UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S "MOTION *IN LIMINE* TO EXCLUDE THE 2011 LITIGATION SURVEY AND LIMIT DEFENDANTS' EXPERT REPORT"

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Defendants, H&R Block, Inc.; 2SS Holdings, Inc. ("TaxACT"); and TA IX L.P., respectfully request that this Court deny Plaintiff's Motion *in Limine* to Exclude the 2011 Litigation Survey and Limit Defendants' Expert Report as untimely and meritless. The survey at issue (hereinafter the "Marketing Survey") is probative evidence that clearly contradicts Plaintiff's alleged product market and competitive effects theories – core elements that Plaintiff bears the burden of establishing if it hopes to show that it has a likelihood of succeeding in proving its underlying case. Even if the Marketing Survey were not probative, it is not central to the opinions expressed in Dr. Christine Meyer's expert report or her deposition testimony; as a result, even if the survey is excluded, no portion of Dr. Meyer's report should be limited.

PRELIMINARY STATEMENT

Apparently concerned about the mounting evidence against its alleged market and against the claimed anticompetitive effects, Plaintiff filed an untimely and meritless motion asking this court to ignore some of that evidence and to limit Dr. Meyer's expert report. The motion should

be denied in part because it is untimely and in total because the Marketing Survey is a web-based survey that was conducted by a prominent and respected consumer research company applying the applicable industry standards for web-based surveys. The Marketing Survey is, thus, probative and useful to the Court in assessing whether Plaintiff has met its burden in establishing a relevant product market and the likelihood that anticompetitive effects will result.[1] Regardless, the law is clear that questions regarding the reliability of studies go to the weight accorded the evidence rather than its admissibility.[2] Particularly where, as here, the Court is the ultimate trier of fact, there is no basis for excluding a survey. In any event, regardless of the Court's view of the survey, Dr. Meyer's opinions are based only in small part on the Marketing Survey, relying more substantially on documentary evidence and data from Defendants, deposition testimony, and Intuit's documents, which all corroborate the results of the Market Survey and demonstrate that manual (and assisted) preparation are closer substitutes to Defendants' respective products than those products are to one another. According to the Department of Justice's own Merger Guidelines, this means that Plaintiff's market definition is incomplete and invalid.[3]

BACKGROUND

In early 2011, Defendants asked Directions Research Inc. ("Directions") to conduct a simple survey of existing TaxACT customers to try to determine what options those customers would turn to in the event that the customers became dissatisfied with TaxACT's price, services

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[1] United States Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines §4.1.3 (2010) (noting that survey data from customers regarding their likely response to a price increase is probative evidence of a transactions likely competitive effects); *see also*, *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 180-81 (D.D.C. 2001) (requiring a plaintiff to "show that a pending acquisition is reasonably likely to cause anticompetitive effects" and to "carr[y] the burdens of proof and persuasion regarding market definition").

[2] *See infra* Section III and accompanying notes (discussing courts' treatment of the admissibility of surveys).

[3] Horizontal Merger Guidelines §4.1.1.

or functionality.[4] Directions was chosen because it has conducted similar surveys for H&R Block for over a decade and because it is one of the largest and most respected market research companies in the United States.[5]

During the Department of Justice's investigation of the Transaction, the Defendants presented evidence that there is extremely low switching between the Defendants' products. However, the Department of Justice noted that switching data is not an appropriate proxy for diversion – *i.e.*, current switching rates are not necessarily predictive of how TaxACT consumers would react to a price increase, service decrease or functionality decrease in the TaxACT products. Therefore, the Defendants conducted a survey to address this question more directly and to demonstrate to the Department of Justice that its views regarding what would happen in such an event were incorrect. Because this was a market survey of actual customers, the survey did not list "Remain with TaxACT" as an option because such an option would lead consumers to assume that the survey was trying to figure out whether TaxACT could implement a price increase or service/functionality decrease without losing customers, which would in turn potentially skew the responses. Moreover, since the goal was to find out the alternatives that customers would consider, the option of TaxACT was not relevant (and was arguably covered by the all encompassing "Other" option).

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[4] Plaintiff criticizes Dr. Meyer as "mischaracterizing the question" when she used the term "displeased" rather than "dissatisfied." Pl's Mot. *in Limine* To Exclude the 2011 Litigation Survey and Limit Defs'. Expert Report at 4 n. 18 [hereinafter "Motion"]. Merriam Webster's dictionary defines "dissatisfied" as "expressing or showing lack of satisfaction : not pleased or satisfied." http://www.merriam-webster.com/dictionary/dissatisfied. It also lists "displeased" as one of six synonyms for "dissatisfied." *Id.*

[5] Directions was founded over twenty years ago. http://www.directionsresearch.com/files/20Anniversary.pdf. It has been listed in Marketing News' Honomichl Top 50 U.S. Market Research Firms for over a decade, ranking 28th in the 2011 Report. http://www.morpace.com/Honomichl-Top-50-2011-cover-story.pdf. In 2008, Directions received the coveted Gold Index Award from Inside Research® and Prevision Corporation for the highest rated custom quantitative market research supplier. http://www.directionsresearch.com/files/IR_2009.pdf.

In order to make the survey as simple as possible and to avoid confusing consumers, the survey focused generally on dissatisfaction based on a change in any one of three factors on which the Government and the case law typically focus when trying to assess the potential anticompetitive effects of a transaction. The survey asked consumers to check all of the options that they would consider and provided names and prices of various options.[6] By focusing on the name and the price of the option, the survey placed emphasis on both factors. In order to account for the potential that purchasers of different TaxACT products might turn to different options, the survey was sent to purchasers of four different purchaser groups.[7] When one group did not have a representative sample, additional survey invitations were sent to others in that group to ensure that there were enough responses to view the sample as representative.[8]

Ultimately, Defendants emailed surveys to over 70,000 TaxACT customers. The four purchaser groups included: (1) customers who used TaxACT's free federal edition and did not pay for a state return; (2) those who used the free federal edition and paid for a state return; (3) those who paid for a federal return but not a state return; and (4) those who paid for both a federal and state return.[9] From this population, a sample of 1089 responses were received and analyzed. The results of the survey were detailed to the Department of Justice in Defendants' May 2, 2011 Joint Submission in Support of the Proposed Acquisition.[10]

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[6] GX-604.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] GX-629 at 49-51 (Defs'. Joint Submission in Supp. of the Proposed Acquisition (May 2, 2011)). GX-604, which is cited throughout the Motion and this Opposition, is an Appendix to GX-629.

ARGUMENT

I. The Motion Is, In Part, Untimely.

The Joint Scheduling and Case Management Order that the Court entered on July 6, 2011 clearly states at Paragraph 31 that "[p]rehearing motions not otherwise covered in this Order shall be filed no later than August 12, . . . except that pre-hearing motions concerning Defendants' experts will be due on August 19." Plaintiff was clearly aware of these deadlines as it timely filed a motion *in limine* on August 12 that has now been fully briefed. The present motion *in limine* requests by its very title two separate things: "Motion *in Limine* To Exclude the 2011 Litigation Survey ***and*** Limit Defendants' Expert Report." (emphasis added). The portion of the motion seeking to exclude a survey that Plaintiff has known about for almost four months was not timely filed on August 12 and should, thus, be denied.

II. The Marketing Survey Is Probative.

Even if the Court allows Plaintiff to maintain its untimely motion, the motion should still be denied as it is without merit. The Marketing Survey was conducted by an experienced market research company in accordance with generally-accepted survey principles for web-based surveys, and the results were used in a statistically correct way. Indeed, the Marketing Survey is the same type of survey that Directions regularly conducts for Fortune 100 companies in order to develop pricing and product features. It is, thus, valid, probative, and should be considered (and given great weight) by the Court.

A. The Marketing Survey Asks and Answers the Relevant Question.

Defendants' Marketing Survey asks the right questions in a straightforward, logical manner. Plaintiff does not like the answers, but its dissatisfaction is no basis for exclusion. First, the survey was conducted using the correct target universe—a statistically-significant sample of

TaxACT customers, randomly selected across all TaxACT products.[11] Additionally, the survey questions are simple, sequential, and straightforward. The survey begins by broadly asking respondents what products they would *consider* using if they became dissatisfied with the price, functionality or quality of the TaxACT product they most recently used.[12] Despite straining to create ambiguity in the simple question, Plaintiff and its expert fail to provide any compelling basis for assuming that consumers were confused in any way by the question. As Dr. Dhar has noted in testimony in other cases, respondents can more easily process information that they "read on a web page or in print where [they] can process it at their own speed" than they can over the telephone.[13] Accordingly, with the simple question asked in the Marketing Survey and with respondents having ability to process the survey at their own speed, there is no reason to assume that they were confused.

Furthermore, the Marketing Survey received a larger sample than that obtained for many other opinion surveys that represent much larger populations, suggesting that the size of the survey sample is sufficient to accurately depict consumer preferences.[14] The Marketing Survey, thus, asked relevant questions designed to resolve one important issue: what products do TaxACT customers view as alternatives to TaxACT products? The answer – nearly uniform across a sample of over 1000 customers representing all of TaxACT's product offerings – was that nearly a third of all of TaxACT customers view manual (pencil-and-paper) preparation as

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[11] Ruddy Decl. ¶¶ 9, 11. Neither Plaintiff's Motion nor Dr. Dhar's report criticizes the target population.

[12] GX-604.

[13] Decl. of Ravi Dhar in Supp. of Autodesk's Opp'n to Solidwork's Mot. for Summ. J. or in the Alternative Summ. Adjudication, *Autodesk, Inc. v. Dassault Systèmes Solidworks Corp.*, No. 3:08-cv-04397-WHA at 8 (N.D.Cal. 2008).

[14] Gallop polls, for example, are widely regarded and self-proclaimed to represent approximately 98% of the World's population by analyzing sample sizes of approximately 1000 people. *See* http://www.gallup.com/se/128147/Global-Research-Methodology.aspx.

the best alternative to their current TaxACT product. Plaintiff might not like this result, but it is entirely consistent with the documents and testimony in this case.[15]

B. The Response Rate Is Not the Relevant Consideration in a Web-Based Survey and in any Event Is Consistent with Web-Based Survey Standards.

Web-based surveys generally have significantly lower response rates than other surveys,[16] but they are still regularly used and accepted by many large corporations in the ordinary course of business.[17] A low response rate does not, by itself, indicate the existence of bias.[18] Nor does an extremely high sample response rate prove that a survey accurately represents a larger population.[19] Recent analysis of the subject has actually shown that response rates have no correlation to bias in many situations and that traditional assumptions linking low response rates to bias may be unwarranted.[20]

For web-based surveys, guaranteeing a minimum sample size is much more important than a minimum response rate.[21] Indeed, web-based surveys allow research companies to easily

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[15] *See infra* Section IV and accompanying notes (discussing documents and testimony supporting the finding that the pencil-and-paper option competes with and constrains the price of TaxACT's products).

[16] *See, e.g,* Tse-Hua Shih & Xitao Fan, Comparing Response Rates from Web and Mail Surveys: A Meta-Analysis, 20 Field Methods 249, 258-59 (2008) (Web-based survey response rate was on average 10% below that of mail survey, but differences in response rates could vary as much as by 54%).

[17] Ruddy Decl. ¶¶ 3, 7-8.

[18] *See* Robert M. Groves, Nonresponse Rates and Nonresponse Bias in Household Surveys, 70 Pub. Opinion Q. 646 (Special Issue 2006) ("[T]here is little empirical support for the notion that low response rate surveys de facto produce estimates with high nonresponse bias."); John Rogers, Do Response Rates Matter in RDD Telephone Survey?, Public Research Institute, Theory and Method, available at http://pri.sfsu.edu/New_Folder/corner.html (last visited Aug. 22, 2011) (finding that differences in outcomes of studies with high response rate and low response rate are in many cases few to none).

[19] *Id.*; Shari Seidman Diamond, Reference Guide on Survey Research (hereinafter "Diamond Report") at 245 ("For example, even a survey with a high response rate may seriously underrepresent some portions of the population, such as the unemployed or the poor.").

[20] *Id.*; *see also* Gary Langer, About Response Rates: some unresolved questions (American Association of Public Opinion Research (May/June 2003) (detailing numerous examples from the last decade where significant differences in response rates did not lead to more than a marginal difference in data, most notably, a 45% difference in response rate in a survey conducted by the Center for Disease Control made only a 1.5% point difference in outcome).

[21] *Id.;* Ruddy Decl. ¶¶ 8, 11-15.

approach thousands of consumers and to receive thousands of responses in a low-cost and non-labor intensive manner that provides access to more consumer data than companies have ever had before – regardless of response rate. As a result, courts have admitted surveys with similar response rates.[22] For instance, in *Kinetic Concepts*, the court considered a challenged email survey and found that the survey had a sufficient sample size and sufficient indicia of reliability to be admissible despite having an unascertainable response rate for one sample universe and a response rate of 10% for another sample universe.[23] In this case, Defendants' survey sample size and response rate are at or above the industry standard;[24] the survey is, thus, admissible and highly probative of the relevant product market, diversion and potential effects.

C. The Marketing Survey Appropriately Provides Closed-Ended Questions .

While Plaintiff criticizes the Marketing Survey for providing only closed-ended questions,[25] *i.e.,* questions that "provide[] the respondent with a list of choices and ask[ ] the respondent to choose from among them,"[26] its criticism ignores the fact that closed-ended questions are perfectly appropriate for certain types of surveys. In fact, Plaintiff's own authority (an authority Dr. Dhar cites in criticizing the closed-ended questions of the Marketing Survey[27]) provides the following:

> "Although many courts prefer open-ended questions on the grounds that they tend to be less leading, the value of any open ended or closed-ended question depends on the information it is intended to elicit. Open-ended questions are more appropriate when the survey is attempting to gauge what comes first to a respondent's mind, ***but closed-ended***

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[22] *Univ. of Kansas v. Sinks*, No. 06-2341-JAR, 2008 WL 755065, *4 (D. Kan. Mar. 19, 2008) (refusing to exclude a survey with a similar response rate and noting that concerns about the survey methodology go to weight of the evidence not its admissibility).

[23] *Kinetics Concepts, Inc. v. Bluesky Med. Corp.*, No. SA-03-CA-0832 2006 WL 6505346, *6 (W.D. Tex. Aug. 11, 2006).

[24] Ruddy Decl. ¶¶ 7, 8, 11.

[25] Motion at 9.

[26] Diamond Report, at 273.

[27] Dhar ¶¶18-19.

> ***questions are more suitable for assessing choices between well-identified options or obtaining ratings on a clear set of alternatives.***"[28]

Thus, the Marketing Survey appropriately asked closed-ended questions because it was assessing choices between well-identified options, not attempting to gauge what came first in respondents' minds.

Furthermore, the questions actually did have open-ended aspects. Consumers were given the option of a "product offered through IRS' FFA website" as well as the option of "Other." In both instances, consumers who chose those options were asked to specify the company offering the FFA product and/or the "Other" means of tax preparation that they would consider.[29]

D. The Marketing Survey Appropriately Discourages Guessing.

The Marketing Survey appropriately discourages guessing by asking the customer to choose all options he or she would consider. The survey further includes the option of "Other," which appropriately gives the customer who has chosen to respond the opportunity to choose an option that is not otherwise listed, meaning that the consumer does not need to guess about whether he or she would choose any of the listed options.

Plaintiff ignores these options and instead criticizes the study for not explicitly telling respondents that it is acceptable "to have no opinion to a given question" and for not offering a "Don't Know" option.[30] In support of these propositions, Plaintiff provides two separate quotes from the same pages of the same document. Plaintiff first states that "[t]he consequence of [offering a no opinion option] is substantial,"[31] and then indicates "that inclusion of an 'explicit 'don't know' or 'no opinion' alternative commonly leads to a 20%-25% increase in the

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[28] Diamond Report, at 253.

[29] GX-604.

[30] Motion at 10.

[31] Motion at 10, n. 56 (brackets in motion).

proportion of respondents selecting that response.'"[32] Plaintiff's citations are misleading. Plaintiff omits the key language between the two fragments cited in the parentheticals. The complete quotation conveys an entirely different meaning:

> The consequence of [offering a no opinion option] is substantial. ***Studies indicate that, although the relative distribution of the respondents selecting the listed choices is unlikely to change dramatically***, presentation of an explicit 'don't know' or 'no opinion' alternative commonly leads to a 20%-25% increase in the proportion of respondents selecting that response.[33]

In other words, according to Plaintiff's own authority, even assuming the Marketing Survey had included a "Don't Know" option, the relative distribution of selected choices – *i.e.,* the diversion ratio and the percentage of respondents selecting pencil-and-paper – would not have dramatically changed. Put another way, including a "Don't Know" option would have had no meaningful effect on the low diversion ratio between Defendants' products or the high proportion of respondents selecting pen-and-paper.[34]

E. Plaintiff's Arguments Are Inapplicable and/or Misleading.

In support of its contention that the study is "incurably and fundamentally flawed," Plaintiff posits a strawman set of guidelines that are outdated and inconsistent with a web-based survey.

1. Plaintiff's Response Rate Statistics Are Outdated and Inapplicable.

Plaintiff asserts that the Marketing Survey suffers from a low response rate and proffers response rates that the Federal Judicial Center purportedly "supports" as making a study reliable, usually reliable, warranting greater scrutiny, or being regarded with caution.[35] First, the Federal

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[32] Motion at 10, n. 57.

[33] Diamond Report at 250 (brackets in motion; emphasis added).

[34] *Kinetic Concepts*, 2006 WL at *6 (admitting a survey that did not have an "I don't know" option and concluding that any objections went to the weight of the survey rather than to admissibility).

[35] Motion at 7 (citing Diamond at 245).

Judicial Center does not "support" those numbers. Indeed, the numbers are drawn from a publication – "Reference Guide on Survey Research" – was not written by the Federal Judicial Center, but rather can be accessed from the "Publications & Video Catalog" section of the Federal Judicial Center's website. On that search page is the following statement: "Opinions expressed in the materials found on this site are those of the authors, and not necessarily those of the Federal Judicial Center."[36]

Second, the referenced Reference Guide, which is an article that was published in 2000, states that the numbers are "[o]ne *suggested* formula for quantifying a tolerable level of nonresponse in a probability sample" and notes that the numbers are "based on the guidelines for statistical surveys issued by the former U.S. Office of Statistical Standards."[37]

Third, according to the article that the Reference Guide cites for the suggested numbers – a 1988 article – the numbers were actually used by the former U.S. Office of Statistical Standards as a mechanism for determining whether the federal government should pay for studies not as a mechanism for determining the reliability for those studies. "Before an agency could sponsor a survey it had to state that a response rate of 75% or more was expected. If a lower response rate was expected, a special justification of the usefulness of the survey results

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[36] *See* http://www.fjc.gov/library/fjc_catalog.nsf.

[37] Diamond Report at 245 (emphasis added). Plaintiff fails to account for the fact that since the Diamond article was published there has been a "well-documented falling response rate[ ] occurring across the industry [ ] for many types of surveys over the past decade." Lisa R. Carley-Baxter, Craig A. Hill, David J. Roe, Susan E. Twiddy, and Rodney K. Baxter, Changes in Response Rate Standards and Reports of Response Rate over the Past Decade at 1 (RTI International 2005). One study of Health, Psychology/Sociology, Political Science/Survey Research journals shows that the mean response rate fell 20% between 2000 and 2005 for random digit dial phone surveys and that a significant number of journal editors considered the response rate to be "not very important" in deciding whether to reject or include a survey for publication. *Id.* at 18-20.

were required. Rarely would surveys with an expected response rate of less than 50% be cleared (allowed to be carried out)."[38]

Fourth, the U.S. Office of Statistical Standards – the underlying source for the numbers – has not existed since 1969 (when it was renamed). In other words, Plaintiff relies on a 2000 article that cites to a 1988 article that cites to standards created prior to 1969 for numbers that were promulgated for a different purpose. Clearly those numbers did not contemplate the modern ability to reach out to tens of thousands of consumers and to get responses from thousands of consumers. Yet that is exactly the way many modern web-based surveys are conducted.

As discussed above, in web-based surveys the percentage response rate is not as important as getting a sufficient number of overall respondents and respondents from each relevant category – in this case from each of the four groups of customers.[39] As the court in *University of Kansas v. Sinks* noted, it was "persuaded by defendants' source that explains that the 50% benchmark for telephone surveys, (a) is not necessarily translatable to internet surveys, and (b) is outdated."[40] Despite that language, Plaintiff purports to quote the case as "noting that a 2.16% response rate is 'by any standard . . . quite low' and that it was 'extremely likely that

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[38] 2 Joseph L. Gastwirth, Statistical Reasoning in Law and Public Policy: Tort Law, Evidence, and Health 527 (1988). Mr. Gastwirth then took those numbers and said that he would rely on them "in part" to "quantify the concept of a tolerable level of nonresponse." *Id.* at 502.

[39] Ruddy Decl. at ¶¶ 10, 15.

[40] *Univ. of Kansas*, 2008 WL at *7 . The *University of Kansas v. Sink* court ultimately allowed the survey to be admitted. While it noted that the 2.16% response rate was "quite low" and "*could* point toward non-response bias," there were several additional factors in that case that raised concerns about the 2.16%. *Id.* at *4, *7. (emphasis added). For instance, in *University of Kansas*, unlike here, "the universe of respondents . . . was overinclusive" because it did not limit the survey to those likely to purchase a t-shirt in the future. *Id.* at *4. A response rate of 2.16% where the initial sample group is overinclusive is particularly problematic because the over-included individuals – the individuals not likely to purchase t-shirts in the future – could skew the representative nature of the 2.16%.

[such a low response rate] exerted a bias on the results.'"[41] The first part of that statement is technically correct,[42] but the second part goes too far. The *University of Kansas* court did not note that the response rate was "extremely likely" to yield a bias. Instead, the court stated it was "tak[ing] into account plaintiffs' rebuttal expert, Robert N. Reitter, who explains that *regardless of the rate of response*, 'it is extremely likely that the non-response level exerted a bias on the results.'"[43] In other words, one of the parties' experts in that case (not the court) found it to be "extremely likely" and based his opinion on factors other than the rate of response.

2. Plaintiff's Arguments Regarding the Breadth of the Survey Options Are Inconsistent.

Plaintiff unabashedly criticized the list of options presented to the customers as being both not exhaustive enough and too exhaustive.[44] First, Plaintiff argues that the "response options are severely flawed because they are not exhaustive;"[45] likewise, according to Dr. Dhar, "[t]he responses to a closed-ended question are only meaningful if the list of choices is exhaustive," and the Marketing Survey provides an "incomplete list of response options."[46] Of course, both Plaintiff and Dr. Dhar fail to point out that, to the extent that additional response options would change respondents' choices, it would likely *reduce* the diversion ratio (*i.e.*, the number of respondents selecting H&R Block). In other words, despite Plaintiff's insinuations to

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[41] Motion at 7 n. 32.

[42] *But see supra* note 38.

[43] *Univ. of Kansas*, 2008 WL at *5 (emphasis added).

[44] *See* Motion at 9.

[45] Motion at 9.

[46] Dhar ¶19.

the contrary, the addition of more options would not *increase* the likelihood that consumers would select H&R Block; it would *decrease* it.[47]

In any event, neither Plaintiff nor Dr. Dhar explains what options are viewed as missing. It is uncontested that there are at least seventeen companies providing free tax services through the FFA.[48] Since one option for all categories of TaxACT customers was to choose "a product offered through the IRS' FFA website," Plaintiff and Dr. Dhar must believe that an "exhaustive" list of options would have to include all of those companies.[49] Moreover, specific companies providing accounting services like Jackson Hewitt, Liberty and H&R Block's retail offices would also need to have been included rather than the catch-all "An accountant." If another ten to fifteen options had been included in the survey, Defendants are certain that Plaintiff and its expert would have criticized the study as being overwhelming and confusing, especially since Plaintiff already argues that the current list is *too exhaustive*:

> [b]y providing respondents with a list from which to choose, the survey hardly mirrors competition in the marketplace where the Big Three competitors spend millions of dollars annually to get their message in front of potential customers; [instead, it] counterfactually de-emphasizes the significance of brand and the millions spent building and maintaining it.[50]

This is Plaintiff essentially complaining that customers did not choose the options that Plaintiff's proposed market suggests should have been chosen. Of course, the two relevant branded options that Plaintiff appears to believe should have been emphasized (Intuit's TurboTax and H&R Block's At Home products) were options in every answer. As a result, if Plaintiff's theory about

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[47] While increasing the number of options could also decrease the percentage of pen-and-paper choices, neither Plaintiff nor Dr. Dhar suggest that the addition of more options would materially change the high percentage of pen-and-paper selections.

[48] *See* August 19, 2011 Joint Pre-Hearing Statement at 17 (stipulating that "seventeen companies offered free federal tax preparation products through the FFA" in Tax Season 2011).

[49] GX-604. The respondent was then asked to specify the FFA product/company that he or she would consider. *Id.*

[50] Motion at 9-10.

the significance of brand were correct, one would anticipate that those options would have been overly chosen, meaning again that the survey overstates the diversion ratio between Defendants' products. Moreover, a survey that reduced the options offered to consumers (as Plaintiff seems to recommend) would not "be sufficiently wide in scope to encompass the possible relevant market[ ]," which would defeat one of the purposes of the study.[51]

3. Plaintiff's Complaints About the Survey Suggest that, if Anything, It Exaggerates the Diversion Ratio.

As discussed above, Plaintiff's arguments regarding the number of offered options suggests that if the study has some bias (Defendants assert that it did not), that bias would actually overstate the likely diversion to H&R Block. Indeed, even without the recommended additional options, Plaintiff's arguments regarding the "significance of brand and the millions spent building and maintaining it"[52] suggest that any bias would lean toward an *artificially high* diversion ratio because of the prominence of H&R Block's brand.

In desperately trying to conjure some bias that would invalidate the Marketing Survey, Plaintiff suggests that the survey overstates the number of consumers who would turn to pencil-and-paper (manual) because non-responders are clearly busier (as evidenced by the fact that they did not respond) than responders, and busier people are less likely to choose manual preparation as an option. This creates the anomalous conclusion that those who responded to the *web-based* Marketing Survey – all of whom did their taxes on their own using an online product last year – are more likely to switch to *pen-and-paper* than those who did not respond. Common sense, however, suggests that the customers most inclined to fill out an internet survey frequently use

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[51] GX-622 (Christine Meyer, "Designing and Using Surveys to Define Relevant Markets" in Economics of Antitrust: Complex Issues in a Dynamic Economy, 101, 106 (Lawrence Wu, ed. 2007) (explaining that the number of options needs to be broad enough to help understand the relevant product market)).

[52] Motion at 10.

and/or are most comfortable using the Internet and are, therefore, the users most likely to continue using some form of internet tax preparation. Indeed, to the extent that "busy" customers are underrepresented by the survey (as suggested by Plaintiff), any resulting "bias" would most likely have been an underrepresentation of consumers who would choose an accountant/assisted preparation method because that was the only option allowing busy people to have someone else prepare their taxes.

III. Concerns Regarding a Survey's Methodology Go to Weight Not Admissibility.

In any event, questions regarding the Marketing Survey's methodology go to the weight, not the admissibility of the evidence,[53] particularly in a bench trial/hearing. For instance, despite several questions regarding the study in the *University of Kansas* case – a jury trial, the court admitted the survey and the corresponding expert testimony:

> The Court finds that while there are significant flaws in the methodology of this survey, they go to the weight and not the admissibility of the survey. Because the flaws discussed herein may be adequately brought to the jury's attention through rigorous cross-examination and the presentation of plaintiffs' rebuttal expert, the Court declines to exclude Berger's survey and expert report.[54]

Similarly, in *Kinetic Concepts* (another jury case), the court found that "any potential ambiguity . . . does not obfuscate the survey's results into irrelevancy" and allowed the survey to

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[53] *See Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1261 (9th Cir. 2001) ("Technical unreliability goes to the weight accorded a survey, not its admissibility."); *Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 228 (2d Cir.1999) ("[E]rrors in methodology thus properly go only to the weight of the evidence—subject, of course to Rule 403's more general prohibition against evidence that is less probative than prejudicial or confusing."); *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir.1997)("Challenges to survey methodology go to the weight of a given survey, not its admissibility."); *AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611, 618 (7th Cir.1993) ("While there will be occasions when the proffered survey is so flawed as to be completely unhelpful to the trier of fact and therefore inadmissible, such situations will be rare . . . .").

[54] *Univ. of Kansas,* 2008 WL at *5.

come in because it could still "assist the jury in deciding the question of whether the advertisements mislead a potential class of consumers."[55]

Furthermore the Court's gatekeeping function, which generally focuses on "the problem of exposing *the jury* to confusing and unreliable expert testimony," is significantly diminished in the context of a bench trial.[56] This case obviously poses no risk of any such jury confusion. In the one case that Plaintiff can point to where a judge decided to exclude survey evidence in an antitrust bench trial – *United States v. Dentsply* – the Judge included the inadmissibility ruling in the overall final decision and noted that there were several fundamental flaws in the telephone survey at issue in that case, including among other things that the survey 1) had confusing and overly-complex instructions, 2) failed to identify the relevant universe, 3) had an unreasonably low response rate, 4) did not include a pre-test, 5) had overly-complex and confusing tasks; 6) lacked standard error calculation, 7) was manipulable, and 8) could not be reproduced.[57] The Marketing Survey does not suffer from any of the flaws enumerated by the *Dentsply* court.

IV. Evidence Overwhelmingly Supports the Marketing Survey and Dr. Meyer's Testimony.

Plaintiff's contention that Dr. Meyer's expert opinion should be excluded "to the extent that she relies on the 2011 litigation survey" is self-defeating because the Marketing Survey is only one of many data points and documents underlying Dr. Meyer's testimony on competition

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[55] *Kinetic Concepts*, 2006 WL at *2.

[56] *Johnson v. BigLots Stores, Inc.*, No. 04-3201, 2008 WL 1930681 *2 (E.D. La. 2008) (emphasis added) ((citing *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1301-02 (Fed.Cir.2002) (explaining that in the context of a bench trial the *Daubert* standard must still be applied but the concerns about expert evidence misleading a jury "are of lesser import"); *see also e.g. Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) ("Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury."); *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F.Supp.2d 584, 596 n. 10 (D.N.J.2002) ("[W]here the court itself acts as the ultimate trier of fact at a bench trial, the Court's role as a gatekeeper is arguably less essential.").

[57] *United States v. Dentsply*, 277 F. Supp.2d 387, 435-40 (D.Del. 2003).

between digital DIY tax preparation and manual preparation methods.[58] Data and documents on consumer behavior, pricing and promotions, pricing models, and testimony from industry players overwhelmingly support Dr. Meyer's testimony. These data and documents also confirm that the Marketing Survey is accurate.

A. Customers View Manual DIY as an Alternative to Digital DIY.[59]

Manual filing is one of several do-it-yourself ("DIY") methods of tax preparation, along with software DIY and online DIY.[60] Like other forms of DIY filing, manual filing can include the purchase and/or use of various types of assisted elements. For instance, manual filers have used self-help tax guides for over fifty years, with one such guide – *J.K. Lasser's* – boasting 39 million sales.[61] Additionally, with the rise of the Internet, free and subscription-based tax help sites (sites that offer tips and guides but do not offer "digital DIY tax preparation") have proliferated, providing a wealth of free and low-cost resources to taxpayers who choose not to use online or software products.[62]

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[58] Meyer Dep. 175:6 – 175:16 ("I think [the 2011 survey] – it's an important data point. It's not the only data point to make any of the points that I use it to make."); DX0017-022 – 26,28 – 42 (citing various documents and data to support Dr. Meyer's conclusions regarding competition with manual filing and unilateral effects).

[59] While Plaintiff's Motion and Defendants' Opposition focus on consumers choosing pencil-and-paper in the event of dissatisfaction with TaxACT's prices and/or services, the Marketing Survey also shows that TaxACT customers dissatisfied with TaxACT's prices or quality would choose accountants/assisted preparation at roughly the same rate that they would choose H&R Block's digital product. As Dr. Meyer has noted, numerous additional data points and documents confirm this fact and further show that H&R Block customers and TurboTax customers both view assisted tax preparation as a better substitute than TaxACT for their respective tax preparation products. DX0017-012 – 17.

[60] *See, e.g.,* DX-6035-008 (categorizing "Pen & Paper" as part of the "DIY marketplace" along with "online & software standard," "online & software premium," and "Free/FFA online & State DOR sites"); DX6033-012 (categorizing "pencil & paper" as part of the "control/DIY" segment); DX0030-08 (categorizing "pencil & paper" as part of "self," which also includes software and online options).

[61] Google Books, *JK Lasser's Your Income Tax 2011: For Preparing your 2010 Tax Return*, available at http://books.google.com/books/about/J_K_Lasser_s_Your_Income_Tax_2011.html?id=Hvu1w69l0DMC (last visited August 22, 2010).

[62] *See, e.g.,* IRS Tax Topic Index, available at http://www.irs.gov/taxtopics/ (providing free help on numerous tax preparation issues) (last visited August 22, 2010); http://www.jklasser.com/WileyCDA/

DIY taxpayers can also take advantage of IRS' "fillable forms," which "provides the taxpayer, at no cost, the ability to electronically file their return [as well as] a great deal of assistance in preparation of their return."[63] As Dr. Meyer noted, IRS' fillable forms assist users with calculations, allow users to e-file for free, and help users check for common math and other mistakes before the forms are "accepted" for processing by the IRS.[64]

Given the number of robust free or low-priced manual filing options, it is not surprising that taxpayers move in large numbers between digital DIY options and manual pencil-and-paper options.[65] Indeed, a document created by REDACTED in May 2008 and considered by Dr. Meyer shows a high rate of defection from REDACTED to manual filing given the relative market shares of "Manual" versus "Software Online" and "Software Desktop."[66] The same document also shows that REDACTED new customers in 2008 included a higher percentage

(providing free help and subscription-based tax services) (last visited August 22, 2010); About.com "Filing Your Own Taxes," available at http://taxes.about.com/od/preparingyourtaxes/File_Your_Own_Taxes.htm (providing "everything you need to know to prepare your own federal tax return") (last visited August 22, 2010).

[63] Dunn Dep. 31:1-7.

[64] DX0017-23 (Expert Report of Dr. Christine Siegwarth Meyer).

[65] *Id.* at 68-67.

[66] GX-180, at 30. That same document shows that the highest rate of defection was to assisted tax preparation, including "Tax Store" and "Pro," the latter of which is the focus of the included chart).

of previous "Manual" DIY filers than "Online Software" users, which indicates that REDACTED targets non-digital DIY customers and views them as likely candidates for REDACTED

67 REDACTED

Another document considered by Dr. Meyer – a 2010 analysis (the below horizontal bar chart) from REDACTED – provides similar data.[68]

While it is true that in recent years more customers have switched from manual DIY to digital DIY than the reverse, thereby reducing manual's share of the total tax preparation market, Plaintiff is wrong in asserting that the gradual decline in manual DIY renders the category obsolete or proves that manual DIY does not constrain the prices of digital DIY providers. Plaintiff is further wrong to suggest that Dr. Meyer's analysis of this depends on the Marketing Survey. On the contrary, numerous documents that Dr. Meyer has considered show that many manual DIY customers are drawn to the online category because prices are very low (free in many cases).[69] Simply stated, if low prices have increased the number of digital DIY customers

[68] DX0011-002.

[69] *See, e.g.*, DX5003-18 REDACTED .

by diverting customers from manual filing, then price increases would likely divert customers back to manual filing and/or slow the rate of growth in digital DIY filing. This is precisely what the Marketing Survey confirms.

Dr. Meyer also found state filing trends to be instructive about customers' views on the substitutability of manual DIY and digital DIY. As Plaintiff's expert Dr. Warren-Boulton admits, digital tax preparation companies often try to cross-sell state products with federal products.[70] Contrary to Plaintiff's suggestion that all taxpayers who use a digital federal product also use the same brand of digital state product, the documents considered in part by Dr. Meyer demonstrate that state attach rates for TaxACT and H&R Block range from about REDACTED% because taxpayers who use the federal TaxACT and federal H&R Block products can and do turn to other alternatives for state preparation and filing.[71] One of the principal alternatives to state digital DIY products is manual filing, as shown by the state filing data from a 2008 study by H&R Block concerning taxpayers who use free and FFA federal products.[72]

[70] GX-121, at 14. Companies refer to the rate at which federal customers purchase state products as the "state attach rate." *E.g.*, DX200-003.

[71] *See, e.g.*, *id.* (showing state attach rates ranging from REDACTED for H&R Block from 2006 to 2008); DX6041-002 (showing state attach rates ranging from REDACTED for H&R Block in 2008 to 2010) DX9527-002 (showing that TaxACT Standard had REDACTED sales in 2008 and REDACTED state sales in the same period, amounting to a REDACTED state attach rate for the Standard product); DX6053-048 (showing state attach rates of REDACTED for H&R Block's FFA product and REDACTED for TaxACT's free federal product in 2008, where users that did not need to file state returns were excluded from the attach rate).

[72] DX6053-048.

The above data are informative because they identify customers who file using both manual (pencil-and-paper) and digital DIY methods in the same year for state and federal returns. Specifically, the data show that [redacted] of TaxCut FFA customers and [redacted] of TaxACT Free customers – customers who are obviously comfortable and familiar with online filing – use manual state filing in lieu of an online filing to avoid paying for their return. This supports Dr. Meyer's opinion that customers consider manual DIY a good substitute for digital DIY products at current prices. It also suggests that the underlying data in the Marketing Survey is correct.

Consistent with Plaintiff's desire to have this Court ignore the Marketing Survey, Plaintiff contends that these states filers are irrelevant to its market share "estimates" despite having alleged a relevant product market that includes "the preparation of U.S. federal and state tax returns"[73] and despite the fact that the above data show that TaxCut FFA filers using "State Website[s]" *outnumbered* filers who used TaxCut's state product in 2008, while an additional [redacted] of TaxCut FFA and TaxACT Free users decided to manually file their state returns.[74] This

[73] Complaint at ¶23.

[74] Plaintiff justifies its decision to ignore state filing because Defendants have purportedly sometimes assessed market shares based on federal e-filing rates, but Defendants are not alleging and do not bear the burden of establishing a market consisting of federal *and state* return preparation, and none of the documents cited by Plaintiff stand for the proposition that federal e-filing rates are a good proxy for state shares.

not only supports Dr. Meyer and the Marketing Survey, it shows that manual state DIY is a viable substitute for digital state DIY, and it proves that estimating state sales based on federal e-file shares significantly overstates Defendants' market shares by *completely excluding* other state digital DIY options.[75]

Indeed, the Marketing Survey's conclusion that REDACTED of TaxACT customers would abandon TaxACT in favor of manual filing if TaxACT raised its prices or reduced the quality of its products is consistent with the above data showing that even in the case where TaxACT's quality and prices remain the same, REDACTED of TaxACT's Free customers are willing to abandon TaxACT in favor of cheaper (free) manual filing when asked to pay a fee for state products.

B. DIY Tax Preparation Firms Price and Market Their Products to Compete with Manual Filing.

As Dr. Meyer has opined, "Digital DIY tax preparation firms, in particular those with lower-priced, value products, regard pen-and-paper as a 'serious alternative.'" This belief is not based just on the Marketing Survey or the above-referenced documents, but rather on deposition testimony, additional documents and an older survey that Plaintiff does not contest. For instance, REDACTED

[redacted]

[75] State websites provide free *digital DIY* options – such as California's CalFile – that must be included in Plaintiff's gerrymandered market based on its own definition of the market.

[76] REDACTED.

[77] REDACTED.

Defendants' historical pricing behavior and pricing studies further support Dr. Meyer and show that both companies view manual filing as a legitimate alternative to digital DIY preparation and filing. For instance, in 2008, TaxACT declined to raise the price of its state product because such a price increase "may drive customers to complete [tax filings] manually."[78] REDACTED

[redacted] In contrast, Plaintiff has not adduced any evidence that TaxACT declined to raise prices or offered promotional discounts at any point to compete with H&R Block.

An H&R Block pricing study further validates Dr. Meyer's testimony and the Marketing Survey's conclusions. H&R Block commissioned a pricing simulator in 2009 to analyze the likely effects of price changes in the marketplace on sales of its own products and on competing products. The pricing simulator analysis indicates that the second largest diversion from HRB's TaxCut, in the event of a price increase, would be to pencil-and-paper, and the largest diversion would be to assisted tax preparation. The price simulator shows that the sales gained by pen-and-paper would account for 23 percent of the sales lost by TaxCut. Plaintiff is well aware of the Pricing Simulator, having had its own expert reference the Simulator in his initial expert report.[80] Nevertheless, Plaintiff ignores the Simulator and all of the evidence supporting Dr. Meyer and the Marketing Survey in requesting that this Court exclude the Markey Survey and limit Dr. Meyer's testimony. Plaintiff's request should be denied.

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[78] DX0013-002; *see also* DX1100-21 (REDACTED [redacted]).

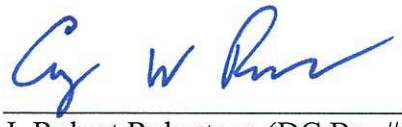
[79] DX1410-001.

[80] GX-121, at 50.

WHEREFORE, Defendants respectfully request that the Court deny Plaintiff's Motion in Limine to Exclude the 2011 Litigation Survey and Limit Defendants' Expert Report.

Dated: August 24, 2011

Respectfully submitted,



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