. (Stmt. 16).

48. The word “Freemium” is a term used to describe business models that use free products to sell paid products, either through upgrades, cross-selling or another mechanism. (DX0400).

B. Customer Switching Between Tax Preparation Methods

49. Over twenty million taxpayers switch tax preparation methods each year. (GX127-7 at 7 (“[b]eneath the surface 23 [million] tax filers are in motion,” including significant switching between tax preparation methods); vol. 3, 70:9-71:18 (Ernst) (testifying that the level of switching described in GX127-7 was “probably about right”); *id.*, 41:7-12 (Ernst) (testifying that the total number of switching each year was over 20 million customers)).

50. “Customers flow” among the various tax preparation methods as if in a “matrix.” They move “in all different directions . . . there’s no question that some people shifted from both digital as well as professional back to paper and pencil.” (Vol. 3, 39:10-40:2 (Ernst)). For instance:

a. *In 2006*, Intuit **REDACTED**

REDACTED (DX0089-004).

b. *From 2006 to 2009*, TaxACT obtained substantially more customers from assisted tax preparation and manual tax preparation than from H&R Block’s digital products and lost more customers to assisted tax preparation than to H&R Block digital products. (DX0378-001-006 (providing that TaxACT’s online clients were much more likely to have “Prepared myself,” used a “Tax Professional,” used a “Tax Preparation Service” or used “Other” than to have used TaxCut (H&R Block) every year from 2006 to 2009); DX0443-001 (providing that more former TaxACT customers chose assisted tax preparation than H&R Block’s digital products); DX2200

(showing that few former TaxACT users turned to H&R Block, while many more “prepared by hand” or used a “Personal Accountant or CPA”); vol. 6, 37:8-39:8, 40:22-42:13 (Dunn) (noting that TaxACT’s exit surveys show that very few customers switched to TaxACT from H&R Block, while most customers switched from pencil and paper, accountant/retail, or TurboTax)).

c. IRS data show that:

- i. *between 2007 and 2008*, 9.5 million people switched between DIY tax preparation methods and assisted tax preparation methods. (DX9803-001);
- ii. *from TY2007 to TY2008*, 2.7% of TaxACT customers switched to H&R Block as compared to 11.2% of TaxACT customers who switched to assisted tax preparation and 9.1% who switched to TurboTax. (DX0017-042 n.159 (summarizing IRS data));
- iii. *from TY2007 to TY2008*, 2.8% of H&R Block online customers switched to TaxACT, as compared to 11.0% of H&R Block customers who switched to assisted tax preparation and 11.4% who switched to TurboTax (*id.*).

d. *In 2008*, [REDACTED] of Intuit’s new free customers came from assisted (“CPA/Pro,” “Tax Store,” and “Friend/Family”) whereas [REDACTED] came from all digital DIY (“Online Software” and “Desktop Software”), and [REDACTED] came from manual methods (DX0426-041).

e. *In 2008*, [REDACTED] of TurboTax’s new paid customers came from assisted methods versus [REDACTED] from digital methods and [REDACTED] from manual methods.⁴

f. *In 2009*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (DX0079-038). [REDACTED]

[REDACTED]

[REDACTED]

⁴ Intuit reported similar figures for 2007. (DX0426-041).

REDACTED [REDACTED]. (GX293 (Maurer Dep.) 44:24-45:6; DX0079-025).

g. *In 2009*, Jackson Hewitt’s assisted tax preparation stores lost more market share to H&R Block’s online products than to assisted tax preparation competitors. (DX5057-009).

h. *In 2009*, TaxSlayer REDACTED [REDACTED]
[REDACTED]
[REDACTED]

(DX0114-033).

i. *In 2010*, Intuit lost approximately REDACTED and acquired approximately REDACTED customers to and from “Tax Store” and “Pro.” At the same time, Intuit lost about REDACTED customers and acquired about REDACTED customers to and from “Software Online” and “Software Desktop” and also lost around REDACTED and acquired around REDACTED customers to and from manual. (DX0011-002; DX0078-004 (Approximately “REDACTED of New [TurboTax] Customers Came from Tax Store/Pros in FY10.”)).

j. *As of July 2011*, REDACTED [REDACTED] who left Liberty Tax’s brick and mortar stores “filed online with a competitor.” (GX607 (Vanderpool Dep.) 35:24-36:9; DX0341-012).

51. While a change in tax return complexity can lead to a switch between tax preparation methods, such changes do not account for the majority of switching.⁶

a. 75% of taxpayers did not have changes in complexity between 2007 and 2008. (DX9010; vol. 16, 65:22-66:4 (Meyer)).

b. TY2007 and TY2008 IRS data used by Dr. Warren-Boulton indicate that 9.6% of total

⁵ REDACTED [REDACTED]. (GX607 (Vanderpool Dep.) 36:3-5).

⁶ “Complexity” refers to the IRS’ definitions of “simple, medium, and complex” tax returns. (Vol. 16, 65:22-24 (Meyer); DX9010).

TY2007 filers, 2,628,650 people, switched from digital DIY products to assisted preparation without having a change in complexity; no significant number of digital DIY filers switched to manual due to a change in complexity. (DX9010; DX9811; DX0017-067-69).

c. Even when the 2007-2008 IRS switching data are adjusted to take into account complexity changes, Dr. Warren-Boulton agreed that “[a]most three times as many people with no complexity change [in their tax returns] switched to assisted [from digital DIY] than between H&R Block and TaxACT.” (Vol. 12, 63:9-12 (Warren-Boulton)).⁷

d. REDACTED of customers leaving H&R Block assisted tax preparation services from 2004 to 2009 cited “Return was uncomplicated” as the reason for leaving; REDACTED of departing customers cited “had a life-changing event” as the reason. (DX0309-011).

52. In addition to switching for changes in complexity, taxpayers switch from digital DIY to assisted tax preparation services because of “price, brand loyalty, recommendation of a friend, a dissatisfaction with [their] current method [of tax preparation],” or loss of confidence with their current method.⁸ (GX293 (Maurer Dep.) 142:25-143:17; vol. 6, 48:13-20 (Dunn)).

53. Moreover, customers frequently compare tax preparation methods within a single season.

a. REDACTED

REDACTED. (GX607 (Vanderpool Dep.) 35:24-36:9; DX0341-012).

⁷ Dr. Warren-Boulton did not analyze whether people switching *from* assisted retail stores *to* digital DIY experienced a change in complexity. (Vol. 27, 25:3-26:6 (Warren-Boulton) (I haven’t done exactly what you’ve just suggested.”)).

⁸ While the declaration of Intuit’s Daniel Maurer REDACTED

REDACTED (GX293 (Maurer Dep.) 142:22-143:8), Maurer testified at his deposition that REDACTED

b. In TS2010, **REDACTED** of H&R Block's online registrants who did not complete their returns online purchased or tried assisted tax preparation services. (DX0400-002).

c. In TS2009, **REDACTED** of H&R Block's online registrants who did not complete their returns online purchased or tried assisted tax preparation services that year. (*Id.*).

54. While hundreds of thousands of customers switch every year between H&R Block's assisted tax preparation business and its digital products, H&R Block's tax offices have not historically lost significant numbers of customers to its digital business because roughly the same number of taxpayers have switched from digital to assisted **REDACTED** and back **REDACTED**. (DX0028-004; vol. 1, 111:10-20 (Bennett)).

55. Similarly, the relative number of assisted tax preparers and digital DIY tax preparers has not *historically* shifted because assisted tax preparation firms have gained roughly as many customers from digital tax products as they have lost to digital tax preparation. (DX9803-001 (providing that 4.1 million customers switched from DIY to assisted in 2007 to 2008, while 5.4 million customers switched from assisted to DIY, resulting net switching of 1.3 million)).⁹

C. Substitution and Diversion Between Tax Preparation Methods

56. As Plaintiff's expert acknowledges, assisted tax preparation is a substitute and an alternative to digital DIY products. (Vol. 12, 101:2-4 (Warren-Boulton) (DDIY and assisted tax preparation "are substitutes. It's clear that they're substitutes"); *id.* 53:12-15 (Warren-Boulton) (acknowledging that digital DIY is a substitute for office tax preparation); *id.* 107:10-14 (Warren-Boulton) ("[A]ssisted is still going to be there, and it will be a substitute...It is an

⁹ As Dr. Meyer explained, this historical absence of net changes between assisted and DIY does not reflect industry participants' and third party analyses of potential future net losses and gains from assisted tax preparation. (Vol. 19, 28:17-29:1 (Meyer) ("[N]et switching is masking a lot of switching back and forth....Just because you don't see a lot of changes in share between two different products doesn't mean that they're not competing. Coke and Pepsi may or may not be losing share to each other, but no one would say that they're not competing.")).

alternative [to Digital DIY]”); vol. 16, 24:21-25:23, 27:2-15 (Meyer) (stating assisted is the closest substitute for H&R Block’s DIY products)).

57. In addition, Digital DIY products are substitutes for pen-and-paper tax preparation. (Vol. 3, 37:13-40:3 (Ernst)).

58. As explained by Dr. Meyer, diversion is customer movement “in response to a change in price, typically; could be in response to a change in quality or features as well, but generally speaking, we think about it as responsiveness to changes in price.” (Vol. 16, 16:5-21 (Meyer)).

a. Diversion is measured by looking at cross-elasticity of demand: which products customers will choose when they leave a product as a result of a price increase. (Vol. 18, 13:10-14:6 (Meyer)).

b. Diversion is not the same as “switching,” which can be a response to a number of non-competitive factors. (Vol. 16, 15:21-17:6 (Meyer) (switching not the same as diversion)).

c. As Dr. Warren-Boulton explained: “Switching rates . . . are not the same as, or a direct estimate of diversion rates. The true diversion rate from TaxACT to HRB quantifies the rate at which consumers would choose HRB over TaxACT in response to a small price increase by TaxACT. (GX121 at 55) (emphasis omitted).¹⁰

59. Dr. Warren-Boulton admitted that “the documents which probably came closest to [discussing diversion] are, I would say, probably the simulator and the 2011 survey.” (DX1505 (Warren-Boulton Dep.) 47:4-9, 48:12-19).

(1) The 2011 TaxACT Survey and the 2009 Pricing Simulator Provide Diversion Data that Confirms that Plaintiff Has Not Alleged a Proper Product Market.

60. The “2011 survey” was jointly commissioned by TaxACT and H&R Block to determine

¹⁰ Dr. Warren-Boulton also stated that “[u]nfortunately, there is not sufficient information in the IRS data to allow me to isolate switching due solely to price changes.” (GX-121 at 55).

which products TaxACT's customers would switch to if those customers were displeased with TaxACT because of price, quality or functionality. (GX604 at 2; Ruddy Decl. in Sup. of Defs.' Opp. to Pl.'s Mot. in Limine ¶6).

61. According to Dr. Meyer, Defendants conducted the 2011 survey because some of the economists at the Department of Justice indicated that the switching data on which Defendants were relying at the time was not diversion data, and Defendants sought to obtain data that was closer to diversion in trying to address the concerns raised by DOJ's economists. (Vol. 19, 25:14-26:3 (Meyer)).

62. The 2011 survey predicts greater diversion between TaxACT and manual tax preparation (32.2%), TurboTax (25.4%), FreeTaxUSA (10.37%), and Other (7.89%) than between TaxACT and H&R Block (5.9%). (GX604; DX9811; vol. 19, 15:25-16:3 (Meyer); (numbers averaged across scenarios).

a. The 2011 survey results provide that the closest substitute for TaxACT is pen-and-paper, with a diversion ratio of 32.2%. The next closest is TurboTax; the third closest is FreeTaxUSA; and the fourth closest is Other. (GX604; DX9811).

b. The 2011 survey also demonstrates that the diversion ratio from TaxACT to H&R Block is only 6 percent, indicating that TaxACT and H&R Block are not close substitutes. (GX604).

c. The 2011 survey results comport with what TaxACT's routine business surveys show. (Vol. 6, 43:11-12 (Dunn) ("The results of this survey were generally consistent with the surveys that we've had in the past.")).

63. The 2011 survey is reliable evidence of diversion.

a. Plaintiff's own expert on survey methodology, Dr. Ravi Dhar, testified that response rate

by itself does not imply non-response bias. (DX1506 (Dhar Dep.) 190:17-22; 198:1-4).¹¹

b. Indeed, Dr. Dhar, whom Plaintiff chose not to bring to trial, indicated that the number of participants (sample size) is more important than the response rate for some surveys. (DX1506 (Dhar Dep.) 179:1-4 (testifying that “if properly done,” “the size of the sample and not the response rate factors into the confidence interval”), 180:11-21 (“What’s more important than the response rate is really trying to make sure that the respondents are representative of the population.”)).

c. Dr. Dhar further acknowledged that the sample size of the 2011 survey was adequate for an Internet survey. (DX1506 (Dhar Dep.) 201:17-202:5, *see also id.* 88:16-89:3 (“And the response rates for an Internet survey might be lower There are many such articles written on it.”)).

d. Dr. Dhar’s report did not specifically focus on Internet surveys. Indeed, none of the three articles cited in his report address methodology for Internet-based surveys. (GX623 ¶ 12, n.2; ¶ 17 n.4, ¶ 22 n.9).¹²

e. Dr. Dhar’s analysis of the 2011 survey was premised in large part on his incorrect belief that the survey was prepared for litigation. (DX1506 (Dhar Dep.) 125:15-126:8, 126:14-127:2, 169:16-20, 222:5-226:19, 230:13-231:18)).

64. The “Pricing Simulator” or “Simulator” is a pricing model based on a 2009 H&R Block

¹¹ Dr. Dhar made clear that he disagreed with Plaintiff’s assertion in its motion in limine that a response rate “below 50% [indicates a] a survey should be regarded with significant caution” (DX1506 (Dhar Dep.) 181:17-182:8), and explained that a desirable response rate for Internet surveys is above 10% (*id.* 180:11-21).

¹² Although Dr. Dhar’s report cites the 2000 edition of Shari Diamond’s “Reference Guide on Survey Research,” which mentions Internet surveys, the pinpoint citations in Dr. Dhar’s report actually reference the 1994 version, which does not mention Internet surveys. (DX1506 (Dhar Dep.) 179:14-180:11).

conjoint survey¹³ created in the ordinary course of business to estimate the impact of pricing changes on consumers' choices. (DX0032-018-21.) The Simulator results were presented to H&R Block management and used to set prices. (DX0032-021; vol. 16, 50:16-20 (Meyer)).

a. The survey consisted of 6119 respondents across all methodologies of tax preparation, who were shown up to ten pricing scenarios and, in each pricing scenario, they were asked to choose their preferred tax preparation method among several options, including software, online, assisted, and manual. (DX0032-003-04; vol. 16, 38:7-39:17 (Meyer)).

b. Thus, the Simulator provides a direct measure of diversion, namely, to which products consumers would switch in the event of a price increase on H&R Block products. (Vol. 16, 40:9-20 (Meyer)).

65. The 2009 Pricing Simulator directly measures cross-price elasticity between tax preparation methods. (Vol. 18, 12:1-25 (Meyer) (“[The Simulator] is based on an own-price and a cross-price elasticity, which basically looks at, technically speaking, what we call the ‘slope,’ right around the starting point.”)).

a. The Pricing Simulator shows greater cross-price elasticity between H&R Block online and assisted tax preparation methods, TurboTax and manual filing than between H&R Block and TaxACT. (*Id.*; vol. 16, 40:9-13 (Meyer) (“And so what we can get from that survey is really good evidence as to not only what we call the own price elasticity - so if you raise the price of H&R Basic, what happens to the percentage of people, the number of people who choose H&R Basic - but we also get direct evidence on diversion.”); *see also id.*, 24:21-25:1 (Meyer) (discussing Simulator results that indicate that assisted is the closest substitute to H&R Block

¹³ Conjoint surveys are useful in directly estimating consumer responses to price changes. (Vol. 15, 40:9-16 (Meyer))

online, and pen and paper is the closest substitute to TaxACT)); DTX 5; vol. 19, 15:25-21:3 (Meyer); DX9813; vol. 27, 22:8-25:2 (Warren-Boulton) (Agreeing that diversion to products outside his market is greater than diversion to products inside his market).¹⁴

b. Plaintiff's expert Dr. Warren-Boulton provided no analysis of cross-price elasticities between tax preparation methods.

c. Dr. Warren-Boulton's criticism of the Pricing Simulator was based on a PowerPoint presentation and not the actual Simulator, which he had not seen. (Vol. 16, 45:16-23 (Meyer) (understanding Warren-Boulton's criticism to be only based on the PowerPoint presentation); vol. 11, 26:11-29:5 (Warren-Boulton) ("I personally certainly haven't seen the survey data.").

d. The actual simulator did not have the anomaly that Dr. Warren-Boulton identified in the PowerPoint. (Vol. 16, 48:14-49:8 (Meyer) (testifying that anomaly is only in the spreadsheet, not in the Simulator data).

66. The Pricing Simulator shows that the highest diversion ratio (approximately 40%) from H&R Block digital products is to assisted tax preparation methods. (DX0032-021; vol. 16, 47:3-49:8 (Meyer); DX9811).

67. According to the Simulator, diversion to nearly all alternatives is higher than the diversion from H&R Block online to TaxACT. The diversion ratios are: 41.79% to all assisted (individually, 20.27% to CPA, 13.72% to H&R Block Tax stores, 3.79% to Jackson Hewitt stores, 3.16% to Liberty Tax stores, and .85% to other tax stores), 32.48% to TurboTax, 11.48% to pen and paper, 6.57% to Friend/Family, 5.39% to TaxACT, and 1.6% to other online DIY.

¹⁴ While the 2009 pricing simulator presentation and the spreadsheet it was based on contained an anomaly that created some oddities, the underlying data in the Simulator did not contain any such anomalies. DX0031 (Pricing Simulator). In addition to relying on the slides presented to H&R Block management, Dr. Meyer analyzed the entire data set in the spreadsheet, the spreadsheet data excluding the anomalous data points, and the underlying Simulator data. Each data set that she looked at confirmed the same conclusions. (Vol. 16, 47:3-49:8 (Meyer)).

(DX9813; DX0032-021; vol. 16, 47:3-49:8 (Meyer); DX9813; vol. 19, 16:16-19:21 (Meyer)).

68. Indeed, the Simulator demonstrates that the diversion from H&R Block online to TaxACT is very low, on the order of 5 percent, which indicates that H&R Block and TaxACT are not close substitutes. (DX0032-021; vol. 16, 47:3-49:8 (Meyer); DX9811; DX9813).¹⁵

69. Documents and testimony from 2009 to 2011 confirm the diversion data showing substitution between assisted and digital tax preparation methods.

a. In 2009, H&R Block's assisted tax preparation stores lost market share to Digital DIY products when H&R Block increased assisted tax preparation prices. (Vol. 2, 94:20-95:5 (Bennett) (providing that when H&R Block raised prices on its assisted tax preparation services in tax season 2009 it lost 1 million customers, many of which chose TurboTax's Digital DIY products).

b. In 2009, H&R Block concluded that **REDACTED**

REDACTED
REDACTED
REDACTED (DX0309-002).

c. In 2009, H&R Block concluded: **REDACTED**

REDACTED
REDACTED
REDACTED (*Id.* at 003).

d. In 2009, Intuit concluded that it **REDACTED**

REDACTED (DX6186-003).

¹⁵ According to Plaintiff's survey methodology expert, the fact that several options (including CPAs) do not have listed prices in a survey does not raise concerns about whether the survey takers understood the cost of those options. (DX1506 (Dhar Dep.) 195:10-14 (hypothesizing that survey takers would have considered the relatively higher cost of accountants, though no price was listed for the "accountant" answer choice)). Specifically regarding the Simulator survey, this is demonstrated in part by the fact that the predicted market share of CPAs from the Simulator is close to the actual percent of taxpayers who use CPAs. (Vol. 21, 7:23-9:13 (Meyer)).

e. In January 2011, Intuit concluded that REDACTED

REDACTED

REDACTED

REDACTED. (DX0111-023, 30).

f. Intuit believes that REDACTED

REDACTED (DX0019-001).

(2) Dr. Warren-Boulton's Switching Data Is Not a Proxy for Diversion, and in Any Event, It Supports Defendants' Position

70. Plaintiff relies upon Dr. Warren-Boulton's analysis to establish market definition. Dr. Warren-Boulton's analysis is based solely on switching data related to switching that occurred between TY2007 and TY2008. (GX121 at 44 (using "switching numbers as proxies for aggregate diversion ratios"), 113 (Merger Simulation results based on IRS switching data)).

71. The IRS switching data does not isolate people who switch due to an increase in price (or relevant non-price changes in quality or functionality). Indeed, the switching data between manual and TaxACT's federal product on which Dr. Warren-Boulton relies cannot reflect diversion based on price change because neither price changed during those years. (Vol. 6, 31:4-7 (Dunn) ("We've never raised the price on our standard product.")).

72. Dr. Warren-Boulton acknowledges that the IRS data on which he relies does not consider over 20% of all tax returns (nearly 30 million of 140 million) due to v-coding--the code given to returning filed by mail but prepared by an unknown digital or assisted product. (Vol. 27, 20:14-21:17 (Warren-Boulton)).

a. The switching data used by Dr. Warren-Boulton suggests that TurboTax is the closest competitor to H&R Block, followed by assisted tax preparation. (Vol. 16, 25:6-12, 70:20-71:7 (Meyer); DX9812).

b. The switching data used by Dr. Warren-Boulton suggests that assisted tax preparation is the closest competitor to TaxACT, followed by TurboTax. (DX9804; DX9811-001.)

c. Dr. Warren-Boulton performed a SSNIP analysis, but his method yields positive results for numerous smaller markets than the one alleged by Plaintiff. (Vol. 16, 80:19-81:21 (Meyer)).

73. Dr. Warren-Boulton began his analysis assuming that digital DIY is a market. (Vol. 7, 36:22-37:4 (Boulton))

74. Dr. Warren-Boulton performed a critical loss analysis. Dr. Warren-Boulton started his critical loss analysis after reading the Complaint and chose to start with the market alleged in the Complaint. (DX1505 (Warren-Boulton Dep.) 5:13-6:3; vol. 12 (Warren-Boulton) 44:19-45:2).

While his critical loss analysis supports the market alleged in the Complaint, it also results in separate value and premium markets, a separate market of H&R Block and TurboTax, and a separate TaxACT and assisted market. (Vol. 12, 32:13-35:10, 44:15-17 (Warren-Boulton)).

D. Pricing Decisions and Dynamics Consider All Tax Preparation Methods.

75. Intuit offers free online products REDACTED
REDACTED. (E.g., DX0403-023).

a. In a 7/21/2011 internal presentation by Intuit titled REDACTED
REDACTED (Id.).

b. Intuit's high-level strategy in 2010 includes REDACTED
REDACTED
REDACTED (DX0044-001).

76. Intuit believes REDACTED
REDACTED. (DX0086-021 REDACTED
REDACTED; DX8021-059 REDACTED

REDACTED; DX0078 (same); GX-650 (same)).

77. H&R Block sets the price of its assisted tax preparation services to compete with Digital DIY products and to avoid losing customers to Digital DIY competitors. (*E.g.*, DX6056-023-27).

a. In 2009, H&R Block reduced prices on its assisted tax preparation services to \$39 for federal 1040EZ preparation and \$29 dollars for state tax preparation to REDACTED

REDACTED. (*Id.* at 11, 27 and 37 (speculating that REDACTED

REDACTED

REDACTED

REDACTED)).

b. H&R Block's assisted business later offered free 1040EZ tax preparation services to target customers "generally more attuned to go to Internet solutions." (Vol. 2, 91:7-18 (Bennett)).

78. Prices for assisted tax preparation services and digital DIY products significantly overlap.

a. Intuit's data REDACTED

REDACTED. (DX0026-001).

b. The same data show that REDACTED

REDACTED

REDACTED. (DX0026-001).

c. H&R Block's retail offices not only offer free 1040EZ tax preparation, but also an inexpensive \$29 "Second Look" service. (Vol. 2, 91:7-18, 93:1-6 (Bennett)). "Second Look" is a service wherein H&R Block professionals review a customer's completed tax return for errors. (Vol. 24, 58:22-59:22 (Cobb)).

d. Jackson Hewitt offers a \$38 1040EZ preparation service at Walmart. (DX8011-008;

DX0045).

79. In September 2008, TaxACT decided not to raise prices solely because doing so “may drive customers to complete manually.” (Vol. 6, 57:2-12 (Dunn); DX0013-001).

80. TaxACT provides discounts on state products in part to get customers to purchase state products instead of completing their state tax returns manually. (DX1410-001).

81. “[P]en and paper, especially for state returns, is TaxACT’s biggest threat.” (Vol. 6, 48:23-49:10 (Dunn) (“ [For] federal E-filers, we can only get about half of them to finish their state return using our product. . . . The other half are going out and filling that return in either by – filling it by hand and either mailing a paper return in or using one of the online fill-in forms options that a lot of the states provide.”)).

82. One reason that FreeTaxUSA does not raise its price for state returns is that if the company did so significantly, it would likely experience “significant” customer loss, including to manual tax preparation. (Vol. 14, 31:14-32:2 (Kimber)).

83. Digital DIY customers will REDACTED

REDACTED (GX293 (Maurer Dep.) 192:6-11).

84. REDACTED

REDACTED (GX654 (Edwards Dep.) 57:14-20; DX0333 (demonstrating that H&R Block has been advertising to win customers from manual filing since 1955)).

85. TaxHawk is “roughly” aware of H&R Block’s and Intuit’s prices, including recent price increases, but TaxHawk has not determined price on this basis. (Vol. 14, 56:4-57:4 (Kimber)).

a. FreeTaxUSA’s pricing has remained constant. (*Id.*).

- b. TaxHawk.com increased its state price but not in response to Intuit or H&R Block. (*Id.*)
86. TaxSlayer has never changed its prices in response to TurboTax's, H&R Block's, or TaxACT's prices. (*Id.* 105:19-106:2 (Rhodes)).
87. "Generally speaking...the price that TaxACT charged for its paid products never affected [H&R Block's] decisions about [its] price for its paid products." (Vol. 3, 59:5-8 (Ernst)).
88. Similarly, TaxACT does not look at H&R Block's or TurboTax's prices to establish its prices. (Vol. 6, 9:21, 10:11 (Dunn)).
89. The prices of TurboTax and H&R Block have historically been similar, while the prices of TaxACT, TaxSlayer, and FreeTaxUSA have historically been similar; the prices of the two groups do not significantly correlate. (DX0017-033).
90. Firms can and do provide special offers in the form of coupons and promotions to select customers. (GX294 (Simone Dep.) 28:1-16; 316:18-317:7; DX1900-024; DX0088-001).
91. State governments constrain the pricing of state tax preparation products. (*See* DX0086-020; *see also* GX294 (Simone Dep.) 341:2-343:4 (providing that the State of New York has recently prohibited fees for state e-filing)).

E. Marketing and Promotional Activity Reflect Competition Among All Tax Preparation Methods.

92. Intuit's strategy as of August 23, 2010 was to "Beat Tax Store[s]" by REDACTED
[REDACTED]
[REDACTED] (GX293 (Maurer Dep.) 25:2-15; DX0078-002-3; *see also* vol. 12, 54:10-14 (Warren-Boulton) (conceding that "part of Intuit's strategy, since it doesn't have tax stores, is to target H&R Block stores.")).
93. In 2010, TurboTax strategized to REDACTED
[REDACTED]

REDACTED

(DX6186-013).

94. Intuit has conducted many recent advertising campaigns to “Beat Tax Store[s],” REDACTED (GX293 (Maurer Dep.) 27:3-29:25).

95. While H&R Block’s digital tax preparation business does not intentionally compete with its own retail offices, converting customers from other assisted tax preparation firms (such as Jackson Hewitt) is part of H&R Block’s digital strategy. (DX6122-001-2 (2010 letter from former CEO Russ Smyth to the former head of H&R Block’s Digital division concluding that “[w]e have many competitors – Intuit, TaxACT, Jackson Hewitt, Liberty and 100,000 independent tax preparers in the retail space – and need to perform better against all of them.... I expect our digital business to aggressively market their products and services against all retail and digital competitors”); vol. 12, 53:21-25 (Warren-Boulton)).

96. H&R Block uses its assisted “Second Look” service to attract customers using all forms of tax preparation. (Vol. 24, 58:22-59:17 (Cobb); vol. 2, 93:1-6 (Bennett)).

97. Most of the people that have used “Second Look” initially completed their tax returns using a Digital DIY product. (Vol. 2, 93:7-13 (Bennett)).

98. H&R Block’s assisted business specifically targeted TurboTax in 2010 with an advertisement called “Isis Martinez” featuring a customer stating that “This year I did my taxes two ways. I did it on my own with TurboTax and I went to H&R Block. The tax professional told me that my refund was \$2000 more that what I found on my own. Surprise!” (DTX 1; GX-293.D14, p. 11).

a. Internal Intuit documents show that Intuit believes that REDACTED

REDACTED (DX0204-001).

b. H&R Block viewed this advertisement as extremely effective. (Vol. 2, 92:20-25 (Bennett) (The “Isis Martinez” advertisement “was the best performing ad that we ran”)).

c. H&R Block believes that claims highlighting the “benefit of HRB tax expertise/live help” and the fact “HRB finds bigger refunds” are two of TurboTax’s “vulnerabilities.” (DX0235-014).

99. FreeTaxUSA has also advertised to attract customers currently using assisted preparation. For example, in a YouTube video advertisement with the slogan “Paying Too Much for Your Taxes is Like Throwing Money Away,” the company compared shooting an iPad to wasting money by paying too much to prepare one’s taxes. (Vol. 14, 28:12–29:4 (Kimber)).

100. TaxSlayer attracts retail tax store customers with its general marketing. (*Id.*, 78:5–79:5 (Rhodes)).

a. TaxSlayer does not specifically target customers of retail tax stores with its advertising because customers of TaxSlayer’s professional product prefer the company not do so. (*Id.*, 78:5–79:5 (Rhodes)).

b. Nonetheless, TaxSlayer’s marketing reaches a broad group of customers that is not limited to only digital customers. (*Id.*).

i. For instance, TaxSlayer will sponsor the Gator Bowl for the next three years. (*Id.*, 74:18-23, 75:16-17 (Rhodes)).

ii. TaxSlayer also sponsors the Dale Earnhardt, Jr. NASCAR race team. (*Id.*, 78:5-79:5 (Rhodes)).

101. TaxACT markets to manual filers and customers using assisted tax preparation. (Vol. 6, 54:23-56:10; GX28-6).

F. Competition Between Tax Preparation Methods Is Not New and Is Growing.

102. In 2006, Intuit **REDACTED**

REDACTED (DX0089-004).

103. Former H&R Block CEO Mark Ernst (“Ernst”) initially did not view Intuit as a competitive threat to H&R Block’s assisted customers but changed course when Intuit “became more aggressive in promoting TurboTax as an alternative to a tax office.” (Vol. 3, 69:3-11 (Ernst)).

a. Indeed, Mr. Ernst became concerned in 2006 and 2007 about Intuit targeting H&R Block’s assisted customers. (*Id.*, 69:24-70:4 (Ernst)).

b. Mr. Ernst ultimately came to the view Intuit “as the most significant competitive threat to H&R Block’s entire tax business.” (*Id.* 68:7-69:2 (Ernst)).

104. In June 2007, Intuit concluded: **REDACTED**
REDACTED (DX0023-002).

105. In December 2007, H&R Block CEO Alan Bennett perceived Intuit to be “clearly targeting retail locations in their marketing.” (Vol. 2, 99:14-19 (Bennett)).

106. Competition between assisted tax preparation and digital DIY has dramatically intensified from 2009 to the present and will continue to intensify. (*E.g., id.*, 92:11-19 (“[C]learly in the last two years, in all public filings, in analyst reports, and in the marketing programs, TurboTax is marketing directly against our retail locations. Absolutely clear. And . . . [H&R Block has] reacted by some of our advertising”); DX6107-008 **REDACTED**
REDACTED
REDACTED; DX0308-001 **REDACTED**
REDACTED;
DX0007-007 **REDACTED**
REDACTED).

107. The shift from assisted tax preparation to digital DIY is likely to accelerate as the pool of

manual filers continues to shrink. (GX127 (Bennett CID Dep.) 98:9-99:9; DX5010-003 (“[F]rom TS00-TS07, Online/Digital has squeezed out Pen and Paper, and Assisted has held its own to even expanded.... It’s the data from TS08 to this tax season where I think we’re starting to see Online/Digital squeeze both Pen and Paper and Assisted at the same time, creating a small change in the past trends.”); DX0033-004 **REDACTED**

108. Intuit has concluded that **REDACTED**
REDACTED. (GX650 at 42). For instance, in 2011, Intuit concluded that **REDACTED**
REDACTED.
(DX0078-004; GX293 (Maurer Dep.) 33:17-24).

109. In Intuit’s Q1 2011 Earnings call, the company stated that “[i]n our tax business, we’ve been talking for some time about the secular shifts in the market that are driving the software and online category to grow faster than other tax preparation methods. A proposed acquisition by one of our competitors has validated the importance of this secular shift and the strength of tax software as a value proposition versus tax stores and manual preparation. We will continue to take advantage of the ongoing shift to digital tax preparation. This is our sweet spot—on our playing field...For the last half dozen years, digital tax category’s been growing at 6% to 8%, tax stores have been flat. Now you take the RAL [refund anticipation loans] out and we’ll just have to see if that accelerates their decline even faster.” (DX0406-002-03).

110. Jackson Hewitt’s surveys of customers leaving Jackson Hewitt showed that five times as many customers in 2009 left for online solutions compared to 2008. After discussing these results during a public investor call, Jackson Hewitt’s Mike Yerrington (Chief Executive Officer)

opined that “I think that is becoming more of an issue for us as we go forward.” (DX5057-010).

111. Internal H&R Block documents forecast that REDACTED
REDACTED. (DX0001-054).

112. An internal H&R Block document reported that REDACTED
REDACTED (DX5007-009).

113. In a July 2009 offering memorandum, TaxACT and its investment banker Jeffries & Company, Inc. wrote that REDACTED
REDACTED
REDACTED
REDACTED (DX5071-005.; *see also* DX0007-011 (providing that TaxACT views the online

channel as “the fastest growing segment of a large stable market [where] [c]omputer-aided DIY tax preparation is quickly replacing paper & pencil as well as professional preparation.”)).

114. Based on Intuit’s public statements, analyst reports, and Intuit’s marketing programs, H&R Block perceives increasing competition between Intuit and H&R Block’s tax offices. (Vol. 23, 37:13-25 (Cobb)); DX6106-005 (providing in a 2010 H&R Block board presentation that “Intuit’s client growth strategy is to expand the digital category by attracting clients from “pen and paper” and “tax stores” through low/free price points.”)).

115. Third party analysts have also noted the trend toward increasing competition between assisted and digital DIY products. In an October 14, 2010 investor call, one analyst stated “that over the last couple of years we did see a trend where there was a shift to cheaper do it yourself alternatives that was kind of happening and it was at the expense of retail stores.” (DX6124-010).

G. Competition Between Retail Tax Offices and Digital Products Continues to Evolve.

116. As of July 2011, there is REDACTED

REDACTED (GX293 (Maurer Dep.) 23:21-24:6).

117. “Turbo Tax is now the market leader in U.S. Tax returns completed.” (DX5007-002; vol. 23, 50:11-51:1 (Cobb) (noting that TurboTax “is the largest by far competitor in the entire tax preparation industry.”)).

118. Intuit is currently the primary competitor of H&R Block’s retail offices. (Vol. 23, 37:13-38:2 (Cobb)).

119. H&R Block’s CEO, William Cobb, believes that Intuit is currently targeting H&R Block’s assisted tax preparation business in Intuit’s online advertising. (*Id.* 38:3-9 (Cobb); DX0285-001 (providing an example of an online advertisement targeting “tax stores”)).

120. The industry is shifting towards online products that combine online and assisted elements (“hybrid” products). (*E.g.*, vol. 3, 67:4-9 (Dunn); DX7001-020 (“This [hybrid] area is the next growth generator for the industry”); DX0413-062-63 **REDACTED** **REDACTED**).

121. In 2007, H&R Block publicly identified a group of customers that it called “hybrid” customers, which it believed “disperse among the various preparation methods and are quick to shift from one to another.” (Vol. 3, 66:8-19 (Ernst); DX7001-015).¹⁶ “One out of every four taxpayers fall into this 36-million-client segment.” (Vol. 3, 67:7-9 (Ernst); DX7001-020).

122. H&R Block has taken and continues to take significant steps to reach that group.

a. An April 1, 2010 internal H&R Block presentation t**REDACTED**
REDACTED
REDACTED

¹⁶ H&R Block often refers to hybrid products as “DIWM” (“do it with me”) products. (Vol. 2, 99:20-99:25 (Bennett)).

REDACTED

(DX6020-001-19).

b. An April 22, 2010 strategy presentation titled REDACTED

(DX6136-004; *see also* DX0243-006 (providing that REDACTED

c. H&R Block advertising reflects its ongoing attempts to merge online tax preparation and assisted tax preparation. (DX6011-034 (showing a 2010 H&R Block advertisement with the slogan “It’s DIY, with a tax pro by your side.”)).

d. H&R Block’s currently offers the hybrid product “Best of Both.” “Best of both” REDACTED

(DX6105-045; vol. 24, 60:3-7 (Cobb) (REDACTED)).¹⁷

i. Best of Both is a product based on a traditionally digital platform, wherein customers complete their taxes digitally and then submit their completed returns to an H&R Block tax professional. (*Id.* 59:21-60:2 (Cobb)).

e. In 2012, H&R Block REDACTED

(Vol. 24, 57:24-14 (Cobb)).

¹⁷ At trial, Plaintiff offered the Defendants’ White Paper as evidence that the Best of Both product has been offered since 2001 and tried to impeach various witnesses based on this. That was a typo; “Best of Both” was offered in 2010. Its predecessor “Signature” was first offered in 2005. (DX9809).

- i. REDACTED .
- ii. REDACTED
REDACTED . (Vol. 23, 38:10-12 (Cobb); vol. 24, 60:12-23 (Cobb)).
- iii. REDACTED
REDACTED . (Vol. 24, 57:24-58:14 (Cobb)).
- iv. REDACTED
(*Id.*, 65:2-9 (Cobb)).
- v. REDACTED
REDACTED (*Id.*, 66:4-11 (Cobb)).
- vi. REDACTED
REDACTED (*Id.*, 66:25-67:3 (Cobb); GX1519-A at 20-22).

123. H&R Block is not alone in developing and marketing hybrid products.

a. Liberty Tax currently offers an online product under its eSmartTax brand that allows customers to consult with a live tax professional. (GX607 (Vanderpool Dep.) 51:14-22).

b. As H&R Block reported in a 2010 board presentation, H&R Block believes that “Liberty is increasing the promotion of its online tax service, eSmartTax, and introducing a hybrid channel product.” (DX6106-005).

c. In TY2010, TaxSlayer released plans for a new hybrid product called “call a tax professional” that the company will offer next year. (Vol. 14, 72:13-25, 73:8-9 (Rhodes)).

d. In a September 21, 2011 presentation, Intuit opined REDACTED
REDACTED (DX9824-029).

124. Dr. Warren-Boulton’s analysis of the market using 2007 and 2008 data does not account for trends in tax preparation from 2008 to the present and excludes recent competitor growth and new products. (Vol. 16, 62:5-22 (Meyer)).

a. Competitors that were relatively small in the 2007/2008 timeframe have expanded. (Vol.

15, 96:11-25 (Rhodes) REDACTED

REDACTED; *id.*, 63:15-64:20 (Kimber) REDACTED

REDACTED; GX 21-7 (same)).

b. Competitive awareness of aggressive historic competitors like TaxHawk (FreeTaxUSA) and TaxSlayer has substantially changed since 2008. (DX0087 REDACTED

REDACTED

REDACTED

REDACTED; DX1401-001 (TaxACT's Kris Peterson noting in an e-mail to TaxACT's Cammie Greif that "[w]e no longer have a unique position in the market" in response to a marketing effort by FreeTaxUSA.com); DX1403-001

(REDACTED

REDACTED

REDACTED)).

c. Historically smaller competitors have become more aggressive with marketing. (Vol 14; 74:14-76:4 (Rhodes) (explaining that TaxSlayer's recent three-year contract to sponsor the Gator Bowl, renewed sponsorship contract with NASCAR's Dale Earnhardt Jr., YouTube contest campaigns with \$25,000 prizes, and extensive use of social media); DX4200-068 (providing in 2011 that FreeTaxUSA (TaxHawk) started its first radio and television advertising)).

125. H&R Block believes that REDACTED

REDACTED (DX6046-003; vol. 23, 36:23-37:12 (Cobb)).

H. Industry Participants Perceive the Market to Be All Forms of Tax Preparation.

126. TaxACT's executives believe that "[t]he Company has numerous competitors that include other income tax software providers, companies providing pure E-file service, professional tax

practitioners who provide these services directly to individual consumers.” (Vol. 6, 68:25-69:3 (Dunn quoting from GX28-8)).

127. To that end, TaxACT’s executives believe that digital DIY is a part of the broader tax preparation market. (*See, e.g.*, vol. 4, 60:1-5 (Dunn); DX5056-007 (according to 2007 TaxACT offering memorandum, the market is a single, \$19 billion tax preparation market); DX5058-011 (according to a 2010 TaxACT offering memorandum, the market is all tax preparation though the “Internet has increasingly become a preferred platform”); vol. 6, 30:20-31:7, 45:23-46:5 (Dunn) (providing that in sales pitches, TaxACT “present[s] the market as 140 million taxpayers.”)).

a. Internal TaxACT documents that calculate “market share” based on federal e-filing data do not purport to relate to antitrust markets and do not establish lack of substitution or interchangeability between assisted products and digital products.

b. The phrase “entire industry” in high-level corporate TaxACT documents means “tax preparation across the board. Every possible solution.” (Vol. 6, 31:17-20 (Dunn)).

128. H&R Block executives believe (and believed before meeting with DOJ about the Transaction) that H&R Block’s assisted and digital businesses compete against the entire tax preparation market. (*E.g.*, vol. 23, 37:9-12 (Cobb); vol. 2, 90:3-14 (Bennett); *see also* DX0358-026 (2010 Annual Report) (“Our digital tax solutions businesses also compete with in-office tax preparation and a number of online and software companies, primarily on the basis of price and functionality.”); DX6122-001-02 (providing in a 2010 letter from Russ Smyth (former CEO) to Tom Allanson (former President of H&R Block’s Digital division) that “we have many competitors – Intuit, TaxACT, Jackson Hewitt, Liberty and 100,000 independent tax preparers in the retail space I expect our retail business to aggressively market the value of their services

against all retail and digital competitors, just as I expect our digital business to aggressively market their products and services against all retail and digital competitor.”)).

a. Internal H&R Block documents calculating “market share” based on federal e-filing data do not purport to describe antitrust markets and do not establish lack of substitution or interchangeability between assisted and digital products.¹⁸

b. H&R Block’s documents use the term “market” to refer to digital players and to refer to all tax preparers. (Vol. 2, 106:14-25 (Bennett) (“So we probably have a thousand documents that show the market this way, and we have another thousand that show it the way we’ve been seeing it this morning.”)).

129. Intuit’s executives believe that **REDACTED**

REDACTED (GX293 (Maurer Dep.) 14:22-15:8).

130. TaxHawk (FreeTaxUSA) executives believe that all American taxpayers are TaxHawk’s potential customers, including people currently using pen and paper and accountants. (Vol. 14,

¹⁸ Plaintiff relies on deposition testimony from Alan Bennett and Jason Houseworth noting that (1) there has not been much *net* movement between assisted tax preparation and digital tax preparation, and (2) H&R Block does not attempt to compete with itself and its own digital business does not “impact” its retail business. First, as noted, *supra*, n. 9, net movement is irrelevant; the fact that approximately equal numbers of customers switch from assisted tax preparation to DIY as switch from DIY to assisted is consistent with vigorous competition. Second, whether H&R Block attempts to compete with itself or “impacts” its own business sheds no light on substitution, diversion or any other indicia of the scope of the market. Purely digital competitors, like TaxHawk, also do not attempt to migrate customers between their various digital business properties (their websites), but no party to this case has argued that TaxHawk’s websites are in separate markets merely because they do not intentionally compete or “impact” one another. Vol. 14, 40:5–17. Finally, both Jason Houseworth and Alan Bennett clearly testified that they do not agree with Plaintiff’s market definition. For instance, Jason Houseworth stated in his deposition that “[w]hen I say “the market,” I’m also thinking about, actually, assisted and DIY” GX-61, 263:4 – 13 (Houseworth). Alan Bennett explained that “we view the marketplace often as a broader market,” and competition between digital and assisted competitors has intensified over the last two years. (Vol. 2, 90:3-90:14, 92:7-92:19).

28:1-11 (Kimber)).¹⁹

131. Rhodes Financial Services (TaxSlayer) executives view TaxSlayer’s potential customers as “anyone who is looking to file their tax return,” including people who used a retail tax store, pen and paper, or TurboTax the previous year. (Vol. 14, 77:14-78:4 (Rhodes)).

a. TaxSlayer loses customers to all these same sources. (*Id.* (Rhodes)).

132. The head of corporate development for the tax and accounting division of Wolters-Kluwer (CompleteTax) believes that REDACTED
REDACTED (GX573 (Tennola Dep.) 22:13-16).

133. OnePriceTaxes has represented in documents created for potential investors t REDACTED
REDACTED
REDACTED (DX0096-003).

134. On-Line Taxes REDACTED (GX570 (John Dep.) 38:23-39:2).

I. Within the Tax Preparation Market, Premium and Value Products Typically Appeal to Different Customers.

135. Within the tax preparation market, premium products and value products largely appeal to divergent customer segments. (GX607 (Vanderpool Dep.) 21:8-24 REDACTED
REDACTED
REDACTED
REDACTED.

¹⁹ Though Kimber stated in a declaration that REDACTED
REDACTED, (GX25 (TaxHawk Decl.) ¶¶ 11-12), he explained in his testimony that his declaration referred to the fact that taxpayers “satisfied [with] where they’re at” would not look elsewhere “unless given a reason.” (Vol. 14, 48:21-49:6 (Kimber)). He also explained that TaxHawk markets to users of all tax preparation methods, including television ads targeted at assisted-preparation customers. (*Id.*, 28:12-29:4 (Kimber)).

a. Documents from H&R Block significantly predating when the Transaction was announced reveal H&R Block does not believe that it currently competes effectively in the “value” or “low-end” segment. (DX1804-001 (noting that H&R Block’s rationale for the Transaction was its realization that “the most aggressive way to grow would be to enter the value space”); DX0243-012 (“We do not plan to utilize Block-branded DIY to compete in the lower-priced online space, so this [merger] provides an opportunity to grow share where we are not.”); DX1013-006 (“Recommendation . . . Continue to run TaxAct as a separate brand focused on low cost segment Strategic Benefits. . . . Allows H&R Block brand to focus on ‘State of the Art’ tax preparation experience.”); DX1009-003 (“Option A (preferred) . . . TaxACT brand continues to be low cost value provider focused on free. . . H&R Block brand is the premium offering.”); DX1002-006 (providing that post-merger, H&R Block will “Own CONTROL + ASSURANCE” in “Premium DIY,” while TaxACT will “Own Easy/Free” in “Lowest Total Cost.”)).

b. OnePriceTaxes’ founder testified that the market is segmented by price, with high-priced solutions and low-prices solutions in different markets. (GX654 (Edwards Dep.) 8:21-9:8).

c. Charles Petz of Petz Enterprises, Inc. (TaxBrain) testified that “there are two distinctly different market strategies and segments [in consumer tax preparation]” and “[w]e see that in the consumer tax prep market we have individual companies that offer purely a price play in their advertising. They use that as their differentiator. We are the lowest cost or the cheapest for free tax preparation electronic filing solution versus companies like myself who want to sell to a higher value, a more long-term relationship, a full support, a full service type product.” (GX571 (Petz Dep.) 9:21-10:14).

d. A March 2011 presentation by Thomson Reuters, maker of TaxSimple, opined that there

REDACTED

(GX606 (Baron Dep.) 21:4-25; DX0033-007).

e. Pricing trends are consistent with the beliefs of industry participants that there are generally two tiers of pricing for tax preparation products. (DX0017-033 (Figure 1)).

136. Value solutions and premium products offer different levels of features, functionality, and brand cache. (*E.g.*, Vol. 3 62:13-64:1 (Ernst); DX6010-006; DX6118-010-11).

a. H&R Block At Home has free Audit Assistance and Representation. (DX6010-006).

b. TurboTax has a similar paid program. (*Id.*).

c. TaxACT does not have an analogous Audit Assistance program; its audit assistance is essentially an online tutorial. (*Id.*; DX0355-001).

d. TaxACT also has fewer W-2 import capabilities than H&R Block At Home and TurboTax. (DX6010-006).

e. Historically, H&R Block's TaxCut product was more expensive than TaxACT's product, because "the H&R Block brand had a cache within the market." (Vol. 3, 62:13-64:1 (Ernst)).

f. H&R Block continues to have brand cache. (*Id.*, (Ernst)).

g. "Brand Consideration" for H&R Block and TurboTax is on par or superior to brand consideration for "CPA," while TaxACT's brand consideration is significantly lower than these three competitors. (DX6118-010-11).

137. No fact witness in this case has testified that there is a single "digital DIY" market containing and limited to all digital products used for federal and state tax preparation.²⁰

²⁰This includes the third-party declarations put forward by Plaintiff. As stated, *supra*, note 19 and paragraph 130, Kimber's declaration was not meant to indicate he saw a single "digital DIY market." Rhodes likewise confirmed that TaxSlayer's customers are "anyone who is looking to file their tax return," including tax store and manual users, though his declaration REDACTED. (Vol. 14, 77:14-23 (Rhodes), GX113 (Rhodes Decl. ¶7). Rhodes testified that TaxSlayer does not

J. The Parties' Market Shares And Concentration in an All Tax Preparation Market Are Low.

138. A market defined as products and services used for federal tax preparation would include the following participants with the following market shares: H&R Block (15.1%), TaxACT (5.7%), TurboTax (17.0%), FFA (2.4%), pen and paper (6.5%); Jackson-Hewitt (2.0%), accountants (39.8%); Other DIY online (1.1%); other DIY software (2.4%). (DX0017-028 (Table 3)). H&R Block's share drops to 10.8% if franchisees are not considered. (*Id.*).

a. H&R Block franchise operations make up over half of H&R Block's total retail operations and 25% of H&R Block's total market share (DX0358-035 (for FY2010, franchisees processed approximately 5.064 million retail returns, whereas company-owned retail stores processed approximately 9.182 million and H&R Block processed a total of 20.142 million).

139. Even if all H&R Block franchisees are counted in H&R Block's market share in a relevant market consisting of all tax preparation, the change in HHI is 172 and post-merger HHI will be 792. (Vol. 16, 85:1-16 (Meyer)).

140. Therefore the market is not concentrated and the Transaction is unlikely to have adverse competitive effects. (*Id.*, (Meyer)).

specifically target tax store and CPA customers due to concerns voiced by his professional clients--*that he was taking their business*. (Vol. 14, 78:5-23 (Rhodes)). Rhodes is confident that TaxSlayer's general marketing is "still attracting" users of assisted preparation. (*Id.* (Rhodes)). Jonathon Baron's declaration also does not tell the full story. He declared that he did **REDACTED**

(GX 156 ¶12.) Yet he acknowledged at his deposition that **REDACTED**

(GX606 (Baron Dep.) 29:23-31:2), and **REDACTED**

(*Id.* 57:3-17, 58:10-19). The remaining declarations,

REDACTED

(GX29 (Maurer/Intuit Decl.) ¶ 26), do not opine on the scope of the market (GX155 (Edwards/OnePriceTaxes Decl.), GX154 (John/OLT Decl.), GX26 (Tennola/CCH Decl.), GX291 (Cahall/Microsoft Decl.); GX24 (Vanderpool/eSmartTax)).

K. Plaintiff Has Not Proved Its Alleged Market that Includes All State Filings.

141. No fact witness in this case has testified that e-file statistics from the IRS establish shares of *state* tax preparation and filing.

142. No document showing “market shares” based on e-file statistics purports on its face to establish or describe a market consisting of federal and *state tax* preparation.

143. Plaintiff has admitted no documents into evidence directly estimating any company’s share of state tax preparation and filing.

144. Federal e-file shares are not a reliable proxy for state filing shares.

a. Intuit reported that its TY2007 state attach rate (the number of individuals who used both Intuit’s federal and state product) was [REDACTED], while its state attach rate for TY2006 was [REDACTED].

Indeed, [REDACTED]
[REDACTED]. (DX0426-045).

b. In 2009, between [REDACTED] and [REDACTED] of FFA and free federal online customers for TaxACT, TurboTax and H&R Block decided not to use the same company’s state product because [REDACTED]
[REDACTED] while between [REDACTED] and [REDACTED] did not use the same state product because [REDACTED]
[REDACTED] and between [REDACTED] decided not to use the same state product because they [REDACTED] (DX0034-111).

c. In 2010, the state attach rate for H&R Block was [REDACTED] meaning that [REDACTED] of H&R Block’s federal customers did not use H&R Block’s state products. (DX6041-009).

d. TaxACT’s state attach rates have historically been between [REDACTED] and [REDACTED] depending upon the product, with state attach rates for its free product being comparatively lower than its paid product. (DX0007-027).

e. In a study of free and FFA users, H&R Block found that for TaxCut FFA users, a majority

used a "State Website" [REDACTED] or "Pen and Paper" [REDACTED] rather than use TaxCut to file their state taxes. For TaxACT Free customers, [REDACTED] use a "State Website" while [REDACTED] use "Pen and Paper." (DX6053-048).

V. The IRS' Role in Tax Preparation

145. The IRS piloted electronic filing ("e-filing") of individual federal tax returns in 1986. E-filing first became available on a nation-wide basis in 1990. (Stipulated Facts, Sep. 2, 2011 (hereinafter "Stip. Facts"), 2).

146. In 2001, the President's Management Council announced the establishment of various initiatives intended to expand electronic services ("e-services") within the federal government. One was the EZ Tax Filing Initiative. (Stip. Facts, 2).

147. The objective of the EZ Tax Filing Initiative was to decrease the tax preparation and filing burden on wage earners by providing greater access to free online tax preparation and filing options. (Stip. Facts, 2).

148. Ultimately, the IRS determined that the most effective and efficient way to accomplish the goals of the EZ Tax Filing Initiative was to work with the Free File Alliance ("FFA"), a consortium of companies offering electronic tax preparation services. (Stip. Facts, 2).

149. As part of this Initiative the IRS began allowing private companies to offer free products on its "Partners Page" after each company entered into a memorandum of agreement with the IRS. (DX0050-011).

150. The FFA was formed in late 2002 as a public-private partnership between the IRS and participating tax preparers. Its purpose was to ensure that low income taxpayers could prepare and e-file their federal tax returns for free. (Stmt. 16).

151. FFA members must meet certain requirements to participate, including earning a security

certification and providing free services to a minimum number of taxpayers. (Stip. Facts, 2).

152. Indeed, the IRS's agreement with the FFA also provides "performance standards" for FFA members and states that "[i]f the IRS determines a particular offering of Free Services is deficient or that Free Services are not being properly performed, it will notify the Consortium . . . [of] corrective actions it believes are needed." (Stip. Facts ¶ 20).

153. The 2009 agreement between the IRS and FFA further provides that "[e]ach member shall guarantee the calculations performed by its federal free file offering." (DX2220-012).

154. Both industry participants and former IRS executives believe that the IRS will enter the tax preparation market if private companies do not offer free products. (GX28 (Dunn Dep.) 26:4-9 ("The United States Government says that they have to provide a free product, or that the government will. That threat from the government, you know, really permeates the whole industry and the behavior that you see, especially with respect to free products."); GX-569 (Dumars Dep.) 53:5-13 (if the FFA dissolved, the IRS would consider building its own mechanism to provide free e-filing).

155. The presence of the IRS in the tax preparation market keeps prices low and prevents coordination. (Vol. 16, 124:20-125:8 (Meyer)).

VI. The "Freemium Model" Is Prevalent In Tax Preparation And TaxACT's Use of It Does Not Make TaxACT An Antitrust Maverick.

156. "Free" in the private tax preparation market began in 1993 when a company called Computer Associates distributed free tax preparation software via CD. Customers paid only shipping and handling. Parsons Technology followed suit with a product called TaxMate, which was available free by download or on a free CD except for shipping and handling. (Vol. 6, 72:24-73:9 (Dunn)).

157. Intuit started offering a free product on the IRS Partners' Page several years later in 1998.

(Vol. 6, 73:21-74:4 (Dunn); vol. 3, 54:14-55:4 (Ernst); vol. 12, 77:10-13 (Warren-Boulton)).

158. “TaxACT didn’t provide free e-filing until the government forced them to in [the] FFA.”

(Vol. 6, 75:2-4 (Dunn); vol. 4, 65:2-3 (Dunn) (providing that TaxACT was not the first to offer free preparation of federal taxes)).

159. After the FFA started in 2002, numerous FFA members offered (and continue to offer) free federal tax preparation services through the FFA. (Stmt., 16).

160. In Tax Season 2003, the FFA’s first tax season, its approximately thirteen independent members were permitted to offer free federal products to whichever taxpayers they chose, so long as the FFA as a whole covered 60% of all taxpayers. (Stmt., 16).

161. Most companies in 2003 limited their free tax preparation to consumers based on adjusted gross income (“AGI”). (Stip. Facts ¶ 14). Nevertheless, several FFA members limited their free offer by state and age instead of by income. (DX0046-001).

a. As of January 16, 2003, FreeTaxUSA (my1040EZ.com) was offering free tax preparation to everyone who was “age 20 or younger or age 45 or older.” (*Id.*).

b. OnLine Taxes, Inc. offered free tax preparation to all taxpayers age 20 and younger. (*Id.*).

c. FileYourTaxes.com offered free tax preparation to residents of 4 states, and C&S Technologies (then owner of eSmartTax) offered free service to residents of IL and NY. (*Id.*).

162. In 2003, before TaxACT started offering free federal tax preparation products with no restrictions on the FFA page, the cumulative effect of all offers on the FFA page amounted to 94% coverage (119 million out of 127 million individual taxpayers). (DX2205-002; GX-569 (Dumars Dep.) 62:12-24).

163. In 2004, FreeTaxUSA.com offered completely free tax preparation and e-filing on the FFA to all residents of all of the states for which FreeTaxUSA had a state product. (DX5033-001).

164. Also in 2004, FileYourTaxes.com made that same offer to residents of 7 states. (*Id.*).
165. In 2004, TaxACT offered free tax preparation on the FFA to all taxpayers, regardless of income and state of residence. (DX5033-001).
166. Three other tax companies eventually offered similar free-for-everyone tax preparation services in 2004. (DX2210-016) (Congressional Report from Dumars).
167. The number of free-for-everyone offers on the FFA expanded significantly in 2005. Ten out of the twenty 2005 FFA participants offered free file services to all taxpayers. (DX2205-003).
168. In 2005, the IRS curbed the proliferation of free offers by prohibiting any free offer from covering more than 70% of taxpayers. (DX2207-006).
169. “[T]he [IRS’s] decision regarding a cap on free e-filing services was grounded in public policy and political considerations, not the ‘insistence’ of FFA members,” as the IRS represented in *Byers v. Intuit*, 564 F. Supp. 2d 385 (E.D. Pa. 2008) (DX0340-004).
170. As free product offerings grew on the FFA website from 2003 to 2005, at least one online company – TaxHawk – was also offering free products on its proprietary websites.
- a. TaxHawk first conceived of offering free federal tax returns in the summer of 2002, before the FFA was created and well before TaxACT started offering “free for all” products on its own website. (Vol. 14, 15:20-23 (Kimber)).
 - b. TaxHawk’s plan to offer a free product was conceived of internally by Dane Kimber and Scott Rasmussen. (*Id.*, 60:6 (Kimber)).
 - c. In tax season 2004, TaxHawk started offering free federal filings with no AGI restrictions on its FreeTaxUSA website to residents of fourteen states. (*Id.*, 16:13-17:2 (Kimber)).
 - d. In tax season 2005, TaxHawk offered free federal filings, without AGI limitation, on at

least one of its websites to residents of twenty-six states. (*Id.*, 58:10–59:6 (Kimber)).

e. In tax season 2006, TaxHawk offered free federal filings, without AGI limitation, on at least one of its websites to residents of thirty-one states. (*Id.*, 59:16–60:6 (Kimber)).

171. In tax season 2005, TaxACT started to offer a free product to all taxpayers regardless of income on its proprietary website. (Vol. 4, 79:12-23 (Dunn)).

172. TaxACT does not offer a free state preparation return product. (Vol. 6, 66:10-16 (Dunn)).

173. The free-for-everyone offer on the FFA was not the only innovative offer on the FFA.

Indeed, companies other than TaxACT made several different innovative FFA offers including free state filing, time extensions, and free Spanish versions. (DX2207-006.)

174. Various digital DIY companies have also been responsible for numerous innovations outside the FFA, including Intuit’s “SnapTax” mobile tax filing application (2010); H&R Block’s Signature and “Best of Both” hybrid products; CCH’s free premium product targeted at former users of TaxACT, H&R Block, and TurboTax; and free state products. (DX9809-001; *infra* ¶¶ 179-182).

175. Since 2005, TaxACT has not engaged in any significant innovation in the free space. (Vol. 14, 76:12-77:13 (Rhodes); vol. 16, 117:1-12 (Meyer)).

176. Industry players do not currently view TaxACT as any more innovative than “any other software company.” (Vol. 14, 76:12-77:13 (Rhodes), 34:13-35:11 (Kimber)).

177. In TS 2011, seventeen companies offered free federal tax preparation products through the FFA. (Stmt., 17).

178. Numerous companies currently offer free products on their proprietary websites.

a. TaxSlayer offers a “Free Federal Edition” on its website that “[a]llows for the free filing of any Federal tax return filed on a form 1040EZ” and includes a deductions finder, “life events

wizard,” “real time refund calculation,” and “Free Email Support.” (DX0114-001-2).

b. TaxSlayer also offers a free federal and state product to all active duty members of the military. (DX0114-005).

179. TaxSlayer offers a free state product to persons filing in one of 21 states who meet the following conditions: “1. Household income is under \$58,000; AND 2. Are 25 years old or younger OR 3. Are 65 years old or older OR 4. Qualify for Earned Income Credit OR 5. AGI \$10,000 or less regardless of age OR 6. Are currently Active Duty Military.” (DX0114-003).

180. In 2009, H&R Block considered emulating the TaxSlayer model for free state tax preparation return and filing. (*See* DX0300-001 **REDACTED**

REDACTED).

a. On its FreeTaxUSA website, TaxHawk offers free federal preparation and e-filing comparable in scope to TaxACT’s free offering. (Vol. 14, 14:16-15:5 (Kimber)).

b. On its TaxHawk website, TaxHawk offers free federal and state tax return preparation and filing to customers with an AGI of \$20,000 or less. For customers with an AGI over \$20,000, the federal return is free but the state return is \$12.95. (*Id.*, 15:11-19 (Kimber)).

c. Unlike other free products, TaxHawk’s free product allows customers to import their prior year data if they used TaxHawk the previous year. (*Id.*, 41:6-23 (Kimber)).

d. As of December 17, 2010, CompleteTax offered its Premium edition product (ordinarily \$29.95-\$49.95) for free to any customers that used TurboTax, TaxACT, or H&R Block at Home to file the previous year; it also offered a price lock guarantee and a free return to persons who owe the IRS money. (DX1420-001).

e. Intuit currently offers a free online product. (GX293 (Maurer Dep.) 80:12-16).

f. H&R Block currently offers a free online product. (DX5053-455).

181. In addition to offering a free federal product online, H&R Block also offers free form 1040EZ preparation to qualifying customers. (Vol. 2, 91:7-18, 93:1-6 (Bennett); DX0353-001).

182. As of 2009, “the primary players [in free state tax preparation] were TurboTax, TaxSlayer, TaxHawk, and OLT.” (DX1430-001).

183. On its TaxHawk website, TaxHawk allows customers with an AGI of \$20,000 or less to prepare and e-file their federal and state tax returns for free. (Vol. 14, 15:11-19 (Kimber)).

184. As of August 10, 2011, 18 companies (including one new one, just last month) offered various free e-filing products through the FFA. (DX0328).

A. The Use of “Free” Is Profitable

185. Free is a highly-profitable method of acquiring customers for H&R Block. (*See, e.g.*, vol. 3, 56:22–57:25 (Ernst) (H&R Block “figured out that making a free offer was profitable [and a] viable business model...in part because some people would buy a state tax return [and] [i]t was a very attractive offer to get people to come in to the digital space.”)).

a. Although H&R Block initially had concerns about free products cannibalizing paid products, when H&R Block tested its Free EZ product, the product had “very little effect on H&R Block’s premium products.” (*Id.*, 52:1-4, 56:22-57:25, 67:15-68:6 (Ernst); DX 7003).

b. H&R Block’s cannibalization rate of paid clients (retail & digital) for its free online products was approximately ^{REDACTED} as of April 15, 2010. (DX6136-033).

c. For H&R Block, **REDACTED**

REDACTED. (DX5031-032-33).

d. As of March 2010, **REDACTED**

REDACTED (DX0400-001-02).

e. REDACTED

REDACTED (Id.; DX0401-001); DX0413-008 REDACTED
REDACTED).

f. REDACTED

REDACTED
REDACTED (DX6011-012).

186. H&R Block has also profited from offering free 1040EZ preparation in its retail stores. (Vol. 2, 91:9-18 (Bennett) (We went out with a very aggressive free product at retail . . . we picked up hundreds and hundreds of thousands of new customers . . . and had great retail success with that.”)).

187. Intuit recognizes REDACTED

REDACTED. (E.g., GX293 (Maurer Dep.) 126:12-127:23; 128:12-15; 128:23-129:8 REDACTED

REDACTED

REDACTED

REDACTED (emphasis added); DX0086-013 REDACTED

REDACTED; DX8023-003 REDACTED;

DX6055-007.).

a. For Intuit, REDACTED

REDACTED (DX0086-013); REDACTED

REDACTED (Id. at 021); and REDACTED (GX-650-004.)

b. In 2008, Intuit found REDACTED

REDACTED (DX0426-013).

c. REDACTED

(DX6186-002)

d. Intuit has started offering free Quicken – a financial product unrelated to taxes – REDACTED

(DX6186-002).

e. Total revenue per return for Intuit REDACTED

(DX6152-096-

97).

f. In 2008, Intuit estimated REDACTED (DX0426-044).

B. The Offering of TaxACT Branded-Boxed Software Products with a Free State E-file Does Not Make TaxACT a Maverick.

188. Boxed software sales have declined in the last several years and likely will continue to decline. (DX1900-004-009 (discussing retail software as a “software category [that is] declining at an increasing rate”)).

189. H&R Block and Intuit are currently the two largest providers of boxed software. (*Id.*, at 2, 9; DX0082 ¶ 24 (Intuit retail software sales were 80% of Staples’ total sales)).

190. In 2010, “Avanquest,” a distributor approached TaxACT to retain the rights to distribute TaxACT-branded boxed software products at retail locations. (Vol. 6, 100:6-12 (Dunn)).

191. When TaxACT was approached by Avanquest, TaxACT had no intention to sell boxed products at any retail location. (GX28 (Dunn Dep.) 389:19-390:9).

192. TaxACT signed a distribution agreement with Avanquest in June 2010. (DX0335; DX0336).

193. Avanquest currently offers a TaxACT-branded boxed product at Staples that includes a state e-file at no additional cost. (GX295 (Kintzel Dep.) 212:18-22).

a. This was not the first time that fee state e-files were offered with retail boxed software. H&R Block and CompleteTax both offered free state e-files in retail boxed products in TY2008. (GX294 (Simone Dep.) 308:22-310:16).

194. Avanquest **REDACTED**
REDACTED. (Vol. 8, 4:11-15 (Dunn); GX295 (Kintzel Dep.) 37:5-13; DX0335 & DX0336 (Agreement between 2SS & Avanquest North America Inc. § 4.5 (June 15, 2010)).

195. In Tax Year 2010, Avanquest sold approximately 20,000 units of TaxACT-branded products in Staples, which TaxACT's Chief Executive Officer Lance Dunn views is a "non-event." (Vol 6, 100:23-101:1 (Dunn)).

196. H&R Block's sales at Staples in 2011 were **REDACTED** (DX0088-001). That **REDACTED** cannot be correlated to the presence of a TaxACT-branded product as other relevant factors that have historically caused significant sales decreases were present.

a. Intuit used promotional blocking techniques at Staples in 2010, which denied H&R Block from all promotional opportunities at Staples. In 2008, when Intuit employed less-aggressive promotional blocking at Staples, H&R Block **REDACTED** of its sales. (DX0361-006).

b. In 2010 when Staples denied all promotional activity to H&R Block, H&R Block sought to lower its price at Staples. Staples refused to honor the price change. (GX294 (Simone Dep.) 22:10-14 (discussing TurboTax's actions to block HRB's advertising at Staples), 159:8-160:13 (discussing Staples' refusal to sell product at \$5 lower than manufacturer's suggested retail price despite agreement to do so); GX559 (discussing response to Staples' refusal to lower price)).

c. The importance of promotions in retail tax software was demonstrated in 2011 at Wal-Mart where H&R Block's sales **REDACTED** as a result of Wal-Mart's decision to place H&R Block in its software section with no displays. (DX0088-001).

197. TaxACT's Lance Dunn views the software segment as declining and largely immaterial to TaxACT's business. (Vol. 5, 124:25-125:7 (Dunn) REDACTED
REDACTED
REDACTED).

VII. Expansion Within And Entry To The Tax Preparation Market Is Likely.

A. Size of Entry Required to Deter a Price Increase

198. An entrant need not be as large as TaxACT to deter a price increase by the combined company. (Vol. 12, 20:21-21:1 (Warren-Boulton); vol. 16, 129:22-25 (Meyer)).

B. Low Barriers to Entry and Expansion

199. In 2009 and 2010, H&R Block repeatedly recognized that one of the risks of acquiring TaxACT was competition from new entrants, given low barriers to entry. (DX0244-006; DX1012-013; DX1010-005; DX1011-006; DX0362-002).

200. Indeed, entry with minimal initial funding is possible. (Vol. 6, 29:19-20 (Dunn) ("We started 2nd Story Software by contributing \$5,000 each, a desk, a chair, and a computer.")).

201. While marketing and advertising are important, it is not REDACTED
REDACTED (GX570 (John Dep.) 34:10-35:6).

202. Social media, such as Facebook, Twitter and YouTube, provide inexpensive ways for companies to expand. (Vol. 6, 98:17-19 (Dunn)).

203. Pay-per-click advertising on Google also REDACTED
REDACTED (GX570 (John Dep.) 31:9-12; vol. 14, 22:8-10, 25:10 27:5, 26:7-27:25, 36:24-37:18 (Kimber)).

204. Furthermore, brand reputation is not a significant barrier to entry in the value space. (DX0003-041 (providing that in a 2008 TaxACT "Marketing Strategy Research" study, only REDACTED
REDACTED of respondents cited "brand reputation" as their primary reason for choosing TaxACT)).

205. Brand recognition is more important to consumers of premium products, such as those sold by TaxBrain, H&R Block, and Intuit. (GX571 (Petz Dep.) 11:18-13:10, 122:1-123:12).

206. Consumers of discount products, such as those sold by TaxACT and TaxSlayer, “don’t care who they buy the product from, and they view the products as being basically the same.” (*Id.*)

207. Entry in the value space is common and does not require a large team of individuals. (*Id.*, 36:19-37:6). In fact, TaxACT grew from 1.5 million customers to 3.3 million customers in just two tax seasons (2004-2006). (GX121 at 82 (Table 5)).

208. A company can expand capacity REDACTED . (Vol. 15, 87:17-88:14 (Rhodes); GX570 (John Dep.) 17:5-9).

209. Existing competitors besides Intuit already have the capacity to serve all of TaxACT’s and H&R Block’s combined customers if they all decided to leave the company post-transaction.

(Vol. 15, 87:23-88:1 (Rhodes) (testifying that TaxSlayer is REDACTED ; vol. 14, 21:8-20 (Kimber) (testifying that TaxHawk has REDACTED GX154; GX570 (John Dep.) 6:17-20 (testifying that OLT’s infrastructure REDACTED).

C. Entry Via the Free File Alliance Is Easy

210. It is “very easy for a company to enter the on-line business,” in part because “the FFA provides a platform for any company that meets a minimum threshold of product quality to make an offer” that appears to have been endorsed by the IRS and that has been checked by the IRS for minimum requirements. (Vol. 3, 72:14-73:5 (Ernst)).

211. One of the purposes of the FFA is to “encourage[e] competition within[] the private sector. (DX0365-001; GX28 (Dunn Dep.) 113:3-5 (“One of their premises for building and maintaining the Free File Alliance was to foster competition . . . in the industry.”)).

212. Small firms see free as “their opportunity to break into the market and create a stir, because it was a model that worked inside the FFA.” (Vol. 3, 61:1-6 (Ernst)).

213. “[F]or start-ups and for companies that don’t have an established reputation, [the FFA] is absolutely a seal of approval, as is the IRS e-file logo which everyone prominently displays on their web sites.” (Vol. 6, 97:14–19 (Dunn)).

214. The FFA is a “springboard” for companies hoping to enter or expand because “it is a fantastic low-cost, free marketing channel” where new entrants and small competitors can “start building that reputation and track record.” (Vol. 6, 97:2-6 (Dunn)).

215. At least seven new companies joined the FFA between 2004 and May 2005. (GX569 (Dumars Dep.) 127:19-129:10).

216. “[O]ver the last few years a lot of players have come online with the FFA, including just in the last month with 1040.com.” (Vol. 6, 30:8-12 (Dunn)).

D. TaxSlayer

217. In May 2010, H&R Block viewed **REDACTED**

REDACTED
REDACTED. (DX1400-001).

218. TaxSlayer began developing its online tax preparation product in 2001 and introduced its first online consumer product for individuals in 2003. (DX0101-004 (Rhodes Decl.)).

219. TaxSlayer’s first year revenue was about **REDACTED**. (Vol. 15, 85:6-11 (Rhodes)).

220. Since its start, TaxSlayer has grown in both revenue and overall units. (Vol. 14, 73:14-25 (Rhodes)).

221. Brian Rhodes (“Rhodes”) **REDACTED**

REDACTED

REDACTED

(Vol. 15, 85:12-86:17 (Rhodes)).

222. TaxSlayer attributes its growth to referrals, marketing, and the price and quality of its product—it was designed by tax preparers, is easy to use, offers good customer support at customer-adjusted levels, and is well-priced. (Vol. 14, 73:14-74:13; 76:5-11 (Rhodes)).

223. From 2006 to 2010, TaxSlayer’s revenue and units REDACTED. (Vol. 15, 96:11-25).

224. TaxSlayer’s revenue in calendar years 2010 and 2011 REDACTED ,

REDACTED

(*Id.*, 84:8-19 (Rhodes); DX0338-027). TaxSlayer provided corrected data and testimony confirming that TaxSlayer did not lose market share. (DX1518).

225. TaxSlayer’s REDACTED , (vol. 15, 86:18-21 (Rhodes)), and has been “very creative in [its] marketing campaigns.” (Vol. 6, 50:7-15 (Dunn)).

a. At a January 2008 meeting attended by all four TaxACT founders, it was noted that REDACTED

(DX1403-001).

b. To that end, TaxSlayer uses search advertising to reach consumers. (Vol. 14, 74:24-75:3).

c. TaxSlayer also has innovative market strategies in semi-traditional media outlets, including television commercials.

d. Indeed, a TaxSlayer television commercial prompted REDACTED

(DX1404-001).

e. TaxSlayer also recently renewed a deal with Dale Earnhardt Jr.'s NASCAR racing team and also signed a three-year contract to sponsor the college football Gator Bowl. (Vol. 14, 74:14-75:17 (Rhodes); vol. 12, 78:8-11 (Warren-Boulton)).

f. TaxSlayer also utilizes social media, such as Facebook, Twitter, and YouTube. To that end, TaxSlayer has hosted YouTube campaigns where people compete for prizes, including \$25,000, for producing commercials for the company. The submitted commercials remain on YouTube even if not selected by the company. (Vol. 14, 75:18-76:4 (Rhodes)).

226. For TY2009, TaxSlayer **REDACTED**
REDACTED. (DX0101-005 (Rhodes Decl.)).

227. For TY2010, TaxSlayer **REDACTED**
REDACTED. (*Id.*; DX0338-027).

228. TaxSlayer's projected revenue **REDACTED**
REDACTED
REDACTED. (Vol. 15, 86:22-87:16 (Rhodes)).

229. If TaxSlayer continues to grow and invest in marketing at its current pace, TaxSlayer **REDACTED**
REDACTED. (*Id.*,
91:18-93:15, DTX 3 (Rhodes)).

230. **REDACTED**
REDACTED. (Vol. 15, 93:16-21 (Rhodes)).²¹

231. Brian Rhodes, TaxSlayer's Product Manager, **REDACTED**

²¹ When Rhodes stated in his declaration that **REDACTED**
REDACTED **GX113**, **REDACTED**
REDACTED (Vol. 14,
102:6-21 (Rhodes)).

REDACTED. (*Id.*, 84:20-85:5
(Rhodes)).

232. REDACTED
REDACTED
REDACTED. (*Id.*, 87:17-88:14 (Rhodes)).

233. TaxSlayer is “happy” about H&R Block’s proposed acquisition of TaxACT. If H&R Block decides to terminate the TaxACT brand or raise prices, TaxSlayer “will be ready to gain some more market share.” TaxSlayer is “poised and ready to take those customers who would want to go elsewhere for lower prices.” (Vol. 14, 79:6-13, 80:19-81:10 (Rhodes)). TaxSlayer’s state prices are already lower than TaxACT’s prices. (Vol. 12, 72:5-10 (Rhodes) (TaxSlayer’s pricing: Free package gets state return for \$14.90; classic = \$9.95 for fed, \$4.95 for state; premium = \$19.95 fed + \$4.95 state)).

234. If H&R Block continues TaxACT products, TaxSlayer still expects to gain some former TaxACT customers that decide to switch companies. (*Id.*, 79:14-80:18 (Rhodes)).

235. If H&R Block eliminates the TaxACT brand or raises prices, TaxSlayer REDACTED
REDACTED
REDACTED
REDACTED
REDACTED. (Vol. 15, 88:15–90:2 (Rhodes)).

236. Dr. Meyer believes that TaxSlayer “appear[s] poised and ready to take advantage of any profit opportunity that an anticompetitive price increase would give [it].” (Vol. 16, 15:13-15 (Meyer)).

E. TaxHawk

237. The idea for TaxHawk was conceived in January 2001. Dane Kimber spent a year designing the software, and the product launched in January 2002. (Vol. 14, 11:5-12 (Kimber)).

238. TaxHawk offers sufficient federal forms to support “over 95 % of the American taxpaying public,” and about 97 % of those eligible to e-file their taxes. Of the forms that TaxHawk does not currently offer, including the deceased taxpayer form, there are none that individually would take more than “a year or two” to add. (*Id.*, 12:23-13:2, 15:6-10, 53:8-55:8 (Kimber)).

239. TaxHawk supports 42 of the 44 states that have a state income tax. TaxHawk plans to support the remaining two states in the next two to three years and could do so by next tax season if necessary. (*Id.*, 13:3-24 (Kimber)).

240. TaxHawk’s digital tax preparation products are “very high quality,” as indicated by company growth and the “comments and compliments” it receives by e-mail and phone. Kimber also believes that TaxHawk has high-quality software engineers, based on their education and performance. (*Id.*, 17:9-23 (Kimber)).

a. In 2010, TaxACT **REDACTED**

REDACTED. (DX0376-001-04).

241. In October 2010, Intuit **REDACTED**

REDACTED. (DX0087-002).

242. In TS2010, TaxHawk had **REDACTED**

REDACTED. (Vol. 15, 62:5-21 (Kimber)).

243. TaxHawk’s annual marketing expenditures **REDACTED**

REDACTED. (GX25 at 7).

244. TaxHawk's average growth rate over the past two years is **REDACTED**.
REDACTED. (Vol. 14, 20:14-21:7 (Kimber)).

245. In January 2008, in response to a marketing effort by FreeTaxUSA, TaxACT's Peterson reported to Greif that, "[w]e no longer have a unique position in the market." (DX1401-001).

246. TaxHawk "appear[s] poised and ready to take advantage of any profit opportunity that an anticompetitive price increase would give [it]." (Vol. 16, 15:13-15 (Meyer)).

247. Post-acquisition, customers unhappy with any changes in the TaxACT product could use TaxHawk instead. (Vol. 14, 35:12-39:15 (Kimber)).

248. If TaxACT's prices increased or services decreased, TaxHawk would consider emphasizing that change in its advertising because TaxHawk believes customers would respond to such advertising. (*Id.* (Kimber)).

249. TaxHawk has the capacity **REDACTED**. (*Id.*, 21:8-20 (Kimber)).

250. TaxHawk normally has about 20 to 25 employees. During peak season the company expands to about 35 employees. (*Id.*, 11:18-21 (Kimber)).

251. TaxHawk would increase its pay-per-click advertising, overall and on a cost per click basis, provided its revenue-per-click remains higher than the related costs. (*Id.*, 27:22-25, 35:12-39:15).

252. TaxHawk's maximum, pre-approved pay-per-click spend per day during the tax season is **REDACTED**. (Vol. 15, 62:22-63:11 (Kimber)).

253. TaxHawk's FreeTaxUSA name was designed to perform well on internet search engines, and the name has been successful.

a. On March 19, 2010, TaxACT's Peterson noted that "FreeTaxUSA.com was up year-over-year in both traffic and units," and she speculated that they are benefiting from "sponsored

search” (i.e., paying for certain search term positions) and Google Auto-Fill (i.e., automatic suggestions made by Google when you type in part of a search term or phrase). (DX1413-001).

b. An October 27, 2010, Intuit **REDACTED**

REDACTED (DX0087-001).

c. On March 20, 2010, Peterson complained that “it looks like in many, many (too many) cases FreeTaxUSA is ranking above us in search.... This is killing us.” (DX1415-001).

254. In 2011, FreeTaxUSA ran its first radio and television advertisements. (DX4200-068).

255. TaxHawk recently developed a “bookmark” feature that has since been emulated by others in the industry. (Vol. 14, 18:2-18:19 (Kimber)).

256. TaxACT **REDACTED**

REDACTED (DX1410-001).

257. Dr. Meyer believes that TaxHawk “appear[s] poised and ready to take advantage of any profit opportunity that an anticompetitive price increase would give [it].” (Vol. 16, 15:9-15 (Meyer)). FreeTaxUSA’s prices are already lower than TaxACT’s prices. (Vol. 12, 33:1-2 (Kimber) (FreeTaxUSA costs \$9.95 for state returns)).

F. On-Line Taxes (“OLT”)

258. OLT’s **REDACTED**

(GX154).

259. OLT is a **REDACTED**

REDACTED (GX154; GX570 (John Dep.) 6:17-20).

260. REDACTED

(GX570 (John Dep.) 17:5-9).

261. Although OLT REDACTED

(GX154).

G. Expansion by Other Digital Competitors

262. TaxBrain views the acquisition as “an opportunity” because “[i]t shakes the market space.”

TaxBrain intends to expand after the acquisition closes because the acquisition will create a “shopping opportunity” for H&R Block customers who may be confused or disappointed.

(GX571 (Petz Dep.) 19:12-20:22, 87:17-19, 96:14-23).

a. TaxBrain plans to immediately increase marketing spend by \$3 million. (*Id.*, 20:23-21:6).

b. With that investment, TaxBrain realistically expects to reach about 1.5 million customers over the next three years. (*Id.*, 22:15-23:8). TaxBrain considers this goal realistic because the general consumer population is now ready to move to online and because it now better understands how to attract those consumers, including through internet advertising and social media. (*Id.*, 84:15–87:19).

263. TaxACT employees track CompleteTax promotions and have considered copying the company’s marketing tactics. (DX1424-001).

264. On March 16, 2010, TaxACT’s REDACTED

(DX0439-001).

265. On December 22, 2010, Dolmage stated “Can I just say . . . I warned people last year that CompleteTax is up and coming? They are going to make huge waves this year.” Leigh Aragon of TaxACT responded, “You absolutely did! Those are strong offers.” (DX1421-001).

266. H&R Block noted eSmartTax’s use of social media as early as May 2009 and Liberty’s

eSmartTax spent \$1 million on advertising in 2010. (DX5031-028; DX0338-029).

267. REDACTED, OnePriceTaxes (“OPT”) REDACTED
REDACTED. (GX654
(Edwards Dep.) 6:12-7:21, 49:20-25; DX0097-002).

268. OPT has REDACTED year since 2007. (DX0097-002).

269. OPT REDACTED
REDACTED. (GX654
(Edwards Dep.) 33:11-22).

270. According to a January 2011 internal business plan, OPT REDACTED
REDACTED
REDACTED (DX0096-001). REDACTED
REDACTED (GX654 (Edwards Dep.) 49:2-13; DX0096-001).

271. OPT REDACTED
REDACTED
REDACTED. (*Id.*, 33:23-35:5).

272. REDACTED
REDACTED²²

273. In a January 2011 investor presentation, OPT states that its goal is to REDACTED
REDACTED
(GX654 (Edwards Dep.) 40:3-11; 42:25-43:24; 44:10-24; DX0097-012).

274. REDACTED
REDACTED

²² To the extent that the declaration of Robbie Edwards, one of the founders of OPT, suggests REDACTED
REDACTED. (*Id.* 38:5-9; 60:4-62:6). OPT REDACTED
REDACTED. (DX0097-011).

REDACTED . (GX654 (Edwards Dep.) 45:4-17; 109:4-7; DX0097-013).

a. REDACTED

REDACTED . (DX0099). REDACTED

REDACTED
REDACTED (DX0100-003).

H. Expansion From Retail to Digital

275. After noting “a higher level of encroachment from online filing” in 2009, Jackson Hewitt – traditionally a brick and mortar tax preparation firm – announced that it expected to have an online presence in 2010. (DX5057-004).

276. In March 2011, Thomson Reuters REDACTED

REDACTED
REDACTED
REDACTED (DX0033-002).

VIII. Effects Of The Transaction

A. Efficiencies

277. The Transaction will result in efficiencies that will permit H&R Block to lower costs, increase quality, and better serve its customers where they want to be served. (Vol. 23, 50:14-51:5 (Cobb); GX657 (Dunn 30(b)(6) Dep.) 90:19-91:2; vol. 2, 71:18-23, 90:18-91:1 (Bennett); vol. 22, 62:10-63:9 (Bowen)).

278. Defendants have conservatively identified over REDACTED in efficiencies that will result if this Transaction is allowed to proceed. (DX0236-007; vol. 8, 11:25 - 12:13 (Dunn)).

279. The efficiencies calculations were made as part of the transaction, not for the purposes of litigation or the government investigation. (Vol. 21, 17:1-14, 18:17-19:4, 36:19-38:3 (Bowen))

(indicating synergies were discussed in September 2009, April 2010, and October 2010); DX9527-053; vol. 8, 12:14-18 (Dunn) (stating that TaxACT's efficiency projections were not prepared for litigation)).

280. H&R Block digital operations are not as efficient as TaxACT, and H&R Block will benefit significantly from TaxACT's cost-efficient business structure. (Vol. 22, 97:22-98:2 (Bowen) (noting that H&R Block's development process is less efficient than TaxACT's); vol. 8, 5:15-24 (Dunn) ("[H&R Block is] grossly inefficient in how they develop software"); DX1008-003 (Board presentation stating "Significant synergy opportunities by utilizing the TaxACT infrastructure"); GX131-9, at 001-002 ("There are significant synergies that will be realized . . . this would likely result in synergies approaching REDACTED).

281. Intuit REDACTED
REDACTED . (DX0085-016, 020 REDACTED
REDACTED
REDACTED).

282. Plaintiff's efficiencies expert, Dr. Zmijewski does not dispute that Defendants will achieve all of the projected efficiencies. (Vol. 25, 3:11-13 (Zmijewski)).

283. Indeed, Dr. Zmijewski concedes that some portion of each projected cost saving may be considered a merger-specific efficiency. (*Id.*, 3:24-5:15 (Zmijewski) ("I'm not saying it definitively, because I don't have all of the information . . . The on-line call center efficiency, could it be entirely achieved on a standalone basis or not? I don't know one way or the other. What I am saying for on-line IT and software IT, that's clear that there would be a merger specific aspect to it. The other ones . . . it's just not clear.")).

284. Detailed discussions regarding integration and achievement of efficiencies started very

early -- at a July 19-20, 2010, meeting in Cedar Rapids. (Vol. 8, 17:14-18:2 (Dunn); vol. 6, 89:9-22 (Dunn) (describing July 19-20 meeting as a job interview where he learned about what H&R Block hoped he could accomplish in terms of integration)).

285. TaxACT insisted on a reverse diligence process so the founders could adequately calculate the synergies they were expected to achieve. (Vol. 6, 102:7-103:19 (Dunn); vol. 8, 15:5-13 (Dunn)).

286. H&R Block and TaxACT exchanged business cost data and, following the July 2010 meeting, held numerous conversations regarding the structure and costs of their respective businesses so that the TaxACT Founders had sufficient information to accurately determine the scope and amount of cost savings. (Vol. 21, 53:6-54:1 (Bowen); vol. 8, 13:16-15:23 (Dunn); GX55-32).

287. After intensive thought, discussion, and calculations, the TaxACT Founders drafted the Preliminary Integration Cost Analysis and Functional Priority Overview to explain the efficiencies they could achieve and to estimate the related costs. (GX55-32 at 011-012; DX0904-001-02; GX131 at 005).

288. They discussed the plan with H&R Block representatives on August 12, 2010. (Vol. 21, 53:16-54:1 (Bowen); DX9524-001).

289. The TaxACT Founders took great care to ensure the accuracy and achievability of each efficiency; in fact, their future compensation is tied to achieving the efficiency projections. (Vol. 8, 12:22-25 (Dunn) (“This is something my compensation will be tied to in the future.”)).

290. The TaxACT Founders relied on their extensive industry experience, including twice starting tax preparation software businesses from scratch, and their ordinary course of business documents to make all business estimates and projections. (GX657 (Dunn 30(b)(6) Dep.) 89:21-

90:11; vol. 8, 13:1-7, 40:5-13 (Dunn)).

291. Likewise, H&R Block took a measured and extensive, but conservative, approach when calculating the efficiencies. (Vol. 21, 24:22-25:7 (Bowen) (stating he reviewed the RedGear acquisition to avoid repeating past mistakes); vol. 22., 65:21-66:4 (Bowen) (explaining use of FY2012 projections rather than 2011 actual numbers to calculate efficiencies because the FY2012 numbers include recently-realized savings, making them much more conservative)).

292. H&R Block and TaxACT together determined ten specific areas where the integration will result in significant cost savings. (DX0236-007).

a. **Online IT.** REDACTED

REDACTED. (DX236-007; vol. 22, 68:12-24 (Bowen); vol. 8, 6:8-16 (Dunn)).

i. REDACTED

REDACTED
REDACTED
REDACTED (Vol. 8, 5:15-24 (Dunn) REDACTED
; vol. 22, 68:25-69:2 (Bowen) (synergy is merger specific); vol. 8, 15:24-16:23 (Dunn) REDACTED
REDACTED
REDACTED.

b. **Emerald Card.** The Emerald Card efficiency, a savings of about REDACTED per year by FY2013, will allow TaxACT's prepaid debit card offerings to be funded and provided by H&R Block's bank. (Vol. 22, 69:3-19 (Bowen); vol. 8, 6:17-22 (Dunn)).

c. REDACTED. The combined company will save REDACTED

REDACTED
REDACTED. (DX0236-007; vol. 22, 69:20-70:14 (Bowen); vol. 8, 6:23-7:7 (Dunn)).

i. Both the Emerald Card and RAC efficiencies are merger specific. Because TaxACT does not have REDACTED

REDACTED
REDACTED (Vol. 8, 10:17-19, 10:22-11:9, 11:17-24 (Dunn) REDACTED
REDACTED.

ii. REDACTED

REDACTED (Vol.
8, 10:22-11:24 (Dunn) (REDACTED
REDACTED
REDACTED)).

d. REDACTED

REDACTED

(Vol. 22, 70:15-71:5 (Bowen); vol. 8, 7:8-14 (Dunn)).

i. REDACTED

REDACTED
REDACTED (Vol. 22, 70:15-71:5 (Bowen)).

e. **Online Call Center.** Integrating H&R Block's online call center with TaxACT's call center in Cedar Rapids will create a yearly efficiency of REDACTED million. (Vol. 22, 71:16-72:13 (Bowen)).

i. This efficiency is transaction-specific because REDACTED

REDACTED
REDACTED (Vol. 22, 71:16-72:13 (Bowen) (explaining efficiency); vol. 8, 7:19-23 (Dunn) (same)).

f. REDACTED

REDACTED (Vol. 22, 72:15-

73:7 (Bowen); vol. 8:7-24, 8:4 (Dunn)).

i. REDACTED

REDACTED
REDACTED (Vol. 8, 7:24-8:4 (Dunn)).

ii. Dr. Zmijewski admits that this synergy is fully merger-specific. (Vol. 26, 39:9-12 (Zmijewski)).

g. Corporate Website. REDACTED

REDACTED

REDACTED. (Vol. 8, 8:5-8 (Dunn); Vol. 22, 73:18-74:19

(Bowen)).

i. REDACTED

REDACTED

REDACTED. (Vol. 22, 73:18-74:5 (Bowen)).

h. Software IT. REDACTED

REDACTED. (*Id.*, 74:21-75:4 (Bowen); vol. 8, 8:9-10

(Dunn)).

i. REDACTED

REDACTED

REDACTED. (Vol. 22, 75:6-76:4 (Bowen); vol. 20, 5:4-10; 53:23-54:4, 55:1-7 (Meyer) REDACTED

i. Download Fulfillment. REDACTED

REDACTED

REDACTED

REDACTED. (Vol. 22, 76:7-14 (Bowen); vol. 8, 8:11-17 (Dunn)).

i. REDACTED

REDACTED

REDACTED. (Vol. 22, 76:15-23 (Bowen); vol. 8, 8:18-22 (Dunn) REDACTED

j. Software Call Center. REDACTED

REDACTED

REDACTED (Vol. 22, 76:24-77:12 (Bowen); vol. 8, 8:23-9:2 (Dunn)).

i. REDACTED

(Vol. 22, 104:7-107:12 (Bowen)).

293. In total, the combined firm will conservatively realize REDACTED in efficiencies by FY2013, and REDACTED from FY2014 forward. (Vol. 22, 77:13-18, 78:9-12, 82:22-83:3 (Bowen) (“[T]he estimates are very achievable and accurate based on the refined work that we’ve done.”)).

294. Each efficiency calculation was verified by the executives’ personal knowledge and experience, and is grounded in the business documents used by each company in the ordinary course of business. (Vol. 16, 107:20-109:24 (Meyer); vol. 8, 5:6-14 (Dunn)).

B. Post-Transaction Pricing and Features

295. H&R Block will not raise the price of TaxACT’s digital tax preparation products post-transaction.

a. Cobb has pledged that H&R Block will not raise TaxACT’s prices for at least three years. (Vol. 23, 48:22-49:10, 52:16-53:5 (Cobb)).

b. H&R Block’s documents analyzing the proposed merger uniformly assume that H&R Block will preserve TaxACT’s “low price” model. (*See, supra*, ¶¶ 34-38).

c. TaxACT’s business model depends upon word of mouth referrals, which requires TaxACT to deliver a high value proposition. (GX28 (Dunn Dep. vol. 2) 277:3-279-2).

d. Raising prices would undermine TaxACT’s business model over the long-term, eliminating any potential short-term profits that might be obtained through a price increase. (Vol. 6, 124:15-19 (Dunn); vol. 16, 104:4-106:24 (Meyer) (providing that the “stickiness” of customers needs to be considered in any price analysis because losing customers due to a price

increase one year reduces revenue in subsequent years)).

e. Dr. Warren-Boulton's merger model does not contain any calculations about what happens in year two after the merger, which is particularly important in this industry where conversion to paid is typically a two-year process. Indeed, Dr. Warren-Boulton admits that his model is purely static. (DX0600-008 (two-year conversion typical); vol. 11, 9:9-10:6 (Warren-Boulton); vol. 27, 26:10-27:3 (Warren-Boulton) (revealing that Warren-Boulton's merger simulation model is a "static model" that does not take into account customer loss in year two or beyond); vol. 16, 104:24-106:20 (Meyer) (stating that the year two impact, which is "such an important part of competition in this market," is "not in [Warren-Boulton's] model.")).

f. No evidence or testimony in the record supports the proposition that Defendants will increase the price of TaxACT's products.²³

296. H&R Block will not raise the price of H&R Block's digital tax preparation products.

a. H&R Block's current CEO believes that the transaction will actually lower prices and/or increase the functionality of the H&R Block products. (Vol. 23, 54:2-22 (Cobb)).

b. When asked in an October 14, 2010 investor call whether investors should "expect any major changes" to TaxACT's, or H&R Block At Home's pricing, then-CEO Bennett responded: "You know I would say, I'd say not." (DX6124-006).

c. H&R Block's financial projections for the acquisition assume "Flat ASP" ("average sales price"). (DX0347-004).

d. H&R Block's documents analyzing the proposed merger do not suggest or discuss increasing the price of H&R Block's digital products; price increases were never discussed

²³ The sole document cited by Plaintiff in support of this proposition does not suggest a pricing action. (*See, supra*, n.2).

during Board presentations regarding the deal. (*See, supra*, ¶ 36).

297. Plaintiff does not have documentary or testimonial support for the notion that prices will increase. Instead, it relies solely on Dr. Warren-Boulton's unilateral effects analysis to support its theory of price increase.

a. Dr. Warren-Boulton's unilateral effects analysis is based on switching data that inflates diversion ratios by discounting 50% of switching to assisted from digital for complexity reasons but not discounting switching between digital products for complexity reasons. (Vol. 12, 64:18-66:23 (Warren-Boulton)). This over-estimates the switching between TaxACT and H&R Block At Home. (DX0017-066).

b. Any merger between any two competitors in [Boulton's] defined market with positive diversion ratios and positive margins under [Boulton's] model will generate a price increase absent entry, efficiencies or expansion." (Vol 12. 51:9 – 51:13 (Boulton))

c. Dr. Warren-Boulton's unilateral effects model, which is based in part on an internal H&R Block document called the "Hoover Model," does not consider efficiencies, repositioning, expansion, free products, or any other factors. (*Id.*, 68:18-69:14 (Warren-Boulton)).

d. When efficiencies are added to Dr. Warren-Boulton's model, the result is a 1.6% price decrease for H&R Block products, a 1% price increase for TaxACT products, and a lower price for TurboTax, resulting in overall lower prices for consumers. ((Vol. 16, 112:13-18 (Meyer)).

e. The relevant underlying assumption for the "Hoover Model" was "plucked [] out of the air," was not "based on previous experience," and "probably at least doubled the amount of any movement" that actually occurs. (Vol. 5, 34:11-16 (Newkirk); GX21 (Newkirk Dep.) 3:05-12-20, 310:17-311:7).

f. Dr. Warren-Boulton's unilateral effects model does not incorporate empirical data

demonstrating the effects of past price increases. (Vol. 16, 94:5-19 (Meyer)).

g. Last, Defendants are not closest competitors: the diversion ratio from TaxACT to TurboTax is over **REDACTED** than that between TaxACT and H&R Block At Home. (DX0017-025; GX604, 3-4.)

298. Third parties do not have the ability or incentive to coordinate with the merged company post-transaction.

a. Attempts at coordination would be thwarted by expansion. (Vol. 16, 125:19-24 (Meyer); *supra*, ¶ 198-276).

i. TaxHawk has **REDACTED**. (DX0171-080).

ii. If H&R Block raises the price of TaxACT's product or eliminates the product, TaxSlayer **REDACTED** (Vol. 15, 88:15-90:4 (Rhodes)).

b. Moreover, product feature development ordinarily occurs in between March and January prior to a given tax season, while product delivery occurs in January through April, making coordination on products and prices difficult. (DX0304-036).

c. Coordination is also unlikely in this industry because Intuit and H&R Block have divergent incentives with respect to DIY growth at the expense of tax stores. (Vol. 20, 66:13-69:7 (Meyer) (discussing Intuit's focus on tax store competition)).

d. Coordination is also unlikely because pricing is not transparent as industry participants give substantial discounts and promotions. (Vol. 16, 123:20-125:24 (Meyer)).

299. Defendants will have an incentive to *decrease* pricing and increase product promotions. (GX296 (Houseworth Dep.) 23:8-24:20; 26:8-27:2; vol. 23, 50:6-51:5 (Cobb); DX9521-006-09).

C. The Transaction's Effect on Free

300. "Freemium is a known market dynamic that has arisen in multiple product categories and

will continue to grow.” (DX0001-103 (also noting that in light of \$.99 apps and recent entry, the price of tax preparation products “will continue to dip further over time”)).

301. There is no evidence in the record that Defendants or any third party will reduce the scope of their free offerings in response to the Transaction. Quite the contrary.

302. H&R Block will “[c]ontinue to offer a free product in the HRB brand to drive client acquisition.” (DX1008-010; vol. 2, 121:23-122:4 (Bennett); vol. 4, 86:24-87:5 (Dunn)).

303. After the Transaction, H&R Block will continue to improve TaxACT’s products. (DX9554 (“If we purchase [TaxACT], the other thing we *cannot* do is let their product rot on the vine....[TurboTax] continues to improve their product – even their Free product.”)).

304. After the Transaction, “HRB will aggressively market free and on-line value pricing through the TaxACT brand.” (DX1004-001-02; vol. 2, 66:10-12 (Bennett); *see also* DX0001-096 (providing that H&R Block will “[c]ontinue to run TaxACT with its existing brand (outside Block) in order to aggressively acquire share in the FREE low price/value space.”)

305. Intuit REDACTED

(a) REDACTED

(DX0403-023), (b) REDACTED

(DX8021-059), and (c) REDACTED

(GX293 (Maurer Dep.) 128:5-15).

306. Intuit will likely respond to the Transaction by improving its free products and developing new products to counter the combined company.

a. Intuit REDACTED

(GX293 (Maurer Dep.) 98:14-21).

b. REDACTED

REDACTED

. (DX0084-003-04, 07, 08).

c. REDACTED

(DX0084-009).

d. In another document discussing the Transaction, REDACTED

(DX0085-017, 22).

e. Intuit REDACTED

(GX293 (Maurer Dep.) 120:6-17).

f. A presentation to TurboTax's Board of Directors expressed REDACTED

(*Id.*, 123:20-124:11). REDACTED

g. REDACTED

(DX0085-017, 22).

h. Warren-Boulton has questioned Intuit's commitment to free, but he conceded that he had not actually read Daniel Maurer's (Intuit) deposition transcript. (Vol 13, 88:22-24).

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Robert Robertson".

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