UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' POST-TRIAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PERMANENT INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The evidence developed in this case clearly and convincingly demonstrates that H&R Block's proposed acquisition of TaxACT will not "substantially . . . lessen competition." 15 U.S.C. § 18. Indeed, the evidence shows that the Transaction will benefit consumers through lower prices and/or better products.

This case began with Plaintiff filing a complaint alleging a theoretical product market unsupported by any economic data and theorizing potential anticompetitive effects based on select, "out-of-context" snippets from documents. After almost ten full days of trial, over twenty depositions, and the production of millions of pages of material, Plaintiff is still in the same position – it has theories but no evidence.

Under the law, establishing a relevant product market is a "'necessary predicate'" to Plaintiff's case. *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 618 (1974); *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 181 (D.D.C. 2001) ("[P]roper definition of the relevant product market [is] the key to the ultimate resolution of this type of case."). Yet, Plaintiff did not meet its burden of proving a relevant product market. "The definition of 'relevant market' rests on a determination of available substitutes." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986). Nonetheless, Plaintiff failed to show that consumers do not consider assisted preparation and free forms from the IRS as substitutes for digital forms of tax preparation. Indeed, Plaintiff's own expert admitted that assisted preparation is a substitute.[1] Moreover, the uncontradicted evidence offered by Defendants showed that customers regularly switch between these methods of tax preparation and would certainly divert their business to these methods in the event of a price change.

[1] *See* Defendants' Proposed Findings of Fact ("DFOF") ¶ 56 (explaining that Plaintiff's expert economist Dr. Warren-Boulton testified that digital DIY and assisted tax preparation "are substitutes. It's clear that they're substitutes").

While Plaintiff's failure to prove a relevant product market is dispositive,[2] the complete lack of any evidence supporting its claims of anticompetitive effects is an independent basis for ruling against Plaintiff. Plaintiff claims the merger will result in unilateral effects even though the combined *alleged* market share is under 30% and even though the evidence clearly shows that Defendants' products are not particularly close substitutes. Plaintiff also claims that the merger will lead to coordinated anticompetitive effects, but has only stale, outdated claims of TaxACT as a "maverick" to support its theory. In contrast, Defendants offered significant evidence that prices would not go up and even committed to the Court not to raise TaxACT's prices or change its free offering. DFOF ¶ 295.a. Defendants further provided undisputed evidence of competition from tens of thousands of assisted preparation providers and other digital providers, including TaxSlayer and Tax Hawk – unrebutted evidence that independently prevents Plaintiff from sustaining its burden. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 n.3, 988-92 (D.C. Cir. 1990).

Ultimately, Plaintiff's theories are supported only by its expert's opinion[3] (but not by the data on which he relies) and by snippets of testimony and documents that ignore contrary evidence in the very same testimony and documents. This is not enough – especially in the face of overwhelming evidence that the Transaction will not harm competition. As a result, Defendants respectfully ask the Court to deny the extraordinary relief that Plaintiff seeks and to allow the Transaction to go forward and benefit consumers.

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[2] A finding that the market is all forms of tax preparation results in HHIs below 1500. DFOF ¶ 138.a. The agency's own Horizontal Merger Guidelines state unequivocally that mergers with such low HHIs "are unlikely to have adverse competitive effects and ordinarily require no further analysis." U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, § 5.3 (2010), attached as Exhibit A.

[3] As Commissioner J. Thomas Rosch said when the new Merger Guidelines were adopted, "economic theories based on prices and margins are considered to be just that—theories. Although they may be considered in order to corroborate the inferences drawn from the empirical evidence, they are not substitutes for that evidence." Statement by Comm. Rosch, attached as Exhibit B, *available at* http://www.ftc.gov/os/2010/08/100819hmgrosch.pdf.

ARGUMENT

I. Legal Standard

To prevail on a Section 7 claim, a plaintiff must demonstrate a substantial lessening of competition that is sufficiently probable and imminent to warrant injunctive relief. *Marine Bancorp.*, 418 U.S. at 622 n.22; *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (Section 7 is concerned with "probabilities" not "ephemeral possibilities"); *Baker Hughes*, 908 F.2d at 984 (same). A plaintiff "ha[s] the burden on every element of [its] Section 7 challenge, and a failure of proof in any respect will mean that the transaction should not be enjoined." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004).

The first step in determining whether a merger violates Section 7 is to establish the relevant "line of commerce," including the relevant product market. *See, e.g.*, *Marine Bancorp.*, 418 U.S. at 603; *Sungard*, 172 F. Supp. 2d at 181. Once a plaintiff has established the market, it must show that the merger would produce "a firm controlling an undue percentage share of the relevant market, and [would] result[] in a significant increase in the concentration of firms in the market." *Baker Hughes*, 908 F.2d at 990. Such a showing establishes a presumption that the merger will substantially lessen competition. *Id.* at 982. A defendant may rebut that presumption by producing evidence that "show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition" in the relevant market, *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975), or by "discrediting the data underlying the initial presumption in the government's favor." *Baker Hughes*, 908 F.2d at 991. If the defendant rebuts the presumption, "the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* at 983.

When analyzing potential competitive effects, courts take a "totality-of-the-circumstances approach" and weigh a variety of factors, including the weakness of the data underlying plaintiff's prima facie case (if established), the possibility of entry and expansion, market fragmentation, product differentiation, inter-industry cross-elasticities, efficiencies, industry marketing and sales methods, the absence of a trend toward concentration, unlikelihood of coordination, and excess capacity. *Id.* at 984-85. Furthermore, Section 7 challenges are forward-looking, requiring courts to examine industry trends and to take into account "fundamental changes in the structure of the market." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501 (1974). All factors "are relevant in determining whether a transaction is likely to lessen competition substantially, but none is invariably dispositive." *Baker Hughes*, 908 F.2d at 985. The defendant does not have the burden "to produce evidence 'clearly' disproving future anticompetitive effects" or to ultimately persuade the trier of fact, and the less compelling the plaintiff's prima facie case, the lower a defendant's burden to rebut it. *Id.* at 984, 991-92; *Arch Coal*, 329 F. Supp. 2d at 129.

II. Market Definition

Because this burden-shifting approach begins with an assessment of market shares and concentration, most courts begin by defining the relevant product market. *Sungard*, 172 F. Supp. 2d at 181. Market definition is "'a necessary predicate' to deciding whether a merger contravenes the Clayton Act." *Marine Bancorp.*, 418 U.S. at 618. As counsel for Plaintiff explained in his opening, market definition is the "fundamental question in this case." Vol. 1, 12:14 – 13:1. The relevant market "consists of all of the products that the Defendants' customers view as substitutes to those supplied by the Defendants." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998). The burden of proving a relevant market in which competition

will be harmed falls "squarely" on the plaintiff. *Arch Coal*, 329 F. Supp. 2d at 122. Despite the admitted importance of market definition in this case, Plaintiff failed to provide evidence proving its alleged market. Indeed, Plaintiff's own expert admitted that Plaintiff's proposed definition excludes clear substitutes, such as assisted preparation. DFOF ¶ 56. Plaintiff thus failed to prove its alleged product market, did not establish relevant shares or concentration, and did not establish a presumption of anticompetitive effects.

Courts focus on two factors to determine the relevant market: (1) the "reasonable interchangeability of use" or (2) "the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. The relevant question for "reasonable interchangeability" is "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997). To determine interchangeability, courts "compare the use or function of defendant's product with other products," *Arch Coal*, 329 F. Supp. 2d at 119, and assess "the degree to which buyers are willing to substitute those similar products for [defendants'] product." *Sungard*, 172 F. Supp. 2d at 182. "[I]f consumers can substitute the use of one product for the other, then the products are deemed 'functionally interchangeable.'" *Arch Coal*, 329 F. Supp. 2d at 119. If consumers would turn to self-supply, which in this case is manual tax preparation, then self-supply is to be included in the market. *See Sungard*, 172 F. Supp. 2d at 191-92 (holding that self-supply was in the relevant market).

A finding of "reasonable interchangeability" does not require a finding that "*all* buyers will substitute one commodity for another." *Arch Coal*, 329 F. Supp. 2d at 122. "[W]hen one product is a reasonable substitute for the other, it is to be included in the same relevant product market even though the products themselves are not the same." *Cardinal Health*, 12 F. Supp. 2d

at 46.[4] A product is a "reasonable substitute" when "the demand for it increases in response to an increase in the price for the other." *Id.* This is often referred to as cross-elasticity of demand. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 469 (1992). Cross-elasticity reflects the rule that the relevant market must include the products that "have the ability to take significant business from each other." *Arch Coal*, 329 F. Supp. 2d at 119. "Diversion," or substitution in the face of a price increase,[5] is the core evidence of interchangeability and cross-elasticity. *See, e.g.*, *United States v. Gillette Co.*, 828 F. Supp. 78, 83 (D.D.C. 1993) (holding relevant market is wider than fountain pens because a "much larger subset of fountain pen consumers . . . will substitute other modes of writing for fountain pens").

In defining relevant markets, courts also look at "practical indicia" of the boundaries of the product market, such as "industry or public recognition," "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325. These factors are "evidentiary proxies for direct proof of substitutability," *Rothery*, 792 F.2d at 218-19, and their purpose is "to augment the analyses of interchangeability and cross-elasticity of demand." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 38 (D.D.C. 2009).

A. The Relevant Market Includes All Tax Preparation Methods.

The evidence proves that all forms of tax preparation are reasonably interchangeable substitutes, and therefore they are all in the same relevant antitrust market. The testimony, documents, and data point to significant substitution between manual, digital, and assisted

[4] For example, in *United States v. Continental Can Co.*, the Supreme Court upheld a product market that included both glass jars and metal containers because the notable differences between the products were "not sufficient to obscure the competitive relationships which this record so compellingly reveals." 378 U.S. 441, 450 (1964).

[5] DFOF ¶ 58.

products. DFOF ¶¶ 56-69. In fact, Plaintiff's own expert economist concedes this point.[6] Moreover, Plaintiff has not presented any evidence proving a low cross-elasticity of demand between Defendants' products and self supply or assisted. DFOF ¶ 65.b. On the contrary, the empirical record evidence shows significant elasticity of demand (*i.e.*, diversion) among manual, digital, and assisted products. DFOF ¶¶ 60-69.

1. Digital and assisted tax preparation are reasonably interchangeable.

There is no dispute that digital and assisted tax preparation products are functionally interchangeable because they both produce a complete income tax return that can be filed with the IRS. DFOF ¶ 42. The only question is "whether and to what extent purchasers are willing to substitute one for the other." *Staples*, 970 F.Supp. at 1074. The evidence shows that millions of taxpayers each year actually switch between these alternatives, and millions more would do so if TaxACT and/or H&R Block raised prices. In fact, each year more taxpayers switch between digital and assisted products (9.5 million) than TaxACT has customers (5.2 million). *Compare* DFOF ¶ 50.c.i. *with* Compl ¶ 10. Thus, they must be in the same product market.

i. The direct evidence of interchangeability and cross-elasticity between digital and assisted is overwhelming.

As Plaintiff's expert economist conceded, the two best direct sources of cross-elasticity (or "diversion") evidence in this case are the 2009 H&R Block pricing simulator and the 2011 TaxACT survey. DFOF ¶ 59. These materials clearly show greater cross-elasticity between H&R Block digital and assisted preparation methods (including H&R Block's assisted product) than between H&R Block digital and TaxACT.[7] For example, the diversion ratio from H&R

[6] DFOF ¶ 56 (DDIY and assisted "are substitutes. It's clear that they are substitutes.").

[7] DFOF ¶¶ 60-69. As the chief economist of the Federal Trade Commission recently wrote, failing to include products with greater cross-elasticity, or diversion, than the diversion between the merging parties' products will result in "a market consisting of miscellaneous unconnected links in the chain of substitution." Joseph Farrell, "Fox, Or Dangerous Hedgehog? Keyte and Schwartz on the 2010 Horizontal Merger Guidelines," 77 ANTITRUST LAW JOURNAL 661, 663 (2011), attached as Exhibit C. This is exactly what Plaintiff's proposed

Block digital to H&R Block retail is 13.72%, while the diversion from H&R Block digital to TaxACT is 5.39%. DFOF ¶ 67. This evidence is unrebutted, as Plaintiff did not present any evidence addressing the question of diversion;[8] and Plaintiff's attempts to discredit the 2009 pricing simulator were factually incorrect. DFOF ¶ 65.c-65.d.

Moreover, Plaintiff's preferred data source, IRS switching data, shows that many more H&R Block customers switch to assisted products such as H&R Block retail than to TaxACT and vice versa. DFOF ¶ 72.a, 72.b. The switching data also show that over 20 million taxpayers switch between digital, assisted, and manual each year,[9] and the overall switching from H&R Block digital to assisted preparation dwarfs the switching from H&R Block digital to TaxACT.[10]

In an attempt to make the switching data conform to Plaintiff's arguments, Plaintiff's expert argued that some of the switching data should be discounted by 50% to account for people switching from digital to assisted because of changes in complexity rather than changes in price. DFOF ¶ 297.a. This attempt to "correct" for non-price changes was overstated (complexity changes account for less than 25% of taxpayers year to year) and was applied in only one direction (for those switching to assisted). DFOF ¶¶ 51, 297.a. The results, nevertheless, show that almost three times as many people whose complexity did *not* change switched from digital to assisted than switched between H&R Block digital and TaxACT. DFOF ¶ 51.c.

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market looks like -- unconnected links in the chain of substitution. DFOF ¶ 65.a (showing that Plaintiff's market omits several links in the chain of substitution that fall between the products that Plaintiff does allege are in the market).

[8] Plaintiff's complete failure to present any actual evidence of cross-elasticity is sufficient by itself to find that Plaintiff has failed to prove its market. *See FTC v. Lundbeck, Inc.*, 2010 WL 3810015, *20-21 (D. Minn. Aug. 31, 2010) (noting that plaintiff's economist "did not offer any opinion as to the cross-elasticity" and crediting defendant's expert testimony that the "cross-price elasticity between [the merging products] . . . is very low"), attached as Exhibit D.

[9] DFOF ¶ 49. Plaintiff attempts to blunt the force of the massive switching between digital and assisted preparation by noting that there is not significant *net* switching between them. This is an obvious red herring – net switching has nothing to do with whether digital and assisted are competing for the same customers and taking millions of customers from each other, which they clearly are. DFOF ¶¶ 49-50.

[10] DFOF ¶ 50.c. Other digital competitors such as REDACTED also gain more customers from assisted than from the Defendants' digital products, DFOF ¶ 50.f, 50.h, and assisted preparers such as REDACTED lose more customers to H&R Block digital than to other assisted providers. DFOF ¶ 50.g.

Plaintiff ignores the substantial empirical and anecdotal evidence of competition among digital and assisted products, relying instead on a hypothetical monopolist test that shows using Dr. Warren-Boulton's flawed switching data that monopolizing all digital products would be profitable. Plaintiff's argument fails for two reasons. First, as a matter of law, the hypothetical monopolist test is not dispositive.[11] Second, Plaintiff's application of the hypothetical monopolist test in this case proves nothing. The same test shows that almost any combination of tax preparation products could be a relevant "market" under that test. DFOF ¶ 72.c. Indeed, Dr. Warren-Boulton conceded that after reading the Complaint, he started with the assumption that digital DIY is a market and proceeded to find a test that supported that assumption. DFOF ¶ 73.

ii. "Practical indicia" of competition also clearly show substitutability between digital and assisted.

The record is replete with testimony and documents demonstrating that digital and assisted solutions are in the same market. While the merging parties certainly have documents that discuss each other and digital competitors generally, and even reference a digital market and the "Big Three," this is not sufficient to prove a market.[12] Courts have given the "apt warning" against basing a market on documents that are "preoccupied" with specific other companies. *CCC Holdings*, 605 F. Supp. 2d at 42 n.18. The uncontroverted evidence in this case shows that digital providers attempt to take customers from assisted competitors and vice versa, the prices of each affect one another, and each group recognizes the other as a significant competitive threat. DFOF ¶¶ 75-134. In particular, both Intuit and H&R Block retail recognize that TurboTax closely competes with assisted preparation. DFOF ¶¶ 116-19. Indeed, digital and

[11] *See, e.g.*, *United States v. Engelhard Corp.*, 970 F. Supp. 1463, 1484 (M.D. Ga. 1997) *aff'd*, 126 F.3d 1302 (11th Cir. 1997) (denying injunction and holding that the DOJ's "steadfast application of the [hypothetical monopolist] test as the foundation of its market definition analysis resulted in a pervasive failure to acknowledge relevant information throughout the evidence of record").

[12] U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006) ("Commentary"), 11 (2006), attached as Exhibit E ("Industry usage of the word 'market' is not controlling.").

assisted products battle every tax season to expand their share at the expense of the other, DFOF ¶¶ 69, 92-99, and REDACTED [redacted]. DFOF ¶¶ 76, 108-09. In fact, Intuit's primary goal is to "beat tax stores." DFOF ¶ 92. That is the essence of competition.

Recent pricing and market share trends support the same conclusion.[13] So too does the fact that digital and assisted products advertise and market heavily against each other.[14] Industry participants also recognize the strong competition between digital and assisted products.[15] TaxACT's testimony and documents demonstrate that it targets "140 million taxpayers." DFOF ¶¶ 126-27. H&R Block internal and public documents, such as its 2009 and 2010 annual reports, discuss competition between assisted and digital. DFOF ¶ 128. Intuit's executives believe that "the competition is all methods of tax preparation other than TurboTax." DFOF ¶ 129. Digital competitors such as TaxHawk, TaxSlayer, OnLineTaxes, CompleteTax, and OnePriceTaxes all agree. DFOF ¶¶ 130-34.

2. Competition between digital and assisted is increasing.

While competition between digital and assisted products historically has been strong, it is becoming increasingly vigorous as the line between digital and assisted continues to blur, the pool of manual filers shrinks, and Intuit more aggressively targets tax stores. Mark Ernst testified that when he became CEO of H&R Block, he did not believe digital products competed

[13] DFOF ¶ 69. For example, H&R Block retail stores raised their prices in 2009 and lost market share to digital competitors. DFOF ¶ 69.a. Similarly, H&R Block retail began offering free in office services to stem the tide of taxpayers turning to digital DIY. DFOF ¶¶ 69.e, 77.a. In addition, assisted and digital providers clearly set prices with regard to each other and have prices that significantly overlap. DFOF ¶¶ 75-78.

[14] For instance, Intuit expressly targets tax store customers in its advertising. DFOF ¶ 94. H&R Block's "second look" retail store campaign and corresponding television campaign is targeted largely at digital (TurboTax) customers, DFOF ¶¶ 96-98, and H&R Block's digital strategy includes converting customers of competing assisted products. DFOF ¶ 95. TaxHawk and TaxSlayer also engage in advertising that targets all taxpayers. DFOF ¶¶ 99-100.

[15] Notably, while the fact witnesses at trial (and in depositions) expressed various views about the scope of their competition, not a *single* fact witness testified that Plaintiff's alleged market is correct. DFOF ¶ 137. The only witness who supported Plaintiff's market definition was Plaintiff's expert economist, Dr. Warren-Boulton.

with assisted preparation, but by the end of his tenure in 2007, Intuit was "the most significant competitive threat to H&R Block's entire business." DFOF ¶ 103. Intuit, H&R Block, TaxACT, other competitors, and even third party analysts all recognize that competition between digital and assisted has increased dramatically since 2009. DFOF ¶ 106. Plaintiff's economic analysis relies solely on data from TY2007 and TY2008, and thus completely fails to address the significance of these more recent developments. DFOF ¶ 124.

Even more telling is the industry movement toward "hybrid" products that combine some elements of both digital and assisted tax preparation. H&R Block documents reflect that H&R Block believes 25% of all taxpayers are likely to adopt "hybrid" products, DFOF ¶ 121, and H&R Block believes that hybrid products are "the next growth generator for the industry." DFOF ¶ 120. In fact, H&R Block and others, including Liberty and Taxslayer, have offered hybrid products in recent years.[16] DFOF ¶¶ 122, 123. REDACTED [17] DFOF ¶122.e.

3. Manual preparation is a competitive constraint on digital products.

Although the total pool of manual preparation customers is shrinking, manual remains a significant competitive constraint on digital products, particularly lower-end "value" products. The 2011 survey of TaxACT customers showed that manual preparation had the greatest diversion ratio of any alternative.[18] DFOF ¶ 62. The results of that survey were consistent with other prior TaxACT surveys, DFOF ¶ 62.c, and also comported with documentary evidence

[16] H&R Block's current hybrid offering, Best of Both, has had somewhat limited success because of "technical issues" with the product and a lack of consistent marketing. DFOF ¶ 122.d.

[17] REDACTED DFOF ¶ 122.e.ii.

[18] Plaintiff attempts to discredit the 2011 survey by calling it a "litigation survey." In fact, Defendants conducted the survey a month before this litigation commenced in response to statements by Plaintiff's in-house economists that switching data are not reliable indicators of diversion. DFOF ¶ 61. Ironically, the conclusions of Dr. Warren-Boulton rely entirely on the same switching data that Plaintiff criticized pre-litigation.

showing TaxACT has refrained from raising price in the past because of potential losses to manual. DFOF ¶ 79. Because manual preparation is clearly a substitute for digital products, DFOF ¶¶ 57, 81, it must be included in the relevant market.

B. Plaintiff Cannot Prevail Without Establishing State Shares and Filing Data.

Plaintiff cannot satisfy its burden to establish market concentration in the product market it alleged, "Digital do-it-yourself tax preparation products for the preparation of U.S. federal and *state individual tax returns*,"[19] because Plaintiff has proffered no evidence of Defendants' share of "state individual tax returns." *See Morgan, Strand, Wheeler & Biggs v. Radiology, LTD.*, 924 F.2d 1484, 1491 (9th Cir. 1991); *L & J Crew Station, LLC v. Banco Popular de Puerto Rico*, 278 F. Supp. 2d 547, 558 (D.V.I. 2003).

Plaintiff attempts to avoid this fatal flaw by arguing that "there is no reason to expect that the market share numbers would be any different if state return estimates were included."[20] The evidence proves otherwise. Many customers do not purchase state tax preparation products from the company from which they purchase federal products. For example, REDACTED of H&R Block's federal customers in 2010 also purchased state products from the company. DFOF ¶ 144.c. Similarly, REDACTED of TaxACT's federal customers have historically also purchased state products from the company. DFOF ¶ 144.d. Thus, Plaintiff's market share estimates exclude a substantial portion of its alleged market, thereby inflating Defendants' shares.

Plaintiff further tries to avoid this problem by citing *FTC v. PPG Indus., Inc.*, 798 F.2d 1500 (D.C. Cir. 1986), for the proposition that "market share *estimates* are sufficient."[21] This argument is incorrect. First, Plaintiff here has provided *no* evidence, exact or estimated, of

[19] Compl. ¶ 23 (emphasis added), attached as Exhibit F.
[20] Pl.'s Reply Mem. of Points & Authorities in Further Supp. of Its Mot. for a Prelim. Inj. at 11 ("Reply Memorandum"), attached as Exhibit G.
[21] Reply Memorandum at 11-12.

Defendants' shares of "state individual tax returns." Second, the plaintiff in *PPG* succeeded exactly where Plaintiff here fails, in that it "provided [the court] with information from the record for every market the evidence suggests as remotely possible." *Id.* at 1505.

III. The Transaction Will Not Lead To Anticompetitive Effects.

Putting aside the issue of market definition, Plaintiff has not demonstrated a likelihood that the Transaction will lead to anticompetitive effects. For instance, Plaintiff has not shown that Defendants will raise prices or reduce product quality post-merger. Indeed, quantitative data,[22] qualitative data,[23] the market structure,[24] and direct evidence of Defendants' pricing plans[25] all indicate that such unilateral effects are highly unlikely. Moreover, with the low HHIs in this case, this merger is "unlikely to have adverse competitive effects," and the Court's analysis should end there.[26] In any case, Plaintiff's purported evidence of unilateral effects primarily consists of an economic model that fails to take into account market dynamism,[27] does not incorporate diversion data,[28] does not explain historical trends in pricing and competition,[29] does not properly account for switching due to non-price factors,[30] does not account for

[22] DFOF ¶¶ 62, 65.a, 66-68, 81-84, 89.

[23] DFOF ¶ 23, 29-31. Defendants and market participants acknowledge that low end value products typically have different (less) features than premium products, and accordingly cost less. DFOF ¶¶ 46, 135-37. Plaintiff's own Horizontal Merger Guidelines recognize that such differences in price and quality are relevant to unilateral effects analyses. Horizontal Merger Guidelines § 6.1 (*"[O]ne high-end product may compete much more directly with another high-end product than with any low-end product.*").

[24] The tax preparation industry is a highly-competitive, differentiated marketplace with numerous competitors primed to expand or reposition in the event of a price increase. DFOF ¶¶ 45-46, 198-99, 207-12, 215-16, 230, 235-36, 246-49, 259-60, 262, 270.

[25] William Cobb, current CEO, and Lance Dunn, who will run the digital business, both testified that the Transaction will increase competition and lead to lower prices and/or better products. DFOF ¶¶ 22-23, 26-38.

[26] Horizontal Merger Guidelines § 5.3; *see also* DFOF ¶ 138-39 (demonstrating that the HHIs calculated by Dr. Meyer based on a market that includes all tax preparation methods are below 1500).

[27] For instance, Dr. Warren-Boulton's model does not consider the impact of second year monetization and word-of-mouth advertising, both prevalent in the industry. DFOF ¶¶ 124, 125, 293.e.

[28] DFOF ¶¶ 58.c, 70-72, 297.a.

[29] DFOF ¶¶ 102-25, 297.e.

[30] For example, Warren-Boulton excluded from his model a substantial amount of assisted competition to account for changes in complexity but failed to do the same for customers switching between digital competitors. DFOF ¶ 297.a.

efficiencies,[31] and would find a price increase in any candidate market.[32] Moreover, no court has *ever* enjoined a merger based solely or even primarily on the type of merger simulator model offered by Plaintiff's expert and the economist generally credited with inventing such merger simulation in differentiated product markets has cautioned that "[p]rice-predictions . . . are never exactly right and may be terribly wrong."[33] In addition, Plaintiffs coordinated effects theory hinges on a "maverick" theory that also has never been adopted by any court as the basis for blocking a Transaction and that is unsupported by the evidence. Plaintiff's coordination argument further ignores the efficiencies that will be generated by the Transaction, the relevant incentives that competitors will have post-Transaction, the fact that products are heterogeneous, and the fact that pricing is neither transparent nor standard.

Furthermore, Plaintiff has ignored overwhelming and unrebutted evidence showing that the purpose of the Transaction is procompetitive.[34] Specifically, the parties hope to reduce to H&R Block's cost structure, increase the scope of the parties' product offerings, and ultimately reduce prices and/or increase innovation. DFOF ¶¶ 22- 38.

A. The Transaction Will Not Lead To Unilateral Effects.

Plaintiff's unilateral effects claims fail as a matter of law. In *United States v. Oracle*, the court explained that "[t]o prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position." 331 F. Supp. 2d 1098, 1123 (N.D. Cal. 2004). The court further noted that

[31] DFOF ¶¶ 21, 24-25, 277, 280, 283, 297.b-c.

[32] For example, Dr. Warren-Boulton's data and models also support a finding of the following relevant markets: a) TaxACT and assisted tax preparation, b) H&R Block and TurboTax, c) all value products, and d) all premium products. DFOF ¶ 74.

[33] Werden, et al, *A Daubert Discipline for Merger Simulation*, ABA Antitrust Magazine, 90 (2004) (hereinafter "Werden"), attached as Exhibit H ("Aspects of marketing strategy may interact in important ways with the choice of price or be affected by the merger in ways that would cause the price-increase predictions to be seriously misleading.").

[34] "Evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." *Brown Shoe*, 370 U.S. at 329 n.48

"[a] presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted. Indeed, the opposite is likely true." *Id.*[35] In *CCC Holdings*, the court rejected plaintiff's unilateral effects claim even though the record showed that (1) the merging firms had a combined market share of about 69%; (2) plaintiff's economic model based on market share, diversion ratios, and production costs predicted an average price increase of approximately 30%; and (3) Defendants' diversion ratios predicted "substantial price increases." 605 F. Supp. 2d at 68-69.

The facts in this case are even more favorable to Defendants than those in *Oracle* and *CCC*. First, Plaintiffs allege a combined market share of 28.4%, significantly below both the 35% threshold proposed by *Oracle* and the 69% found insufficient in *CCC*. Comp. ¶ 39. Second, Dr. Warren-Boulton's merger model predicts a significantly weaker price effect than that alleged in *CCC*, and his proxy for diversion ratios suffers the same defects as those in *CCC* in that it is "not reasonably confirmed by the evidence on the record" and is based on market share. DFOF ¶¶ 70-72, 295-97 (estimating maximum projected price increase of 13.1%). Third, all economic data in this case show that both Defendants are closer competitors with Intuit (and other competitors outside of Plaintiff's proposed market, including retail offices) than with each other. DFOF ¶¶ 62, 65-68, 72. Indeed, the uncontroverted testimony and documents make very clear that TurboTax is H&R Block's closest competitor and that TaxACT and H&R Block consider TurboTax and others' products and prices before considering one another. *Id.* There are simply no documents nor any testimony showing that Intuit is a "distant third" choice for any

[35] The court in *CCC Holdings* similarly held that a successful unilateral effects claim must show that (1) the products are differentiated; (2) the products controlled by the combining firms are close substitutes; (3) other products are sufficiently different from the products offered by the merging firms such that a small but significant and non-transitory price increase would be profitable for the merging firm; and (4) repositioning is unlikely. 605 F. Supp. 2d at 68. Regarding the third and fourth conditions, the key issue is whether "a significant percentage of consumers view [Defendants' products] as their first and second choice and [another competitor] as a 'more distant third.'" *Id.*

"significant share" of Defendants' customers or that the Defendants' products are particularly close substitutes for each other. They are not particularly close substitutes. As a result, Plaintiff has not satisfied its burden of demonstrating unilateral effects.[36]

B. The Transaction Will Not Lead to Coordinated Effects.

The evidence also establishes that the Transaction will not lead to coordinated effects. Coordinated effects can occur if a merger causes firms remaining in the market to become confident that competing less aggressively post-merger will not cause them to lose business.[37] Plaintiff claims that this industry is vulnerable to such behavior and asserts, though no court has ever sanctioned such a theory, that TaxACT is a unique "maverick" that has prevented coordinated conduct in the past.[38] Neither of these facts is true.

To prevail on its theory, Plaintiff had to prove that Intuit and others would "accommodate" a decision by H&R Block to compete less aggressively post-Transaction. No such evidence has been identified. To the contrary, the evidence developed in this case illustrates that (1) the Transaction will make H&R Block a *more* effective competitor post-merger; (2) Intuit has no incentive to compete less aggressively post-Transaction; (3) TaxACT is not a competitive maverick; (4) competition and expansion from existing players would prevent H&R Block from reducing the competitiveness of the TaxACT product post-Transaction; and (5) the structure of the industry would make coordination infeasible.

[36] In any event, the numerous competitors primed to expand in the event of a price increase (as discussed below) are sufficient to defeat such a possibility. *See CCC Holdings*, 605 F. Supp. 2d at 72, n.49 (noting that unilateral effects are only likely where competing firms are not able to reposition or expand).
[37] Horizontal Merger Guidelines § 7.
[38] *Id.* § 2.1.5.

1. Cost savings and other synergies from the Transaction will make H&R Block a more, not less, effective competitor.

As explained above and detailed below, H&R Block and TaxACT expect the Transaction to lead to considerable cost-savings and other synergies. DFOF ¶ 277-78. These improvements will lead to better, more effective, and/or cheaper H&R Block digital products post-merger. DFOF ¶ 25. Additionally, the ability to combine the complementary strengths of the two companies will create a competitive threat to Intuit – a threat to which Intuit is preparing to respond. DFOF ¶¶ 281, 306.

2. Intuit has no incentive to compete less aggressively post-Transaction.

Intuit has no incentive to coordinate by reducing the competitiveness of TurboTax. H&R Block and Intuit view each other as key competitors and as potential sources of a large number of potential converts. DFOF ¶¶ 28, 98, 103, 105, 108, 114, 116-19. Indeed, the fiercest competition is not between their respective digital products, but rather between TurboTax and H&R Block's retail offices. DFOF ¶¶ 75-77, 92, 98, 103-06, 108, 114, 116, 119. Obtaining customers from H&R Block's and others' retail offices is a critical part of Intuit's strategy that would fundamentally be nullified if Intuit decided to reduce the competitiveness of TurboTax. DFOF ¶ 108. The uncontested evidence demonstrates that Intuit seeks to grow – REDACTED – by acquiring customers from other methods of tax preparation – especially assisted tax preparation.[39] DFOF ¶¶ 50.d-f, 69.e, 75, 76, 92-94.

Nor does Intuit have any incentive to reduce the competitiveness of its free product. While Dr. Warren-Boulton questioned Intuit's dedication to its free product, he conceded that he had not actually read the Intuit deposition. DFOF ¶ 306.h. He also failed to account for the fact

[39] As Intuit concluded in one document, REDACTED. DFOF ¶ 108.

that Intuit REDACTED [redacted]. DFOF ¶ 187. REDACTED [redacted]. DFOF ¶ 76.

The truth is that if H&R Block does not compete as aggressively with its own product or the TaxACT product post-Transaction, H&R Block will lose customers to Intuit, its biggest competitor. REDACTED [redacted]. DFOF ¶ 306.b-f. REDACTED [redacted]. DFOF ¶ 306. Plaintiff has presented no evidence at all that Intuit views the Transaction as an opportunity to compete *less* aggressively.

3. TaxACT is not a unique antitrust "maverick."

No merger has ever been enjoined based solely on the theory that one party to the merger is a "maverick." As a result, there is no legal standard for such a claim. Even if the maverick theory were viable, it is not applicable to this case. Antitrust literature provides that a maverick is a firm that has a "competitive significance" greater than indicated by its market share[40] and that is "competitively unique."[41] To apply maverick theory, "one must show that one of the firms has behaved as a maverick and that its incentives will change post-merger."[42]

i. TaxACT is not and never has been an antitrust maverick.

TaxACT is not and never has been a unique antitrust maverick. To be sure, TaxACT offered innovatively priced products in 2003 and 2005 and continues to be a price leader, but that

[40] David T. Scheffman & Mary Coleman, Quantitative Analyses of Potential Competitive Effects from a Merger, 3 (2004), attached as Exhibit I.
[41] Commentary at 24.
[42] *Id.* at 6.

does not make TaxACT an antitrust maverick. While TaxACT has successfully employed "Free" marketing and was one of several early adopters of the "freemium" model, it did not invent the model. The adoption of "free" began before TaxACT even existed. DFOF ¶¶ 156-57. In fact, the IRS was the initial catalyst for the widespread adoption of "free" in the tax preparation industry. DFOF ¶¶ 145-50. In 2002, the IRS aligned with several tax preparation companies in forming a partnership called the Free File Alliance ("FFA") designed to enable low-income taxpayers to prepare and e-file their federal tax returns. DFOF ¶ 150.

According to Plaintiff, the first significant maverick activity by TaxACT occurred in 2003 when TaxACT offered free e-filing to everyone on the FFA website.[43] This "significant" act impacted roughly 6% of the wealthiest taxpayers in the country. DFOF ¶¶ 162, 165. Thus, while new, this offer was not "competitively significant." In 2005, the IRS limited free offers on the FFA for public policy reasons. DFOF ¶¶ 168-69. Only then, in 2005, did TaxACT engage in its second purported maverick move – transferring its "free" offer to its proprietary website. DFOF ¶ 171. Meanwhile, FreeTaxUSA had been offering its own completely free tax preparation products to residents of several states for at least a year. DFOF ¶ 170.

Since then, TaxACT has not engaged in any unique competitive behavior. DFOF ¶ 175-76. Plaintiff alleges that the sale of TaxACT-branded boxed software offering free state e-file in tax season 2010 is unique.[44] It is not. REDACTED [redacted]. DFOF ¶¶ 190-93. Second, both H&R Block and CompleteTax previously offered free state e-file in retail boxed software products. DFOF ¶ 193.a.

[43] Mem. of Facts & Law in Supp. of Pl.'s Mot. for a Prelim. Inj. at 5-6 ("Prelim. Inj. Memorandum"), attached as Exhibit J.

[44] Prelim. Inj. Memorandum at 10.

ii. TaxACT is not competitively unique.

TaxACT is not competitively unique. As the uncontested testimony from TaxHawk and TaxSlayer indicates, they are every bit as much, if not more, mavericks than TaxACT. DFOF ¶¶ 175-76, 178, 180. In fact, both TaxHawk and TaxSlayer offer *lower* prices than TaxACT for their state products. DFOF ¶¶ 233, 257. TaxHawk even offers an innovative *free* state e-filing product to customers at lower income levels – an option that TaxACT has never offered. DFOF ¶ 183. In addition, TaxHawk's and TaxSlayer's innovative marketing strategies have arguably eclipsed TaxACT's. DFOF ¶¶ 225, 245, 253, 254. TaxHawk's FreeTaxUSA domain name effectively targets natural and paid search marketing. DFOF ¶ 253. TaxSlayer has employed a completely different but very aggressive marketing campaign through sponsorship of sporting events such as NASCAR and the Gator Bowl, as well as use of social media like YouTube and Facebook. DFOF ¶ 225.c-f. TaxHawk and TaxSlayer also offer innovative products. Mr. Kimber, for example, testified that TaxHawk recently developed a "bookmark" feature that has since been emulated by others in the industry. DFOF ¶ 255. TaxSlayer, similarly, developed a hybrid product that it offered last year and will offer in the upcoming tax season. DFOF ¶ 123.c.

4. Competition and expansion will prevent coordination.

Coordination would also be infeasible due to competition from competitors like TaxHawk and TaxSlayer, as well as the tens of thousands of CPAs and tax offices that are scrambling for the same customers. As the testimony of TaxHawk and TaxSlayer made clear, any attempt by H&R Block to weaken TaxACT's products REDACTED

. DFOF ¶¶ 229-35, 246-51, 257, 298.a. The potential for expansion is discussed in more detail *infra* at Section IV.A.

5. The nature of the industry makes coordination unlikely.

The structure of the industry would also make coordination very unlikely. In assessing the feasibility of coordination among competitors, courts typically consider several factors, including "product homogeneity, pricing standardization and pricing transparency."[45] Each of these factors indicates a low possibility of coordination here. First, as Plaintiff concedes, digital tax preparation products are not homogeneous; they are heterogeneous or "differentiated."[46] "Where products are heterogeneous, the products compete with one another with respect to their product characteristics, as well as on the basis of price and the other forms of competition . . . anticompetitive coordinated effects [are] difficult and unlikely." *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 342 (S.D.N.Y. 1995). Second, prices in the alleged market are neither standard nor transparent, especially given the existence of both value and premium players. DFOF ¶ 135. Prices range from "free" to over $100. Additionally, given the large number of discounts offered by different competitors through e-mails and other non-transparent mechanisms, pricing is not transparent. DFOF ¶ 90.

IV. Defendants' Evidence of Expansion and Efficiencies Completely Rebuts Plaintiff's Alleged Case.

There are two additional reasons why Plaintiff's case fails: (1) the likelihood of expansion in the alleged market and (2) the efficiencies to be gained by the transaction.

A. Expansion by Existing Competitors Will Offset Any Anticompetitive Effect.

The *threat*[47] of entry or expansion "offset[s] the government's prima facie case of anti-competitiveness" if entry or expansion can "deter or counteract the competitive effects of

[45] *Oracle Corp.*, 331 F. Supp. 2d at 1113 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 238 (1993)); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989).

[46] *See* Prelim. Inj. Memorandum at 27 (acknowledging that digital DIY products compete in a differentiated market and "compete along more dimensions than price").

[47] *Baker Hughes*, 908 F.2d at 987–88 ("the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs").

concern."[48] "Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage." Horizontal Merger Guidelines, § 9.3. Indeed, as this Circuit has made clear, evidence of post-merger entry or expansion that would place "competitive pressure" on the merging parties rebuts plaintiff's case and shifts the burden of presenting additional evidence of anticompetitive effects back to the plaintiff. *Baker Hughes*, 908 F.2d at 989. Plaintiff did not, however, present any factual evidence challenging evidence of likely expansion.

Rather, there is ample evidence that such expansion will occur if the merging parties attempt an anticompetitive price increase. As of August 10, 2011, 18 companies (including one new one, just last month) offered various free e-filing products through the FFA, which provides these companies with a "free marketing channel" to expand their sales.[49] Moreover, multiple competitors confirm that an existing company can expand capacity by over one million units in one week to three months, at a cost of only about $250,000. DFOF ¶ 208. And, as detailed below, existing competitors (besides Intuit) currently have the capacity to serve all of TaxACT's and H&R Block's customers combined should H&R Block raise prices. DFOF ¶ 209.

The only barrier to expansion that Plaintiff asserts is the importance of brand recognition and reputation.[50] The evidence establishes, however, that brand is both less important and easier to achieve than Plaintiff suggests. Charles Petz, CFO of TaxBrain, testified that brand recognition is only important to consumers of premium products, such as those sold by TaxBrain, H&R Block, and Intuit. DFOF ¶ 205. On the other hand, consumers of discount products "don't

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[48] *Cardinal Health, Inc.*, 12 F. Supp. 2d at 55.

[49] DFOF ¶¶ 184, 214. Indeed, one of the stated purposes of the FFA is to "encourage[e] competition within[] the private sector[.]" DFOF ¶ 211.

[50] Plaintiff also alleges that the complicated nature of tax regulations is a barrier to *entry*, Prelim. Inj. Memorandum at 39, but this barrier is irrelevant to the expansion of existing competitors.

care who they buy the product from, and they view the products as being basically the same."[51] TaxACT's own history of growth proves the unimportance of brand: TaxACT grew from 1.5 million customers to 3.3 million in just two years.[52] As Premkumar John, President of OLT, testified at his deposition, it is not REDACTED DFOF ¶ 201.

Of the many existing competitors, TaxSlayer and TaxHawk are the two largest and most poised to replicate the scale and strength of TaxACT. For instance, from calendar years 2010 to 2011, TaxSlayer experienced REDACTED revenue growth, from REDACTED million, and REDACTED unit growth, from REDACTED returns filed.[53] For calendar year 2010, TaxSlayer increased its marketing spend by almost REDACTED. DFOF ¶ 226. It utilizes online advertising, social media, and traditional media, including television commercials and sponsorship of Dale Earnhardt Jr.'s NASCAR racing team and the college football Gator Bowl. DFOF ¶ 225. If TaxSlayer's current trends continue, the company will achieve REDACTED in revenue by tax season 2014 and will spend REDACTED in marketing by tax season 2015. DFOF ¶ 229. By comparison, TaxACT's marketing budget in 2011 was $27 million.[54] REDACTED . DFOF ¶¶ 233-35. REDACTED

[51] DFOF ¶ 206. To the extent that brand recognition or reputation is helpful, inexpensive online advertising and social media can be used to raise consumer awareness just as FreeTaxUSA, TaxSlayer, OLT, and OPT have all successfully done. DFOF ¶¶ 202–03, 225, 253.

[52] DFOF ¶ 207. Even after TaxACT's growth spurt, only two percent of respondents to a 2008 TaxACT "Marketing Strategy Research" survey cited "brand reputation" as their primary reason for choosing TaxACT. DFOF ¶ 204.

[53] DFOF ¶ 224. TaxSlayer provided corrected data and testimony confirming that TaxSlayer did not lose market share, as asserted in Plaintiff's Reply Memorandum at 20. *Id*

[54] Prelim. Inj. Memorandum at n.184.

REDACTED

. DFOF ¶ 235.

Similarly, TaxHawk has demonstrated strong recent growth, currently operates significantly under capacity, is able and willing to expand further, and would actively target former H&R Block and TaxACT customers after the acquisition. DFOF ¶¶ 241-50. TaxBrain and OPT have likewise confirmed their intentions to expand in response to a price increase. DFOF ¶¶ 262, 269. TaxBrain plans to increase its marketing spend immediately by $3 million, to take advantage of the "shopping opportunity" for customers that the acquisition presents. DFOF ¶ 262. REDACTED

. DFOF ¶¶ 270, 274.

While Plaintiff argues that the slow growth of these companies in the past five years portends continued slow growth,[57] Plaintiff again fails to take a dynamic view of the market and ignores what would happen *if* H&R Block raised prices or reduced output. The uncontested evidence demonstrates that existing firms are *likely* to expand in a timely and sufficient manner *in response to* any potential anticompetitive effects.[58]

B. The Transaction Will Result In Significant Efficiencies.

H&R Block's primary motivation for the TaxACT acquisition is to achieve significant synergies that will enable H&R Block to provide better products at a lower price and to compete more effectively. DFOF ¶¶ 22-23, 277. Defendants conservatively believe that they will achieve

[55] DFOF ¶ 235. REDACTED

. DFOF ¶ 232.

[56] DFOF ¶¶ 230 n.21, 235.

[57] Reply Memorandum at 19–20.

[58] *Cardinal Health*, 12 F. Supp. 2d at 54–58.

over [redacted] million in annual efficiencies in ten different areas. DFOF ¶ 278, 292. The Merger Guidelines acknowledge that efficiencies such as these can "reduce or reverse any increases in the merged firm's incentive to raise price" and "may lead to new or improved products, even if they do not immediately and directly affect price." Horizontal Merger Guidelines, § 10.

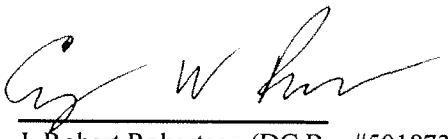
To assess whether the efficiencies are cognizable, the Merger Guidelines Commentary states that courts should "review the parties' internal documents and data, as well as the statements of knowledgeable company personnel." Commentary at 52. The stated efficiencies in this case are supported by exactly the sources that the Commentary recommends. Indeed, the efficiencies calculations are the product of Defendants' pre-existing business documents, detailed transition planning documents, and hundreds of hours of work by the Defendants' senior executives. DFOF ¶¶ 16, 18, 279, 284, 287. Each efficiency calculation was verified based on executives' personal knowledge and experiences, and the efficiencies are grounded in business documents available and used by each Defendant in the ordinary course of business. DFOF ¶¶ 285-91, 293. Not only does Plaintiff's efficiencies expert, Dr. Zmijewski, not dispute that Defendants will achieve the contemplated efficiencies, DFOF ¶ 282, he concedes that some portion of each projected efficiency may be considered merger-specific. DFOF ¶ 283. In short, Plaintiff has not provided any credible evidence to undermine Defendants' efficiencies calculations.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's request for a permanent injunction enjoining the Transaction.

Dated: September 28, 2011

Respectfully submitted,



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