

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. 11-00948 (BAH)

H&R BLOCK, INC.;
2SS HOLDINGS, INC.; and
TA IX L.P.,

Defendants.

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION**

**REDACTED VERSION
FOR PUBLIC FILING***

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

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Plaintiff United States of America (“Plaintiff” or “United States”) respectfully submits this memorandum of points and authorities in support of its motion for a preliminary injunction, enjoining H&R Block, Inc. (“HRB”) from closing its acquisition of 2SS Holdings, Inc. (“TaxACT”), which is partially owned by TA IX L.P. (“TA”) (HRB, TaxACT and TA are collectively referred to herein as “Defendants”), until this Court’s final disposition of the case.¹

INTRODUCTION

The United States brings this action to block an acquisition that will substantially lessen competition in the tax preparation industry. Currently, the three largest providers of digital do-it-yourself tax preparation products (“Digital DIY”) dominate this market. The proposed acquisition would combine HRB and TaxACT, the second- and third-largest providers, and result in a duopoly with two companies controlling 90% of the Digital DIY market. Under the Government’s merger guidelines and relevant case law, this extraordinary market concentration is presumptively anticompetitive, and Defendants bear a heavy burden to rebut this presumption.

They cannot meet this burden. To the contrary, Defendants’ own documents and testimony prove that the transaction will hurt competition. Before this transaction was announced, Defendants’ most senior executives readily admitted that:

- HRB and TaxACT fiercely compete head-to-head in the same market;
- TaxACT is a “maverick” competitor, competing aggressively with low prices and product innovation; and
- TaxACT has forced competitive responses leading to lower prices for millions of consumers.

Indeed, no other evidence beyond Defendants’ admissions is necessary to prove that this transaction will substantially lessen competition in violation of Section 7 of the Clayton Act, 15

¹ In the exhibits submitted with the United States’ Motion, the relevant portions of certain documents have been highlighted for the Court’s convenience.

U.S.C. § 18, and must therefore be enjoined. For example, TaxACT's impact on the market is established by admissions of its own founder and CEO that TaxACT has been a "tax industry maverick" and a "catalyst for change in the tax preparation industry . . . [that] has consistently forced the tax preparation industry to become more competitive, and in doing so [has] forced [its] competitors to change as well."² And Defendants' pre-transaction internal documents refer to each other as direct competitors and track each other's product features and prices. HRB even has an internal identification code, 999009, for campaigns specifically aimed at getting TaxACT digital customers to switch to HRB.³ For its part, TaxACT has publicly acknowledged that it competes with HRB, and touted to potential buyers that its "software and online products are equal or superior to either those of Intuit or H&R Block."⁴ Before the transaction was disclosed publicly, HRB recognized that a merger of the second- and third-largest competitors would create antitrust concerns,⁵ and when the deal was announced, HRB's Vice President of Marketing boasted in an email that "[w]e bought a competitor (which is huge, and great)"⁶.

Since then, Defendants have engaged in a transparent attempt to rewrite history — disclaiming their own documents, criticizing their own executives and modifying public disclosures to pretend that the market realities and competitive dynamics (including direct competition between HRB and TaxACT) they previously admitted no longer exist. HRB's senior executives have tried to "walk[] a little tightrope on this with [antitrust approval],"⁷ and have jettisoned their long-used market descriptions in favor of "the word[s] of choice to get

² Ex. 3 (2SS-GRECe-0028581, at -83); Ex. 4 (2SS-MARKe-0083230, at 18).

³ Ex. 5 (HRB-DOJ-50184793); Ex. 6 (HRB-DOJ-00770275) (the only other company that H&R Block appears to have a similar code for is [REDACTED]).

⁴ Ex. 7 (2SS-CORPe-0025298, at -313).

⁵ Ex. 8 (HRB-DOJ-00347049, at -52).

⁶ Ex. 9 (HRB-DOJ-50452596).

⁷ Ex. 10 (HRB-DOJ-00915524).

passed [sic] HSR approvals.”⁸ Recognizing the same concern, HRB’s attorneys rewrote the “Competitive Conditions” section of the company’s annual Form 10-K filing in order to remove prior language that suggested a single digital market in which HRB and TaxACT competed.⁹ And now, HRB even appears to be contradicting a decade’s worth of clear public statements (as well as recent sworn testimony from its former CEO and current head of Digital), by indicating that it believes its digital products compete with its franchisees’ brick and mortar stores.¹⁰

But the record of Defendants’ pre-transaction admissions cannot be erased. It is this record that demonstrates that this transaction would allow HRB to eliminate a vigorous competitor, and “regain control of industry pricing and avoid further price erosion,” as suggested to HRB executives as early as 2009.¹¹ The acquisition is intended to give Intuit and HRB control of the digital market and to prevent another competitor from taking market share through a “race to the bottom.”¹²

Thus, Defendants’ admissions establish the relevant market, the state of competition and the likely effect of the transaction; these admissions are sufficient without more to require that the transaction be blocked. Of course, as with other merger cases, the United States is also submitting an economist’s extensive expert report, applying standard economic analysis showing that the transaction will have anticompetitive effects. But in this case, at least, the expert is not central to the Government’s case; his report only confirms what the Defendants’ admissions make clear: This transaction will substantially lessen competition.

⁸ Ex. 11 (HRB-DOJ-50258582).

⁹ Compare Ex. 12 (H&R Block 10-K for Fiscal Year Ending April 30, 2011, at 4), with Ex. 13 (H&R Block 10-K for Fiscal Year Ending April 30, 2010, at 4).

¹⁰ See Ex. 14 (Defendants’ Response to Plaintiff’s First Set of Requests for Admissions to All Defendants at 6-7); Ex. 15 (Defendants’ Response to Plaintiff’s First Set of Interrogatories to All Defendants at 1-6).

¹¹ Ex. 16 (HRB-DOJ-00319468, at 20); Ex. 17 (HRB-DOJ-00249335, at 3).

¹² Ex. 18 (HRB-DOJ-00355217).

STATEMENT OF FACTS

There are three ways for individuals to prepare their federal and state income tax returns: (1) unassisted; (2) Digital DIY products; or (3) assistance from a tax professional. In recent years, Digital DIY products have become an increasingly popular method of tax preparation — used last year by an estimated 35 to 40 million U.S. taxpayers.¹³

Digital DIY products are offered through three channels: (1) online through an internet browser; (2) software for a personal computer downloaded from an Internet website; and (3) software for a personal computer on a disc, which is either sent directly to the consumer or purchased by the consumer from a third-party retailer.

Intuit (the maker of “TurboTax”), HRB and TaxACT, known in the trade as the “Big 3,”¹⁴ collectively control approximately 90% of the Digital DIY market — Intuit with 62.2%, HRB with 15.6%, and TaxACT with 12.8%.¹⁵ The Big 3 provide their products through all three methods of digital distribution, while most of the fringe competitors do not. TaxHawk and TaxSlayer, the next two largest competitors, each serve only about 3% of the Digital DIY market, and no other competitor serves more than 0.5% of the market.¹⁶

One unique aspect of the Digital DIY market is that virtually all of the competitors provide some product to consumers for free. For example, a company may offer a basic federal tax return product for free, with the expectation that a consumer will pay for additional products, such as a state tax return or the ability to transport information from one year’s return to the next year’s return. The scope of a company’s free product offerings is a significant competitive factor.

¹³ Ex. 19 (HRB-DOJ-50842379, at 3).

¹⁴ See, e.g., Ex. 20 (HRB-DOJ-01003395, at 5); Ex. 21 (Newkirk Dep. 65:7-15); Ex. 22 (HRB-DOJ-00336019, at -22); Ex. 23 (HRB-DOJ-00347837); Ex. 24 (JTH-DOJ-000001 (Liberty Decl.) ¶ 7); Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 10); Ex. 26 (WK-DOJ-000001 (CCH Decl.) ¶ 4).

¹⁵ Ex. 27 (HRB-DOJ-00012327).

¹⁶ *Id.*

I. TaxACT's History as a Maverick

Electronic filing of tax returns goes back as far as 1986. However, it was not until the passage of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA98") — which set a target that 80% of all tax U.S. returns eventually be e-filed — that Digital DIY products began to be used widely by consumers. At the time RRA98 was passed, Intuit and HRB dominated the Digital DIY market and charged significant fees for their products.¹⁷ But beginning in 1998, TaxACT entered and, over the course of several years, gained market share by disrupting the status quo through unique product offerings at comparatively lower prices. According to TaxACT's founder and CEO, Lance Dunn, TaxACT was created to "give consumers a choice that they did not have before" — a fast, affordable and reliable tax preparation product.¹⁸

By 2004, through its aggressive strategy of offering consumers "a fully-featured federal tax preparation product free for use online or as free software," TaxACT began to seriously disrupt the two dominant market players, HRB and Intuit.¹⁹ This is a fact TaxACT fully acknowledges: it lauds itself to the public as "a tax industry maverick" that "has broken down the barrier[s]" in the Digital DIY market.²⁰

A. TaxACT is the First to Offer Free Federal Tax Return Preparation and E-Filing for All Taxpayers Through the Free File Alliance

One of the first instances of TaxACT's maverick behavior was in connection with the Free File Alliance ("FFA"), a public-private partnership between the IRS and participating tax

¹⁷ Ex. 28 (Dunn Dep. 86:18-21).

¹⁸ Ex. 28 (Dunn Dep. 145:21-22; Dunn Dep. Ex. 10, at 2).

¹⁹ Ex. 7 (2SS-CORPe-0025298, at -301).

²⁰ Ex. 3 (2SS-GRECe-0028581, at -83).

preparers to allow taxpayers to prepare and e-file their federal tax returns for free.²¹ The FFA was formed in late 2002, and its members, including HRB, TaxACT and Intuit, agreed to offer free federal tax preparation and e-filing to certain taxpayers, and the IRS agreed to link to these offers from its website.²²

Initially, FFA participants could offer free filing to any taxpayers. In practice, however, preparers generally limited free filing to taxpayers below certain income thresholds.²³ As a result, free filing was available to only a subset of all taxpayers.

From the outset, however, TaxACT disrupted the strategies of those other companies in the FFA. In the FFA's first year (2003), TaxACT set itself apart by offering its free product to taxpayers with an income level at or above \$100,000.²⁴ The following year (2004), once companies began matching this offer, TaxACT further "changed the rules of the game,"²⁵ by becoming the first FFA participant to offer all taxpayers the opportunity to prepare and e-file their federal tax returns for free, regardless of their income.²⁶ Referred to within HRB as a "land grab" and a "disruptor,"²⁷ TaxACT's maverick offer caused it to take market share at the expense of its competitors, HRB and Intuit.²⁸

TaxACT's strategy of providing free federal tax preparation and e-filing to all taxpayers generally raised concerns in the industry that it would put pressure on profits. Nonetheless,

²¹ Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 8); Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 16); Ex. 30 (FFA000097).

²² See Ex. 30 (FFA000097, at -98).

²³ Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 8); Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 16).

²⁴ Ex. 31 (IRS-DOJ-001006); Ex. 32 (IRS-DOJ-001013, at -15).

²⁵ Ex. 33 (HRB-DOJ-00503167, at -68).

²⁶ Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 8); Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 16).

²⁷ Ex. 34 (HRB-DOJ-50687973); Ex. 35 (HRB-DOJ-00912870, at -71).

²⁸ Ex. 36 (HRB-DOJ-50682747); Ex. 29 (DOJ-INT-000001 (Intuit Decl.) at -33).

many of TaxACT's competitors, including HRB and Intuit, matched TaxACT,²⁹ and competition began to intensify around the quality of free offerings. Again, TaxACT led the way by providing a more robust and high-quality free product.³⁰

Internally, HRB feared that TaxACT's offer was not only impacting the FFA, but also "creat[ing] a huge disruption in the paid side of the business."³¹ Publicly, HRB complained that the industry movement to "free-for-all" was akin to a "suicide pact."³² Seeking to limit this competitive threat, HRB and Intuit successfully lobbied for strict limitations on the number and kind of taxpayers eligible for free FFA filing.³³ These limitations became effective in October 2005.³⁴

B. TaxACT is the First to Offer Free Federal Tax Return Preparation and E-Filing for All Taxpayers Through its Website

No longer able to make its free-for-all offer through the FFA website, TaxACT decided to pursue an even more aggressive strategy through, as Intuit referred to it, a "radically different pricing model."³⁵ In December 2005, TaxACT became the first company to offer all taxpayers, regardless of income, the ability to prepare and e-file a federal tax return for free directly through its own website, bypassing the FFA website.³⁶ According to TaxACT, this "unprecedented

²⁹ Ex. 37 (H&R Block Amended 10-K for Fiscal Year Ending April 30, 2005, at 4); Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 8).

³⁰ Ex. 38 (2SS-CORPe-0002404, at -07).

³¹ Ex. 39 (HRB-DOJ-50704549, at -50).

³² See Ex. 40 (Kirkham, Chris, *Online Tax Filing No Longer Free For All*, WashingtonPost.com, dated Jan. 26, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/25/AR2006012501786.html> (last visited July 30, 2011)).

³³ Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 16); see also Ex. 41 (HRB-DOJ-50695185, at -86).

³⁴ Ex. 42 (FFA000091); Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 16); Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 9).

³⁵ Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 11).

³⁶ Ex. 43 (Press Release, *TaxACT Users Can Now Prepare, Print and E-File Returns Without Charge*, dated Dec. 12, 2005, available at <http://www.taxact.com/press/press-release-12-12-2005.asp> (last visited July 30, 2011)).

offer” and “watershed” moment led to “significant” growth in TaxACT’s market share.³⁷

TaxACT’s competitors quickly followed. In particular, HRB recognized that TaxACT’s growth was the primary driver for “[t]he growth in Free Federal Offers Online” from other companies, resulting in “price compression” for tax preparation products.³⁸ A few months after TaxACT introduced free-for-all on its website, HRB executives convened specifically “to start active discussions about how best to compete with TaxAct”³⁹ This was only the beginning of active deliberations within HRB on how best to respond to the TaxACT threat.⁴⁰

While HRB was considering the appropriate response, “TaxACT’s success in gaining market share propelled Intuit to offer” its own free product.⁴¹ Finally, HRB, “forced to compete with Free or lose significant [online] share”⁴² and in order “to stem online share loss to Intuit and TaxACT,”⁴³ introduced its own free online product outside of the FFA. The year HRB introduced its free product, its average sale price per customer across all of its Digital DIY products declined by approximately [REDACTED].⁴⁴

The launch of a free federal product even had a significant impact on prices and demand for HRB’s downloadable and retail software. According to HRB, the emergence of online free federal Digital DIY products [REDACTED]

[REDACTED]

³⁷ See *id.*; Ex. 28 (Dunn Dep. 135:21-136:4; 168:15-22); Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 12).

³⁸ Ex. 20 (HRB-DOJ-01003395, at 11-12).

³⁹ Ex. 44 (HRB-DOJ-50200815).

⁴⁰ See, e.g., Ex. 45 (HRB-DOJ-50098528); Ex. 46 (HRB-DOJ-50230434); Ex. 47 (HRB000833, at -46).

⁴¹ Ex. 48 (HRB-DOJ-00182356, at -61); see also Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 13); Ex. 49 (HRB-DOJ-00524530, at 3).

⁴² Ex. 50 (HRB-DOJ-00823783).

⁴³ Ex. 51 (HRB-DOJ-00902949, at -53); see also Ex. 52 (HRB-DOJ-00250069).

⁴⁴ Ex. 19 (HRB-DOJ-50842379, at 8).

[REDACTED]⁴⁵ But
 TaxACT's maverick conduct posed an even larger concern for HRB: [REDACTED]

[REDACTED]⁴⁶

C. TaxACT Continues to Offer Robust Digital DIY Tax Preparation Products at Lower Prices

Over the years, TaxACT has continued to disrupt the market and gain share through its maverick behavior and strategy of offering highly functional products at comparatively low prices. Most recently, TaxACT offered taxpayers the ability to use all federal e-fileable forms with its free federal product in January 2010.⁴⁷ In presentations, HRB recognized that, “[h]aving disrupted the digital tax prep market with cheaper, lower-end solutions, TaxAct [was] surpassing [HRB’s] TaxCut in market share and continuing to improve quality (surpassing TaxCut in some press reviews in 2009).”⁴⁸ This sentiment was shared by key HRB executives who were “shocked at the TaxACT price,” “concerned that [HRB was] competing in a ‘price’ world,”⁴⁹ and worried that TaxACT “seem(s) to have stolen share from us and [TurboTax]”⁵⁰. In response, HRB executives recommended conducting “a market simulation,” aimed at seeing how adjusting HRB’s digital prices “could impact [REDACTED]”⁵¹ Ultimately though, HRB would determine that purchasing TaxACT was a better way to “eliminate” TaxACT’s

⁴⁵ Ex. 53 (HRB-DOJ-50022313, at 2).

⁴⁶ Ex. 54 (HRB-DOJ-50196491, at 36).

⁴⁷ Ex. 55 (Grief Dep. 83:5-84:6); Ex. 56 (Press Release, *TaxACT 2009 Raises the Bar Higher on Free and Affordable Tax Preparation Solutions*, dated Jan. 7, 2010, available at <http://www.taxact.com/press/2010/press-release-01-07-2010-affordable.asp> (last visited July 30, 2011)).

⁴⁸ Ex. 57 (HRB-DOJ-00251349, at 6). H&R Block’s Digital DIY product in 2009 was called TaxCut. It is now referred to as H&R Block at Home.

⁴⁹ Ex. 58 (HRB-DOJ-00348453).

⁵⁰ Ex. 59 (HRB-DOJ-50716606).

⁵¹ Ex. 60 (HRB-DOJ-50564563).

“disrupt[ive]” maverick conduct.⁵²

D. TaxACT Competes Through Robust Offerings and Lower Prices

In 2010, TaxACT continued its maverick behavior by entering the retail segment of the Digital DIY market, offering boxed software at Staples, HRB’s [REDACTED] retailer.⁵³

According to the partnership proposal between TaxACT and its distributor, the [REDACTED]
[REDACTED]⁵⁴ TaxACT sought to accomplish that goal by offering its customers free electronic filing of state returns, unlike Intuit and HRB who charge an additional fee for filing state returns.⁵⁵

Though only in the first year, it appears that TaxACT’s presence in Staples is impacting HRB’s bottom line. HRB noted internally that its “[r]etail volumes at Staples [were] at risk due to introduction of TaxACT Retail software on combined display.”⁵⁶ And, Intuit’s analysis confirms that [REDACTED]⁵⁷ If these trends continue, HRB will once again be forced to match TaxACT’s offerings, or continue to lose market share.

II. HRB and TaxACT Compete With One Another

As the history of TaxACT’s maverick conduct and the competitive responses by Intuit and HRB described above make clear, HRB and TaxACT have a long and deep history of competition. This competition is evident not only from the documents and testimony of Defendants’ current and former employees and executives, but also is clear from media reviews, industry analysts, and competitor statements.

⁵² Ex. 16 (HRB-DOJ-00319468, at 20); Ex. 57 (HRB-DOJ-00251349, at 6).

⁵³ Ex. 28 (Dunn Dep. 383:18-384:4); Ex. 61 (Houseworth Dep. 252:9-253:7); Ex. 62 (2SS-PETK-0000267, at -323).

⁵⁴ Ex. 63 (2SS-ARALe-0016784).

⁵⁵ Ex. 64 (2SS-GREC-001358, at -404); Ex. 61 (Houseworth Dep. 270:17-271:8).

⁵⁶ Ex. 65 (HRB-DOJ-00337419, at -20).

⁵⁷ Ex. 66 (INT-DOJ0000038, at 5).

A. Defendants' Internal Documents Reflect Aggressive Competition Between HRB and TaxACT

HRB internally concluded that it was in direct competition for its Digital DIY tax preparation business with TaxACT no later than early 2005.⁵⁸ In January 2006, HRB's Tom Allanson explicitly stated that in the digital business, HRB's "[o]nly real direct competitors are turbotax in san diego and taxact in cedar rapids."⁵⁹ In February of 2006, HRB's CEO, Mark Ernst, echoed Mr. Allanson's statement when he commented that HRB was losing market share and that "the market share gains are going to Turbo . . . and TaxAct."⁶⁰

Within HRB, Intuit, HRB, and TaxACT were known as the "Big 3 Competitors" in the Digital DIY tax preparation market.⁶¹ HRB monitored the number of references to TaxACT on the internet,⁶² tracked TaxACT's share of the Digital DIY market,⁶³ analyzed and compared TaxACT's customer base with its own⁶⁴ and studied why customers were switching from HRB's digital products to TaxACT.⁶⁵ HRB specifically considered TaxACT's customers to be within HRB's "Addressable Market,"⁶⁶ and at times lamented that TaxACT was surpassing HRB in the digital marketplace.⁶⁷

⁵⁸ See, e.g., Ex. 67 (HRB-DOJ-50698926) (H&R Block employee discussing an effective strategy to [REDACTED]); Ex. 33 (HRB-DOJ-00503167, at -83); Ex. 68 (HRB-DOJ-50697962); Ex. 69 (HRB-DOJ-50758528).

⁵⁹ Ex. 70 (HRB-DOJ-00516352).

⁶⁰ Ex. 71 (HRB-DOJ-50094259).

⁶¹ See, e.g., Ex. 20 (HRB-DOJ-01003395, at 5); see also Ex. 21 (Newkirk Dep. 65:7-15); Ex. 22 (HRB-DOJ-00336019, at -22); Ex. 23 (HRB-DOJ-00347837) ("The big three make up 88% of the category.").

⁶² Ex. 72 (HRB-DOJ-00431805).

⁶³ Ex. 49 (HRB-DOJ-00524530, at 3).

⁶⁴ Ex. 73 (HRB-DOJ-00999589) ("The one funny thing to note is that taxact.com is one of the top sites also visited for H&R Block. [REDACTED]").

⁶⁵ Ex. 74 (HRB-DOJ-00553898, at 6).

⁶⁶ Ex. 75 (HRB-DOJ-50009015, at -20); see also Ex. 76 (HRB-DOJ-50083822, at -30-32) (identifying TaxACT as a "[c]ommerciably available alternative[] to [H&R Block's] TaxCut").

⁶⁷ Ex. 77 (HRB-DOJ-00971052) [REDACTED]

Not only did HRB keep track of TaxACT and its products, it also frequently changed its business strategies, products, and prices in response to TaxACT. For example, after TaxACT introduced its free federal product on its website, HRB soon began considering how it could respond. The company began planning to test “[1040]EZ for free on hrb.com and taxcut.com” in February 2006,⁶⁸ and specifically modified the appearance of its website for these tests in order to better compete with TaxACT.⁶⁹ The reason for HRB’s response to TaxACT’s free product was made clear by the then-head of the digital division: “taxact is [REDACTED] and [is] a big concern for future market dynamics. . . . They must play a disrupter role.”⁷⁰

HRB’s competitive responses to TaxACT were not limited to its offering of a free product. For example, HRB brought in an internet marketing vendor to help craft its search term advertising strategy “because we are seeing changes in the search landscape from Turbo and TaxAct and need to respond accordingly.”⁷¹ In 2008, HRB’s Vice President of Marketing for its digital division recommended increasing its online advertising “[i]f we are going to compete aggressively against TaxAct and the ‘others.’”⁷² In fact, HRB even advertised on its website to TaxACT customers that “[i]f you’re using TaxACT®, now’s your chance to switch to H&R Block.”⁷³ These are but a few of the hundreds of documented examples of HRB formulating its

⁶⁸ Ex. 78 (HRB-DOJ-00187065, at 22).

⁶⁹ Ex. 79 (HRB-DOJ-01009830) [REDACTED].

⁷⁰ Ex. 80 (HRB-DOJ-00516176).

⁷¹ Ex. 81 (HRB-DOJ-50198834).

⁷² Ex. 82 (HRB-DOJ-00952577); *see also* Ex. 83 (HRB-DOJ-00510602, at 21); Ex. 84 (HRB-DOJ-00255294, at 30); Ex. 85 (HRB-DOJ-00008519); Ex. 86 (HRB-DOJ-00105026); Ex. 87 (HRB-DOJ-00364310); Ex. 88 (HRB-DOJ-00339950, at 25).

⁷³ Ex. 89 (2SS-MARKe-0060278).

pricing decisions,⁷⁴ improving its products,⁷⁵ increasing its marketing,⁷⁶ making changes to its websites,⁷⁷ and competing aggressively to attract customers from TaxACT.⁷⁸

Indeed, if the Court enjoins the transaction, there is no doubt that HRB will continue to compete aggressively against TaxACT. Right before signing the deal, HRB's CEO informed the HRB board of directors that, "[i]f we do not reach agreement with TaxAct, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁹

TaxACT also focused heavily on HRB as a primary competitor. As far back as 1999, TaxACT publicly claimed that "TaxACT is a [] direct competitor with TurboTax and [HRB's] TaxCut in the consumer market."⁸⁰ Internal TaxACT presentations reflected this sentiment as well, including its "Competitive Analysis: TY 2009," where TaxACT discusses HRB's product offerings.⁸¹ TaxACT also made pricing decisions,⁸² changed its marketing,⁸³ and competed

⁷⁴ See, e.g., Ex. 90 (HRB-DOJ-00170956) (simulating potential pricing scenarios for HRB's digital products against the prices of TurboTax and TaxACT).

⁷⁵ See, e.g., Ex. 91 (HRB-DOJ-00282548, at -55); Ex. 92 (HRB-DOJ-00012773, at -74); Ex. 93 (HRB-DOJ-00190106).

⁷⁶ See, e.g., Ex. 94 (HRB-DOJ-50496362, at -63).

⁷⁷ See, e.g., Ex. 95 (HRB-DOJ-50495449, at 10, 12).

⁷⁸ See, e.g., Ex. 96 (HRB-DOJ-50184789); Ex. 89 (2SS-MARKe-0060278); Ex. 97 (HRB-DOJ-00457538, at -39); Ex. 98 (HRB-DOJ-00347829); Ex. 87 (HRB-DOJ-00364310); Ex. 99 (HRB-DOJ-50030902); Ex. 100 (HRB-DOJ-00155381, at -82).

⁷⁹ Ex. 101 (HRB-DOJ-00007730, at -31).

⁸⁰ Ex. 102 (2SS-GRECe-0038547); see also Ex. 103 (2SS-GRECe-0038731) ("Our product, TaxACT, has been competing with TurboTax and [H&R Block's] TaxCut for the past four years.").

⁸¹ Ex. 104 (2SS-PETKe-0314664); see also Ex. 105 (2SS-GRECe-0024871, at 9); Ex. 106 (2SS-MRKTe-0103983, at 4, 7, 8).

⁸² See, e.g., Ex. 107 (2SS-PETKe-0136388); Ex. 108 (2SS-MARKe-0017599, at 1, 9).

⁸³ See, e.g., Ex. 28 (Dunn Dep. 306:8-307:20); Ex. 109 (2SS-MARKe-0012718) (formulating TaxACT's advertising strategy, which was based on an "attempt to [REDACTED]").

aggressively to attract customers from HRB.⁸⁴ And, in June of 2010, TaxACT even conducted a “brand analysis” in which it specifically compared its brand to those of its “Major competitors’ [] H&R Block At Home and TurboTax.”⁸⁵

B. Other Industry Participants and the Public Recognize the Competition Between HRB and TaxACT

HRB and TaxACT are not alone in believing they are in competition with one another and Intuit. Competitors, such as Intuit, also regularly monitored and responded to TaxACT,⁸⁶ which Intuit characterized as “one of the most aggressive competitors in the provision of Digital DIY tax preparation products.”⁸⁷ Indeed, Intuit makes it clear in its public filings with the SEC that it faces “intense competition from H&R Block . . . [and] TaxACT” whose “competing offers subject [Intuit] to significant price pressure.”⁸⁸ Other industry participants, including TaxSlayer, TaxHawk and CCH, also recognize that HRB and TaxACT compete with one another.⁸⁹ As Liberty Tax Service⁹⁰ in particular notes, “TaxACT has been a pricing constraint on H&R Block and Intuit and has prevented those two companies from dominating the digital DIY market.”⁹¹

Moreover, independent product reviewers also believe that HRB and TaxACT compete with one another. For example, reviews of products available during this past tax season noted that the products sold by Intuit, HRB and TaxACT are “the three leading programs,” and concluded that

⁸⁴ See, e.g., Ex. 28 (Dunn Dep. 181:9-185:13, Ex. 12).

⁸⁵ Ex. 110 (2SS-KINJe-0002225, at -29).

⁸⁶ See, e.g., Ex. 111 (INT-DOJ0018867, at 18, 39).

⁸⁷ Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 7).

⁸⁸ See Ex. 112 (Intuit Inc. 10-K for Fiscal Year Ending July 31, 2010, at 12).

⁸⁹ Ex. 113 (RHO-DOJ-000121 (TaxSlayer Decl.) ¶¶ 7-8); Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶¶ 10-11); Ex. 26 (WK-DOJ-000001 (CCH Decl.) ¶ 4).

⁹⁰ Liberty, in addition to its brick-and-mortar tax preparation business, offers the eSmartTax digital DIY tax preparation product. Ex. 24 (JTH-DOJ-000001 (Liberty Decl.) ¶ 3).

⁹¹ Ex. 24 (JTH-DOJ-000001 (Liberty Decl.) ¶ 8).

[f]or people with straightforward finances — a salary and some investment income, a mortgage and common deductions — any of the leading ones should work. All three — TurboTax, H&R Block at Home and TaxAct — use a question-and-answer format to guide you through your return and then plug your responses into the appropriate places on the I.R.S.’s many forms.⁹²

Like the media, industry analysts — who are tasked with providing expertise on an industry and its competitors — view HRB and TaxACT as digital competitors. J.P. Morgan, for example, in covering HRB’s acquisition of TaxACT, stated that the acquisition “[c]onsolidates the market to two main players now. In our August 2010 initiation, we noted the three main competitors in tax prep software were TurboTax, H&R Block at Home, and TaxAct.”⁹³ HRB’s own competitive monitoring reports, which it commissioned from Stax, Inc., entitled “Competitive Intelligence Monitoring Service,” identify both Intuit and TaxACT as HRB’s digital competitors.⁹⁴ Jeffries & Company provided its own opinion on the impact of consolidating these two players in the Digital DIY tax preparation market: “TaxACT was the deep discount vendor in the market, selling solutions at much lower prices than INTU or HRB. . . . We think if HRB ultimately consolidated the brands, it might actually be positive for aggregate market pricing dynamics over time (i.e. HRB could moderate the deep discount prices).”⁹⁵

III. HRB’s Acquisition of TaxACT

After a long history of aggressive competition between HRB and TaxACT that benefitted millions of taxpayers, HRB and TaxACT declared a truce on October 13, 2010, with a \$287.5

⁹² Ex. 114 (Gray, Tim, *Tasting Three Flavors of Tax Software*, The New York Times, dated Feb. 13, 2011, BU11, available at <http://www.nytimes.com/2011/02/13/business/yourtaxes/13review.html> (last visited July 30, 2011)); see also Ex. 115 (Rosenberg, Eva, *Five Top Online Tax-Prep Services*, MarketWatch, dated Jan. 28, 2011, available at <http://www.marketwatch.com/Story/story/print?guid=370EE742-2A61-11E0-A215-00212804637C> (last visited July 30, 2011)); Ex. 116 (Carroll, Sean, *Online Tax Prep Services*, PC Magazine, dated Apr. 14, 2011, available at <http://www.pcmag.com/article2/0,2817,2359077,00.asp> (last visited July 30, 2011)).

⁹³ Ex. 117 (HRB-DOJ-00134903).

⁹⁴ See, e.g., Ex. 118 (HRB-DOJ-00989633, at -33, -48, -55).

⁹⁵ Ex. 119 (HRB000210). When asked if he was aware of any analyst that took the position that HRB and TaxACT operated in separate value and premium markets, HRB’s head of its digital division, Jason Houseworth, could not identify a single example. Ex. 61 (Houseworth Dep. 281:15-282:14).

million payment to TaxACT's shareholders.⁹⁶ If the acquisition is permitted, HRB's 15.6% market share would be consolidated with TaxACT's 12.8% market share, thus leaving the combined company with over 28% of the market.⁹⁷ With Intuit's 62.2% market share,⁹⁸ the two companies would collectively control over 90% of the Digital DIY market. As HRB's Chief Information Officer remarked, the "[b]ottom line" of the acquisition "is we are stronger together, versus competing and losing share in a growing category."⁹⁹ The United States brought this antitrust suit on May 23, 2011 to permanently enjoin HRB from acquiring TaxACT. As the facts above make clear, the proposed acquisition would substantially lessen competition in the Digital DIY market in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

ARGUMENT

Section 15 of the Clayton Act authorizes courts to grant preliminary relief to prevent violations of the antitrust laws. 15 U.S.C. § 25. The purpose of preliminary relief is "to avoid the need for intrusive relief later, since even with the considerable flexibility of equitable relief, the difficulty of 'unscrambl[ing] merged assets' often precludes an effective order of divestiture." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008) (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n.5 (1966)). The preferred relief in merger litigation is a full stop injunction. *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1506-07 (D.C. Cir. 1986).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Gordon v.*

⁹⁶ Ex. 120 (TA 3d-1).

⁹⁷ See Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part IV); Ex. 27 (HRB-DOJ-00012327).

⁹⁸ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part IV); Ex. 27 (HRB-DOJ-00012327).

⁹⁹ Ex. 122 (HRB-DOJ-00012401).

Holder, 632 F.3d 722, 724 (D.C. Cir. 2011). Where, as here, the United States seeks to enjoin an antitrust violation, “irreparable harm [] should be presumed.”¹⁰⁰ Thus, preliminary relief should be granted where “the Government has shown a reasonable likelihood of success on the merits and whe[re] the balance of equities tips in its favor.” *United States v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980).

In assessing the reasonable likelihood of success, the Court’s task is not to make a final determination on whether the proposed acquisition violates Section 7, but rather to make only a preliminary assessment of the acquisition’s impact on competition. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1070-71 (D.D.C. 1997). To make the sufficient showing, “it is well settled” that the United States need only show “a reasonable probability” that the proposed acquisition would substantially lessen competition. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998).

“The principal public equity weighing in favor” of injunctive relief “is the public interest in effective enforcement of the antitrust laws.” *FTC v. H.J. Heinz Co.*, 246 F.3d 703, 726 (D.C. Cir. 2001). In contrast, private equities are afforded “little weight.” *Id.* at 727 n.25. Where the United States shows a reasonable likelihood of success, “a countershowing of private equities alone would not suffice to justify denial of a preliminary injunction barring the merger.” *Id.*

Because HRB’s proposed acquisition of TaxACT would eliminate a maverick in the Digital DIY market and substantially reduce competition, the United States has a substantial likelihood of succeeding on the merits of its claim.

¹⁰⁰ *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); see also *FTC v. Weyerhaeuser*, 665 F.2d 1072, 1082 & n.22 (D.C. Cir. 1981) (R.B. Ginsburg, J.) (holding Section 13(b) of the Clayton Act, expressly disavowing irreparable harm requirement where case was brought by FTC, was a codification of existing law, including in merger cases brought by the United States); *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 545 (E.D. Pa. 1969) (“The Congressional pronouncement in section 7 [of the Clayton Act] embodies the irreparable injury of violations of its provisions.”).

Under Section 7 of the Clayton Act, a merger is illegal “where in any line of commerce in any section of the country, the effect of such acquisition *may* be substantially to lessen competition or tend to create a monopoly.” 15 U.S.C. § 18 (emphasis added). Under the law, the Court is charged with assessing the future effects of an acquisition and, accordingly, its assessment necessarily concerns “probabilities, not certainties.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Thus, the United States need only show “that the merger create[s] an appreciable danger of [anticompetitive] consequences in the future.” *Heinz*, 246 F.3d at 719.¹⁰¹

Merger analysis typically involves the determination of (1) the relevant markets and (2) the transaction’s probable effect on competition in those markets. *See, e.g., FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000). Undue concentration and a significant market share in the relevant markets establish a presumption that the transaction is unlawful. *See United States v. Phila. Nat’l Bank*, 374 U.S. 321, 365-66 (1963); *Swedish Match*, 131 F. Supp. 2d at 166-67. Once the presumption is established, the burden of rebutting Plaintiff’s *prima facie* case shifts to Defendants. *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 613 (1974); *Whole Foods*, 548 F.3d at 1035; *Swedish Match*, 131 F. Supp. 2d at 167. To satisfy their burden, Defendants must show that the evidence of concentration “give[s] an inaccurate prediction of the proposed acquisition’s probable effect on competition.” *Id.* (quoting *Staples*, 970 F. Supp. at 1083). If Defendants offer sufficient evidence to rebut the presumption, the United States must prove that the acquisition is likely to substantially reduce competition. *Heinz*, 246 F.3d at 715.

¹⁰¹ *See also Staples*, 970 F. Supp. at 1072 (“[T]he government need only show that there is a ‘reasonable probability’ that the challenged transaction will substantially impair competition.”); U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines (2010) § 1.0 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). While not binding on this Court, *PPG Indus.*, 798 F.2d at 1503 n.4, the Merger Guidelines have been considered by courts to be persuasive authority. *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 434 n.13 (5th Cir. 2008); *Cardinal Health, Inc.*, 12 F. Supp. 2d at 53.

I. The Relevant Product Market is Digital DIY Tax Preparation

A relevant product market in an antitrust case includes those “commodities reasonably interchangeable by consumers for the same purposes.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). More specifically, the pivotal question in product market definition is whether a price increase in the proposed market would “drive [enough] consumers to an alternate product” to render such a price increase unprofitable. *Whole Foods Mkt.*, 548 F.3d at 1038. To answer that question, courts frequently apply the hypothetical monopolist test from the U.S. Dep’t of Justice and Fed. Trade Comm’n, Horizontal Merger Guidelines (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (“Merger Guidelines”), and ask whether a profit-maximizing monopolist likely would impose a “small but significant and nontransitory” price increase on at least one product sold by the merging firms. *See, e.g., Whole Foods Mkt.*, 548 F.3d at 1038; *Staples*, 970 F. Supp. at 1076 n.8; *see also* Merger Guidelines § 4.1.1.

Digital do-it-yourself tax preparation products for the preparation of U.S. federal and state individual tax returns (referred to herein as “Digital DIY”) is a relevant product market. The market is no larger than Digital DIY products because consumers view neither unassisted tax preparation nor hiring tax professionals as reasonable alternatives to Digital DIY products. And the product market is no smaller than Digital DIY because all Digital DIY products provide similar functionality, are reasonably interchangeable, and compete with one another. A hypothetical Digital DIY monopolist could impose a small but significant price increase for the products.

Courts also rely on various practical indicia to assess the appropriate market definition, *Brown Shoe Co.*, 370 U.S. at 324-28, including “the nature of the products” that the merging parties principally sell, “the outlets they employ” to distribute their product to the end-user, “how

the market is perceived” by the companies themselves, *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987), and public or industry perception of those markets. *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986) (“[P]ublic recognition . . . of the [market] as a separate economic unit matters because we assume that economic actors usually have accurate perceptions of economic realities.”). Because market definition can be a “highly technical economic question,” *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991), courts also regularly look to expert testimony to define the scope of, and delineate the participants in, a relevant product market, *see, e.g., Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905, 2008 WL 73689, at *10 (N.D. Cal. Jan. 5, 2008).

Here, Defendants’ admissions as to their own perception of the market establish that the relevant market is all Digital DIY products and not some recently concocted subset of “premium” and “value” products. Our expert’s similar conclusion leaves no doubt that the relevant market is Digital DIY products.

A. Digital DIY Products are Not Reasonably Interchangeable with Unassisted Tax Preparation and Professional Tax Preparation

Digital DIY products greatly simplify the tax return process compared to unassisted preparation, such as the “pen-and-paper” method.¹⁰² Digital DIY products walk customers through an easy-to-understand interview process that uses layman’s terms. They request

¹⁰² Pen-and-paper includes both tax preparation by hand, and preparation with the IRS’s free file fillable forms and any state equivalents. Free file fillable forms are simply electronic versions of paper tax forms, allowing individuals the ability to fill out their tax returns manually on the computer. *See* Ex. 123 (*Free File Fillable Forms*, available at <https://www.freefilefillableforms.com/FFA/Gateway/FED.htm> (last accessed July 30, 2011)) (“These online forms are electronic versions of paper IRS tax forms.”). Because free file fillable forms do not offer any of the advantages of Digital DIY products, such as guidance and generally understandable instructions, they are more appropriately categorized as unassisted tax preparation. *See* Ex. 124 (*Free File Fillable Forms: Frequently Asked Questions*, available at <http://www.irs.gov/efile/article/0,,id=226829,00.html> (last accessed July 30, 2011)) (“The Fillable Forms option is the tool for you if you are comfortable filling out tax forms and schedules without software help. This FREE forms-based program provides you with an experience comparable to paper forms . . .”).

information customers might not otherwise realize was relevant (such as information for certain tax deductions), perform and error check necessary calculations, and fill in the appropriate tax forms. Digital DIY customers need not comprehend the tax code, know which forms to file, or understand how to complete them. For most taxpayers, filing tax returns unassisted is a much more complicated, time-consuming, and error-prone process than using Digital DIY products.¹⁰³

In addition, as Russ Smyth, HRB's then-CEO, explained in June 2010, the number of "pencil-and-paper" taxpayers "is diminishing pretty quickly, and . . . there is maybe another three or so years left before there will be very, very few pencil and paper users."¹⁰⁴ Defendants' internal documents and communications reflect little, if any, concern that consumers would switch to pen-and-paper in response to an increase in Digital DIY prices. Finally, industry executives, participants, and empirical evidence make clear that unassisted tax preparation is not in the same product market as Digital DIY products.¹⁰⁵ As a result, too few consumers would switch to pen-and-paper to prevent a small but significant non-transitory increase in price for Digital DIY goods.

Having considered the market conditions, Dr. Warren-Boulton has also concluded that unassisted tax preparation is not in the same product market as Digital DIY products.¹⁰⁶ Dr. Warren-Boulton bases this conclusion in his expert report on several different factors. First, he notes the shift of a significant number of taxpayers over the past several years from pen-and-paper to Digital DIY products, suggesting that this method of tax preparation does not pose a

¹⁰³ Ex. 125 (TA 4c-9, at 6).

¹⁰⁴ Mr. Smyth has also recognized that, rather than customers shifting from pen-and-paper, "more of the growth of the category is going to have to come from [H&R Block] stealing share, from other competitors." Ex. 126 (HRB-DOJ-00138815, at -27).

¹⁰⁵ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Parts III.C.i & iii). Smaller Digital DIY providers believe that pen-and-paper is not viewed as a reasonable substitute for their products. *See, e.g.*, Ex. 113 (RHO-DOJ-000121 (TaxSlayer Decl.) ¶ 9).

¹⁰⁶ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.i).

competitive constraint on Digital DIY products.¹⁰⁷ He also highlights the testimony of industry executives stating that they do not perceive any competitive threat to Digital DIY products from pen-and-paper.¹⁰⁸ Next, Dr. Warren-Boulton recognizes that, to the extent switching occurs between these two methods of tax preparation, it occurs often due to changes in the complexity of an individual's tax return, rather than for competitive reasons such as price.¹⁰⁹ Finally, Dr. Warren-Boulton noted that changes in the price of Digital DIY products over time do not correspond to switching by taxpayers between the tax preparation methods, again failing to indicate that these products are in the same product market.¹¹⁰

Similarly, hiring professional tax preparers, such as certified public accountants (CPAs) and tax professionals in HRB's brick-and-mortar stores, is not a reasonable substitute for Digital DIY products and is not in the same product market.¹¹¹ Professional tax preparation provides customers with one-on-one professional tax guidance, which is generally unavailable with Digital DIY products. Professional tax preparation is therefore typically much more expensive than Digital DIY products, and consumers are unlikely to switch to assisted tax preparation in sufficient numbers to prevent a small but significant non-transitory increase in price for Digital DIY products.¹¹² Indeed, HRB has consistently made clear both publicly and internally that assisted tax preparation and Digital DIY products do not compete with one another.¹¹³ As HRB explained in an internal presentation, "online is not pulling incrementally from assisted. Rather

¹⁰⁷ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.i.1).

¹⁰⁸ *Id.*

¹⁰⁹ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.i.2).

¹¹⁰ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.i.3).

¹¹¹ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.ii).

¹¹² Consumers sometimes switch from Digital DIY to professional assistance, though usually because of a change in life events that has made their taxes more complicated (e.g., buying a home or having a child), rather than the prices of the products. Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.ii.3).

¹¹³ See, e.g., Ex. 127 (Bennett Dep. 98:9-99:9); Ex. 61 (Houseworth Dep. 35:1-36:3).

than creating a shift in DIY vs. assisted, online is stealing from other DIY options.”¹¹⁴

Dr. Warren-Boulton has also concluded that assisted tax preparation is not in the relevant product market with Digital DIY products.¹¹⁵ He again bases this conclusion on several factors. The first is that HRB and other industry players, through their testimony and ordinary business documents, have frequently come to the conclusion that Digital DIY products are not taking share from assisted tax preparation products, and that assisted is therefore not a competitive constraint on Digital DIY products.¹¹⁶ And as with pen-and-paper, Dr. Warren-Boulton recognizes both that switching between Digital DIY products and assisted products occurs primarily due to changes in the complexity of an individual’s tax return,¹¹⁷ and that absence of a correlation between consumer switching across Digital and assisted and the relative changes in price of these products suggest that they are not in the same product market.¹¹⁸

B. All Digital DIY Products Compete in the Same Product Market

The “boundaries of the relevant market must be drawn . . . to recognize competition where, in fact, competition exists.” *Brown Shoe Co.*, 370 U.S. at 326; *see also Heinz*, 246 F.3d at 718 (product market definition “focuses solely on demand substitution”). Defendants’ business decisions, internal documents, and public statements make clear that HRB and TaxACT compete in a single Digital DIY product market. Thus, the relevant product market is Digital DIY products.

As discussed above, TaxACT and HRB have engaged in vigorous head-to-head competition for years. Both companies have identified each other as competitors, made pricing

¹¹⁴ Ex. 128 (HRB-DOJ-00359542, at 9).

¹¹⁵ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.ii).

¹¹⁶ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.ii.1).

¹¹⁷ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.ii.2).

¹¹⁸ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.ii.3).

decisions, improved their products, and increased their marketing in efforts to attract one another's customers. TaxACT's innovative and aggressive price cutting has reduced HRB's Digital DIY market share while causing price compression across all Digital DIY products.¹¹⁹ HRB's acquisition of TaxACT aims to undo this damage: HRB views this acquisition as a "[d]efensive play by capturing [TaxACT's] nearly [REDACTED] million users with [REDACTED] retention."¹²⁰ Simply put, HRB is seeking to acquire TaxACT *because* they compete in the same product market.¹²¹

Indeed, TaxACT competes with HRB because, to quote Tony Bowen, who led HRB's acquisition team, the two firms' "products are [REDACTED] in functionality."¹²² TaxACT's President, Lance Dunn, agreed, saying that his company's "software and online products are equal or superior to either those of TurboTax or H&R Block."¹²³ It is not surprising, then, that there are no observable differences in characteristics between the customers of various Digital DIY providers, such as adjusted gross income, tax complexity, or age.¹²⁴

Thus, while TaxACT's Digital DIY products are less expensive than those of HRB and Intuit, their quality is just as good. TaxACT's lower prices reflect its innovative and aggressive competition, by offering products with "functionality [REDACTED]" than the products offered by "TurboTax, or any other competitors in the space."¹²⁵ By offering such high-quality

¹¹⁹ Ex. 20 (HRB-DOJ-01003395, at 12).

¹²⁰ Ex. 129 (HRB-DOJ-00576608, at 6).

¹²¹ Accordingly, as part of its acquisition due diligence, H&R Block measured TaxACT's market share using a single Digital DIY market with all Digital DIY providers. *See, e.g.*, Ex. 130 (HRB-DOJ-00918192, at -289) ("Why TaxAct vs. Other Online Products?"; comparing the total number of 2008 tax returns filed by all Digital DIY providers, including Intuit, H&R Block, TaxACT, TaxHawk, and TaxSlayer).

¹²² Ex. 131 (HRB 30(b)(6) Dep. 123:17-22); *see also* Ex. 132 (HRB 4c-02, at 18).

¹²³ Ex. 28 (Dunn Dep. 152:20-153:12); *see also* Ex. 28 (Dunn Dep. 266:15-267:13; 303:13-20).

¹²⁴ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part V.A.iii).

¹²⁵ Ex. 131 (HRB 30(b)(6) Dep. 222:14-223:3); *see also* Ex. 104 (2SS-PETKe-0314664).

products with such aggressive pricing, TaxACT has caused “price compression” across all Digital DIY products.¹²⁶ With HRB, TaxACT, and other digital firms engaging in direct competition, the product market in this case is Digital DIY products.¹²⁷

Not surprisingly, HRB’s and TaxACT’s documents are confirmed by the empirical studies conducted by Dr. Warren-Boulton. For example, Dr. Warren-Boulton calculated a hypothetical Digital DIY monopolist’s critical loss for a 10% increase in price and compared that to the aggregate diversion ratio for each of the Big 3 firms. Based on this study, Digital DIY is a relevant product market.¹²⁸

C. Defendants’ Claimed Distinction Between “Value” and “Premium” Markets is Without Merit

Defendants claim that the transaction will not substantially lessen competition because HRB is in a “premium” segment of the market and TaxACT is in a separate “value” segment of the market.¹²⁹ This contention is without merit and is simply a construct for this case.

Throughout their many years of vigorous competition — starting in 2004 with TaxACT’s free-for-all FFA offer and continuing through 2010, when TaxACT offered free state e-filing through Staples — Defendants have recognized that their products compete in a single Digital DIY market. Defendants’ public statements, internal analyses and business decisions have been based on that understanding of the market. The fact that HRB and TaxACT have different strategies in appealing to consumers, such as different prices, does not mean that Defendants are not in competition. On the contrary, TaxACT itself recognized that its “two main *competitors*,

¹²⁶ Ex. 20 (HRB-DOJ-01003395, at 12).

¹²⁷ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.B).

¹²⁸ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part III.C.iii).

¹²⁹ Ex. 133 (Defs.’ Answer at 2-3). It is not clear to the United States what a “segment” of the market is.

Intuit and H&R Block, have [simply] followed significantly different [business] strategies.”¹³⁰

As TaxACT goes on to note, Intuit derives much of its revenue from its retail software sales, while HRB collects much of its revenue from its assisted preparation business.¹³¹ But both of TaxACT’s “main competitors” have chosen a business strategy of “charg[ing] premium prices for [their] tax preparation software solutions.”¹³² TaxACT has taken a different strategy in competing with these two companies: “offering best-of-breed products at lower prices than its peers.”¹³³ Regardless of their strategy, HRB, Intuit, and TaxACT all offer similar products to the same group of customers,¹³⁴ ultimately seeking to be more effective competitors in the Digital DIY market.

At its heart, Defendants’ argument that they compete in separate “value” and “premium” segments of the market is based entirely on the fact that HRB and TaxACT offer their products at different prices.¹³⁵ However, the Supreme Court has held that a price differential alone is insufficient to infer two separate product markets. “[P]rice is only one factor in a user’s choice between one [product] or the other. That there are price differentials between the two products . . . are relevant matters but not determinative of the product market issue.” *United States v. Cont’l Can Co.*, 378 U.S. 441, 455 (1964); *see also Brown Shoe Co.*, 370 U.S. at 326; *HDC Medical, Inc. v. Minntech Corp.*, 474 F.3d 543, 547-48 (8th Cir. 2007) (rejecting proposed product market where market definition was based solely on a “substantial price differential” between two

¹³⁰ Ex. 134 (2SS-CORPe-0001833, at -51) (emphasis added).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at -35.

¹³⁴ Ex. 61 (Houseworth Dep. 38:20-39:2); Ex. 127 (Bennett Dep. 115:12-19).

¹³⁵ *See, e.g.,* Ex. 61 (Houseworth Dep. 186:9-21) (“So if you lowered your price to match TaxACT’s . . . would that make it a Value brand? . . . The answer is yes. Because the Value brand is related to that 9.95 price. Any product that you tell me . . . that has that pricing structure, I would say is a Value brand.”).

products). Indeed, antitrust law expressly recognizes that “[p]roducts competing against one another in a differentiated product market may have widely different prices.” *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 42 (D.D.C. 2009) (internal quotation omitted). This is because inherent in the definition of a differentiated product market like Digital DIY tax preparation is that sellers of the product “compete along more dimensions than price.” *Id.* at 42 n.19 (internal quotation omitted). Thus, it is hardly surprising that Defendants’ own business documents, as opposed to their arguments in this case, recognize that each Defendant is a primary competitor of the other. Indeed, far from being in a distinct premium separate segment of the market, HRB internally admits that it sits “in the murky middle” in between both Intuit and TaxACT, both in terms of price and product features.¹³⁶

Only in 2010, when it became clear to HRB that its acquisition would face close antitrust scrutiny, did Defendants start referring to these separate “value” and “premium” markets. As noted above, on October 11, 2010 — a few days before the deal was announced — HRB’s Vice President for Communications, though not yet identifying these “value” and “premium” markets, began formulating how to describe the market: “Are we calling this the digital category or online category. I was thinking online category were [sic] the word of choice to get passed [sic] HSR approvals, so you’ll notice those changes within the docs.”¹³⁷

After the United States opened an investigation into the acquisition, Defendants repeatedly sought to articulate proposed market definitions that, though frequently inconsistent, had one common factor — each market definition indicated that the competition between HRB and TaxACT was limited or even nonexistent. In their November 2010 presentation to the United States, Defendants claimed that the Digital DIY market was separated into distinct

¹³⁶ Ex. 51 (HRB-DOJ-00902949, at 14).

¹³⁷ Ex. 11 (HRB-DOJ-50258582).

markets for “value” products (under \$25) and “premium” products (over \$25); that Intuit and HRB were the only providers of “premium” products; but that they, along with TaxACT, also operated in the highly competitive “value” market.¹³⁸ A few months later, Defendants contended that Digital DIY products should be separated into “free” and “paid” categories.¹³⁹ The next month, in a March 2011 presentation, TaxACT’s President, Lance Dunn, contradicted Defendants’ November presentation and claimed that “premium” *brands*, such as HRB, TurboTax, TaxBrain (with a 0.2% market share), and CCH’s CompleteTax (0.4% share), never offered “value” products and never competed with “value” brands, such as TaxACT and OnLine Taxes (0.3% share).¹⁴⁰ Even the free product offerings of these brands were not “value products,” but “a gateway to a premium product,” according to Mr. Dunn.¹⁴¹ Defendants have been unable, however, to explain what functional differences there are between value and premium products,¹⁴² let alone why Defendants have repeatedly referred to one another as competitors over the years if they do not compete.¹⁴³

HRB’s lawyers, as well as its executives, have been struggling to recast the market to support its claims in this case. When HRB released its most recent 10-K filing to its investors

¹³⁸ See Ex. 135, at 15.

¹³⁹ See Ex. 136, at 2.

¹⁴⁰ Share numbers come from Ex. 27 (HRB-DOJ-00012327). In his deposition, Lance Dunn disagreed with how the November presentation defined the market, saying that he believed several companies identified in the “value” market should instead be placed in the “premium” market. Ex. 28 (Dunn Dep. 23:4-10, 24:20-25:7).

¹⁴¹ Ex. 28 (Dunn Dep. 25:21-26:2).

¹⁴² Ex. 137, at 7-8. When asked what differentiates H&R Block and Intuit, both of which sell “premium” products, Mr. Houseworth insisted that his firm offers better [REDACTED]. Ex. 61 (Houseworth Dep. 235:4-11). But when asked what differentiates HRB from TaxACT, Mr. Houseworth again named better [REDACTED]. Ex. 61 (Houseworth Dep. 233:21-234:15). TaxACT actually has the ability to auto-import certain financial information. See Ex. 138 (Response of TA IX L.P. to the Request for Additional Information and Documentary Material Issued by the Antitrust Division of the Department of Justice, Feb. 11, 2011, Appendix 2.03).

¹⁴³ During his deposition, HRB CEO Alan Bennett, claimed that TaxACT is a “competitor,” but just not a “competitor of reference.” See, e.g., Ex. 127 (Bennett Dep. 141:9-22; 170:15-171:15).

five weeks ago, it included new language embracing the “value” and “premium” distinction. In prior years, the “Competitive Conditions” section of HRB’s 10-K contained standard language referring to competition with “a number of companies” and increasing competition due to, *inter alia*, “offers of free tax preparation services.”¹⁴⁴ When HRB released its most recent 10-K in June, these passages no longer appeared. Instead, a new passage was included for the first time referring to competition “among value and premium products.”¹⁴⁵ [REDACTED]

[REDACTED] ¹⁴⁶

Obviously, Defendants’ current argument about “value” and “premium” markets cannot be squared with the extensive pre-transaction record;¹⁴⁷ ultimately, the extensive competitive interactions between HRB and TaxACT documented in that record speak for themselves. A market definition that placed HRB and TaxACT in different markets would ignore the competitive dynamics of the Digital DIY market and, as a result, the substantial lessening of competition that would occur if HRB acquired TaxACT.

II. The Relevant Geographic Market is Worldwide

The relevant products, Digital DIY products, are used to prepare U.S. federal and state tax returns. Digital DIY products cannot be used to file tax returns for foreign jurisdictions, nor can similar products designed for foreign jurisdictions be used to prepare U.S. tax returns. However, Digital DIY products (which are often provided online) can be supplied from outside

¹⁴⁴ See, e.g., Ex. 13 (H&R Block 10-K for Fiscal Year Ending April 30, 2010, at 4); Ex. 139 (H&R Block 10-K for Fiscal Year Ending April 30, 2009, at 4).

¹⁴⁵ Ex. 12 (H&R Block 10-K for Fiscal Year Ending April 30, 2011, at 4).

¹⁴⁶ Ex. 140 (Defendant H&R Block, Inc.’s Response to Plaintiff’s Second Set of Interrogatories to Defendant H&R Block, Inc.).

¹⁴⁷ For example, the entire foundation of Defendants’ argument — that people choose to pay more for HRB’s products because of the brand’s reputation and features — is dubious given that as late as April 2010, HRB was creating internal presentations that made clear that HRB was [REDACTED]

the United States, and the customer base includes taxpayers who are in the U.S. and those who are filing U.S. tax returns from abroad. Thus, “the area of effective competition,” *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961), is worldwide. We do not understand Defendants to contest the validity of the proposed geographic market.

III. The Transaction is Likely to Result in Raised Prices and Lower Quality

A showing that a firm controls an “undue percentage share of the relevant market” establishes a “presumption that the merger will substantially lessen competition.” *Heinz*, 246 F.3d at 715. Mergers that significantly increase concentration “must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” *United States v. Phila. Nat’l Bank*, 374 U.S. at 363 (a merger giving one single firm 30% of the market and four firms 78% is “inherently likely to lessen competition substantially”).

Courts generally analyze the likely anticompetitive effects from a proposed acquisition using one of two frameworks: coordinated and unilateral effects.

Unilateral effects analysis examines whether the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of the competitive response from rival firms. *See, e.g., Swedish Match*, 131 F. Supp. 2d at 169. For a unilateral price increase to be profitable, the brands at issue need not be the closest substitutes for all consumers. *See Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law* ¶ 914 (“[U]nilateral effects theories do not require that the output of the two merging firms be the closest possible substitutes for one another.”). Instead, “[e]conomic theory [] suggests that [the acquiring firm] will raise prices as long as the profit gained by the higher prices of the [acquiring firm’s] products in addition to the profit diverted to the [acquired firm’s] brands is greater than the profit lost through diversion” to other suppliers. *Swedish Match*, 131 F. Supp. 2d at 169.

Coordinated effects refer to the tendency of “oligopolistic market structures” to result in “tacit coordination.” *Heinz*, 246 F.3d at 725. An acquisition is likely to result in coordinated interaction where: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct; and (3) there is a credible basis to conclude that the acquisition may enhance that vulnerability. Merger Guidelines § 7.1.

To assess whether either type of anticompetitive effects are likely, courts examine the “structure, history, and probable future” of the market in question.” *Brown Shoe*, 370 U.S. at 322 n.38. The first two are assessed primarily through fact evidence — predominantly the testimony of industry participants and company documents. *Weyerhaeuser Co.*, 665 F.2d at 1080. Assessments of the “probable future” of the relevant market rely primarily on economic analysis conducted by expert witnesses. *Id.* Both types of evidence in this case indicate that HRB’s acquisition of TaxACT will likely lead to higher prices and lower quality Digital DIY products for taxpayers. The Defendants’ documents, testimony from the Defendants and other industry participants, and the overall structure of the market are clear: Prior to the acquisition, Defendants engaged in substantial head-to-head competition that benefitted consumers, and if this transaction is allowed to go forward, that competition will not be replaced. The result will be higher prices and lower quality products for consumers. Dr. Warren-Boulton’s expert report comes to the same conclusion. The elimination of TaxAct – the market’s maverick – is likely to result in both HRB and Intuit raising prices.

A. The Challenged Acquisition is Presumptively Unlawful Because it Will Substantially Increase Concentration

A central concern of antitrust law and policy is that “increased concentration raises a likelihood of interdependent anticompetitive conduct.” *PPG*, 798 F.2d at 1503; *see also FTC v.*

Univ. Health, Inc., 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) (“Significant market concentration makes it easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.”). The proposed acquisition will significantly increase the already high level of concentration in the Digital DIY market. In 2010, the Big Three had 90% of the market — Intuit (62.2%), HRB (15.6%), and TaxACT (12.8%).¹⁴⁸ Market concentration as measured by the Herfindahl-Hirschman Index (“HHI”) is currently 4,291, indicating a highly concentrated market.¹⁴⁹

The proposed acquisition will give HRB and Intuit collectively 90% of the market.¹⁵⁰ It will increase the HHI by approximately 400, resulting in a post-acquisition HHI of 4,691. The merger should therefore be presumed to have anti-competitive effects. *See, e.g., Phila. Nat’l Bank*, 374 U.S. at 363; *Heinz*, 246 F.3d at 716 (3 to 2 merger that would have increased HHI by 510 points from 4,775 created by “wide margin” presumption of anticompetitive effects); *PPG*, 798 F.2d at 1502-03, 1506 (53% market share and post-merger HHI of 3,295 left “no doubt that . . . Commission [was entitled] to some preliminary relief”); *Swedish Match*, 131 F. Supp. 2d at 166-67 (60% market share and 4,733 HHI established presumption).

¹⁴⁸ See Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part IV); Ex. 27 (HRB-DOJ-00012327). 2010 is the most recent year for which accurate data on market shares and concentration currently is available. E-filing figures are used for purposes of calculating market share and concentration because they are the most accurate figures currently available industry-wide. See Ex. 21 (Newkirk Dep. 126:7-19) (stating that HRB-DOJ-00012327, which relies on IRS e-file numbers, “is the best estimate I would have to provide separate shares” for the Digital DIY providers).

¹⁴⁹ The HHI for a market is calculated by summing the squares of the individual market shares of all firms participating in the market. Under the Merger Guidelines, markets with an HHI above 2,500 are considered “highly concentrated.” Merger Guidelines at ¶ 5.3. In cases where the post-merger market is “highly concentrated,” and the acquisition would result in an increase of more than 200 points in the HHI, the transaction is “presumed to be likely to enhance market power.” *Id.* ¶ 5.3.

¹⁵⁰ As HRB’s head of Digital Tax, Jason Houseworth explained, “[w]ith TaxACT off the market, all players remaining [except Intuit and H&R Block] make up less than 10% of the Digital share.” Ex. 142 (HRB-DOJ-00012326).

B. Removing TaxACT From the Market Would End Aggressive Head-to-Head Competition With HRB that Has Benefitted Consumers

Beyond the presumptions that arise from the HHI calculations, the acquisition of TaxACT would eliminate head-to-head competition between these two companies, leading to higher prices and lower-quality Digital DIY products. As discussed above, HRB and TaxACT have fiercely competed over the past several years, resulting in substantial benefits for consumers, including their current ability to prepare and e-file their federal tax returns for free. With this acquisition, HRB is specifically considering actions that would reverse those benefits, including using TaxACT to [REDACTED],¹⁵¹

In his analysis of the proposed transaction, Dr. Warren-Boulton has concluded that eliminating the head-to-head competition between HRB and TaxACT will likely result in higher prices and lower quality Digital DIY products. In particular, HRB will have the independent incentive to raise prices of its Digital DIY products by a significant amount if it acquires TaxACT.¹⁵² Intuit will likely respond by increasing its own prices, providing HRB with an even greater incentive to raise prices or lower the quality of its Digital DIY products even further.¹⁵³ Based on Dr. Warren-Boulton's merger simulation analysis, the combined HRB/TaxACT and Intuit will raise prices, likely resulting in an aggregate loss to consumers, before offsetting for any claimed efficiencies, of tens of millions of dollars annually.¹⁵⁴ This amount does not take into account the loss to consumers associated with the elimination of TaxACT as a maverick, including the value of a robust free product offering, or other coordinated effects of the merger.

¹⁵¹ Ex. 143 (HRB-DOJ-50819576).

¹⁵² Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part V.A.v.2).

¹⁵³ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part V.A.v.3).

¹⁵⁴ *Id.*

C. The Acquisition of TaxACT Will Eliminate a Maverick

As courts have recognized, an “important consideration when analyzing possible anti-competitive effects” is whether the acquisition “would result in the elimination of a particularly aggressive competitor in a highly concentrated market.” *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 47 (D.D.C. 2002) (quoting *Staples*, 970 F. Supp. at 1083). HRB’s acquisition of TaxACT would eliminate the driving force behind every major competitive development in the Digital DIY market over the past seven years, leaving two incumbent companies to control almost 90% of the Digital DIY market.

As described above, since 2004, TaxACT has been the “tax industry maverick”¹⁵⁵ and a “catalyst for change”¹⁵⁶ in the Digital DIY market. Intuit has characterized TaxACT as “one of the most aggressive competitors in the provision of digital DIY tax preparation products.”¹⁵⁷ And HRB referred to TaxACT’s conduct on multiple occasions as having a “disrupt[ive]” effect on the Digital DIY market,¹⁵⁸ by [REDACTED]¹⁵⁹

Defendants are already considering the possibility of reducing the impact of TaxACT’s maverick behavior. Although Defendants have claimed that both brands would be maintained, one option proposed to HRB is to [REDACTED]

[REDACTED]¹⁶⁰ In addition, because of the FFA rules, at least one brand

¹⁵⁵ Ex. 3 (2SS-GRECe-0028581, at -83).

¹⁵⁶ Ex. 4 (2SS-MARKe-0083230, at 18).

¹⁵⁷ Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 7).

¹⁵⁸ See, e.g., Ex. 57 (HRB-DOJ-00251349, at 6); Ex. 35 (HRB-DOJ-00912870, at -71).

¹⁵⁹ Ex. 144 (HRB-DOJ-00529134, at -41).

¹⁶⁰ Ex. 55 (Grief Dep. 317:16-318:16). (TaxACT’s management is slated to take control of HRB’s digital management if the transaction goes through. Ex. 131 (HRB 30(b)(6) Dep. 55:22-56:6)).

would have to be removed from the FFA website, [REDACTED].¹⁶¹ These examples are only hints of the likely effects of the transaction. Even without access to these statements, Jeffries & Company, an industry analyst, predicted the likely consequences of pulling TaxACT off the market: HRB will finally have the ability to “moderate the deep discount prices.”¹⁶² Both HRB and the public have recognized that pulling TaxACT off the market will finally give HRB the opportunity to “eliminate the [TaxACT] brand to regain control of industry pricing and avoid further price erosion.”¹⁶³

This evidence is supported by economic theory and market data. Dr. Warren-Boulton notes that the opportunity cost of a robust free federal tax form product is significantly higher for HRB and Intuit than it is for TaxACT. Thus, TaxACT has a greater incentive to aggressively sell free federal form units than do HRB or Intuit. The economic theory is supported by HRB data [REDACTED]

[REDACTED].¹⁶⁴ TaxACT’s opportunity cost in [REDACTED] is significantly less and thus an independent TaxACT has a greater incentive to promote free federal units. Accordingly, Dr. Warren-Boulton believes the merger “will threaten the benefits consumers have already gained as well as benefits consumers may receive in the future from [TaxACT] . . . because there will no longer be a firm in the market to play the role of the market maverick.”¹⁶⁵

¹⁶¹ Ex. 28 (Dunn Dep. 60:4-17).

¹⁶² Ex. 119 (HRB000210).

¹⁶³ Ex. 16 (HRB-DOJ-00319468, at 20).

¹⁶⁴ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part VI.E.i.2).

¹⁶⁵ Ex. 121 (Expert Report of Dr. Fredrick Warren-Boulton, Part VI.E, at 68).

D. The Acquisition Will Increase the Likelihood of Actual or Tacit Collusion Between HRB and Intuit

This acquisition would give two firms — Intuit and HRB — 90% of the market for Digital DIY products. Such significant market concentration makes it “easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.” *United States v. Rockford Mem’l Corp.*, 898 F.2d 1278, 1282-83 (7th Cir. 1990) (Posner, J.) (quoting *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986)); *see also Univ. Health*, 938 F.2d at 1218 n.24. And “[w]ith only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom.” *CCC Holdings*, 605 F. Supp. 2d at 67.

HRB executives quickly saw that buying TaxACT would change incentives in the market. As one HRB executive observed, Intuit and HRB would have significant incentives to raise prices and no longer increase the quality of their products in the absence of the industry maverick: “Intuit and HRB together would have 84% of the digital market and we both obviously have great incentive to keep this channel profitable. Other potential TA purchasers could decide to cut their prices even further to see if they could make large market share gains & build short-term profitability by ‘winning the race to the bottom.’”¹⁶⁶ Another HRB executive agreed: “One could also argue that there is value in taking control of this ‘segment’ by not encouraging a race to free, which Intuit would have no interest in doing, and therefore has value to HRB by preventing it through the acquisition.”¹⁶⁷ HRB’s Chief Information Officer summed up the advantages of the acquisition for his company: “Bottom line is we are stronger together,

¹⁶⁶ Ex. 18 (HRB-DOJ-00355217).

¹⁶⁷ *Id.*

versus competing.”¹⁶⁸ In contrast to all of the benefits HRB could expect from the deal, its internal documents reflect a swift assessment of the benefits consumers could expect: “None.”¹⁶⁹

Indeed, post-acquisition, coordination between Intuit and HRB would be fairly simple. The companies already have ample opportunities to meet and communicate. The Digital DIY market has a fairly small number of products, with similar functionality, which are sold at a small number of price points. Furthermore, the current prices of Digital DIY products are available on the websites of the various providers,¹⁷⁰ allowing providers to monitor and enforce coordinated pricing. *See Heinz*, 246 F.3d at 724 (expressing concern that firms could use industry-wide scanner data to monitor coordination); *cf. CCC Holdings*, 605 F. Supp. 2d at 62-64 (assessing transparency of prices in industry); Merger Guidelines § 7.2. Indeed, HRB already closely tracks the prices offered by Intuit. As HRB CEO Alan Bennett explained, [REDACTED]

[REDACTED]¹⁷¹ More importantly, some internal HRB communications already suggest there have been attempts by HRB at coordination with Intuit.¹⁷²

Finally, the market for Digital DIY products provides little check on coordinated behavior because sales are made to millions of individual consumers making relatively small individual purchases. Because Digital DIY can only be used for a single tax year, consumers must pay for a new product for each tax season, resulting in tens of millions of yearly

¹⁶⁸ Ex. 122 (HRB-DOJ-00012401).

¹⁶⁹ Ex. 16 (HRB-DOJ-00319468, at 24).

¹⁷⁰ Pricing for retail software sold through third-party retailers is somewhat less transparent, as providers do not make public the wholesale price charged to the third-party retailers. However, providers can easily determine the retail price paid by consumers by, for example, visiting a Staples, reviewing a Staples circular, or monitoring the product prices on <http://www.staples.com>.

¹⁷¹ Ex. 127 (Bennett Dep. 216:18-19).

¹⁷² *See* Ex. 145 (HRB-DOJ-00187146) (e-mail chain in response to a TaxACT press release that highlighted its free-for-all offer on its website in light of the recent FFA restrictions; one of the H&R Block executives who later became head of digital asked: “should you send this to some retailers and say we hope TT [TurboTax] doesn’t respond? It could be nice to send to the buyer at OD [presumably, Office Depot] as an educational/info piece”; another H&R Block executive responds: “Yes, I’ll send it out and a little note educating them....”).

transactions. Thus, there are no powerful buyers of Digital DIY who can constrain the ability of Intuit and HRB to raise prices, and the benefits of departing from a collusive agreement in any single transaction are likely to be small relative to the potential costs. The risk of collusion is therefore significant. *See Cardinal Health*, 12 F. Supp. 2d at 61 (“Given the large number of customers and the interchangeability of contracts, it is unclear just how important each individual customer, particularly each individual small to medium-sized customer, is to the Defendants.”); Merger Guidelines at ¶ 7.2.

IV. Defendants Cannot Rebut the United States’ Case Through Claims of Easy Entry or Efficiencies Arising from the Transaction

By proving that the acquisition will increase concentration significantly in the Digital DIY market, the United States establishes its *prima facie* justification for injunctive relief. *See Heinz*, 246 F.3d at 716 (likelihood of success demonstrated by showing that market concentration would increase substantially). Defendants therefore bear the burden of production to rebut this presumption of anticompetitive effects. *Id.* at 715. As discussed above, the evidence of increasing concentration in the relevant market is compelling, which increases the quantum of evidence Defendants are required to demonstrate in order to rebut the presumption. *Id.* at 725 (“The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully.”). Defendants cannot make this showing.

A. Obstacles in the Digital DIY Market Prevent Companies from Sufficiently Entering or Expanding to Prevent Anticompetitive Harm

Entry by new firms or expansion by existing firms will not defeat an acquisition’s anticompetitive effects unless that entry or expansion is likely to occur in a timely manner and is sufficient to deter those anticompetitive effects. *See Cardinal Health*, 12 F. Supp. 2d at 55 (adopting “timely, likely, sufficient” test). In order for entry to be likely, it must be profitable and at a sufficient scale to replace the competition lost by the acquisition. Merger Guidelines §

9.2. There are substantial barriers to entry by new firms and expansion by existing firms, and therefore HRB and Intuit need not fear that timely entry or expansion would make a price increase unprofitable. *See Heinz*, 246 F.3d at 717 n.13.

Barriers To Entry. As TaxACT President Lance Dunn explained, “several attributes of the tax preparation market create natural barriers to entry. The highly complicated nature of dynamic tax rules and regulations make it an exceedingly specialized field and difficult for new vendors to provide solutions quickly.”¹⁷³ But even for companies with the necessary technology and tax expertise, entry and expansion are difficult and take a long time, as success requires “not only good tax preparation functionality but also a well-known brand and a good reputation for products that allow individuals to prepare tax returns easily and accurately.”¹⁷⁴ And, as TaxACT recognized, taxpayers will not use a Digital DIY product unless they have “confidence that sensitive data is being handled with care and that returns are processed in a secure, error-free and timely manner.”¹⁷⁵ *See, e.g., Rebel Oil v. Atl. Richfield*, 51 F.3d 1421, 1439 (9th Cir. 1995) (“[A] main source of entry barriers” is “entrenched buyer preferences for established brands.”).

“Developing a good reputation takes years of consistently good performance, and developing a well-known brand takes years of significant marketing expenditures.”¹⁷⁶ An important method of developing this reputation, “word-of-mouth referrals are one of the primary drivers of new customers [and] are one of the most important aspects” of a Digital DIY provider’s marketing.¹⁷⁷ But it is “very challenging for a digital self-preparation tax business to

¹⁷³ Ex. 38 (2SS-CORPe-0002404, at -19); Ex. 28 (Dunn Dep. 507:21-508:17); *see also* Ex. 134 (2SS-CORPe-0001833, at -44); Ex. 28 (Dunn Dep. 503:4-13, 503:14-504:4; 504:5-12; 506:1-19). *See CCC Holdings*, 605 F. Supp. 2d at 49 (recognizing need for specialized knowledge as significant barrier to entry).

¹⁷⁴ Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 27).

¹⁷⁵ Ex. 125 (TA 4c-9, at 12).

¹⁷⁶ Ex. 113 (RHO-DOJ-000121 (TaxSlayer Decl.) ¶ 13); *see also* Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 27).

¹⁷⁷ Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 27); *see also* Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 13).

build a strong reputation through word-of-mouth referrals if its existing customer base is small.”¹⁷⁸ In other words, the very fact that a company is a new entrant or a fringe competitor, with a small or non-existent customer base, makes it difficult for that company to grow quickly.

HRB itself concluded that new entry into the Digital DIY market is very difficult and would take many years to gain a substantial amount of share. HRB executives considered and rejected a proposal [REDACTED]

[REDACTED]¹⁷⁹ Rather, HRB concluded that “[t]he only way to guarantee profitable short-term growth [REDACTED]

[REDACTED]”¹⁸⁰ According to HRB’s CEO, one of the “most important aspect[s]” of the TaxACT acquisition is that it will immediately “add [REDACTED] [million] more customers.”¹⁸¹ TaxACT likewise recognizes how difficult it is to “fill [its] shoes”: it would take “at least 11 years to replicate” TaxACT’s “experience and track record.”¹⁸² And unlike TaxACT’s experience, new entrants would be trying to expand in a market that has become significantly more mature since the time period when TaxACT captured its market share.¹⁸³ Marketing costs, in particular, have risen dramatically,¹⁸⁴ [REDACTED]¹⁸⁵

(“In order to substantially increase customers, digital self-preparation tax companies must build a strong reputation through, among other things, word-of-mouth referrals from existing customers.”).

¹⁷⁸ Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 13); *see also* Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 27) (“So, initially, when a customer base is relatively small, there is a chicken-and-egg problem in having any kind of significant word-of-mouth marketing effect. That’s because a small customer base can only provide a small amount of word-of-mouth marketing benefit.”).

¹⁷⁹ Ex. 146 (HRB-DOJ-00319797, at 20) [REDACTED].

¹⁸⁰ Ex. 130 (HRB-DOJ-00918192, at -270).

¹⁸¹ Ex. 148 (HRB-DOJ-00007735).

¹⁸² Ex. 28 (Dunn Dep. 507:11-20).

¹⁸³ *See, e.g.*, Ex. 149 (HRB-DOJ-00354158, at -59); Ex. 150 (HRB-DOJ-00347097, at -100).

¹⁸⁴ In fiscal year 2006, TaxACT spent \$ [REDACTED] million in marketing. By fiscal year 2011, TaxACT’s marketing budget had risen to over \$ [REDACTED] million. *See* Ex. 151 (Defendants 2SS Holdings, Inc. and TA IX L.P. Response to Plaintiff’s First Set of Interrogatories, at 6). H&R Block’s marketing budget for its digital business increased from approximately \$ [REDACTED] million in fiscal year 2005 to \$ [REDACTED] million in fiscal year 2011, *see* Ex. 152 (Defendant H&R

Barriers To Expansion. Current fringe players recognize the difficulty building share through increased marketing.¹⁸⁶ In contrast to the combined \$[REDACTED] million that the Big 3 spent on marketing in tax year 2009,¹⁸⁷ TaxHawk and TaxSlayer (the only other competitors with more than 0.5% of the market) spent only [REDACTED] and [REDACTED], respectively.¹⁸⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸⁹ [REDACTED]

[REDACTED]

[REDACTED]¹⁹⁰ [REDACTED]

[REDACTED]

[REDACTED]¹⁹¹

Block, Inc.'s Response to Plaintiff's Third Set of Interrogatories to Defendant H&R Block, Inc., Ex. 4), while Intuit's marketing budget [REDACTED] from [REDACTED] million to [REDACTED] million from tax year 2006 to tax year 2009, see Ex. 29 (DOJ-INT-000001 (Intuit Decl.) ¶ 38).

¹⁸⁵ Ex. 21 (Newkirk Dep. 434:19-435:2).

¹⁸⁶ Liberty and CCH, which each have less than [REDACTED] of the market, also recognize the significant barriers to expansion. Ex. 24 (JTH-DOJ-000001 (Liberty Decl.) ¶ 7); Ex. 26 (WK-DOJ-000001 (CCH Decl.) ¶ 4).

¹⁸⁷ [REDACTED]

¹⁸⁸ Ex. 25 (THK-DOJ-000001 (TaxHawk Decl.) ¶ 14); Ex. 113 (RHO-DOJ-000121 (TaxSlayer Decl.) ¶ 12). A significant portion of TaxSlayer's marketing expenditures were in the nontraditional channel of a NASCAR race car sponsorship.

¹⁸⁹ [REDACTED]

¹⁹⁰ [REDACTED]

¹⁹¹ See, e.g., [REDACTED]

As a TaxSlayer executive sums up the effect of these barriers: “I do not know of any way I could double the size of TaxSlayer in 1-2 years. . . . There simply is no silver bullet for a small company to grow market share quickly.”¹⁹²

B. Defendants’ Claimed Efficiencies Do Not Immunize This Anticompetitive Transaction

Defendants have claimed that efficiencies from the acquisition will outweigh any anticompetitive effects.¹⁹³ Courts, however, “have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies.” *CCC Holdings*, 605 F. Supp. 2d at 72. In a market like Digital DIY products, which is “highly concentrated” and “characterized by high barriers to entry,” Defendants “must provide proof of extraordinary efficiencies [] to rebut” Plaintiff’s *prima facie* case. *Id.* Defendants have the burden to prove efficiencies as an affirmative defense.¹⁹⁴

Tony Bowen, HRB’s designated witness on efficiencies, was unable to explain Defendants’ purported efficiencies. During his pre-complaint deposition, Mr. Bowen claimed that HRB is likely to achieve 100% of its estimated efficiencies. But in December of 2010 — months after the transaction was announced — Mr. Bowen told HRB’s CFO that the company was most likely to achieve only 75% of those efficiencies.¹⁹⁵ Additionally, more than [REDACTED] of these efficiencies were predicted to arise from the integration of HRB and TaxACT’s [REDACTED] platforms, but Mr. Bowen admitted during his deposition that the companies had

¹⁹² Ex. 113 (RHO-DOJ-000121 (TaxSlayer Decl.) ¶ 13).

¹⁹³ Ex. 133 (Defs.’ Answer ¶ 58); *see also* Ex. 157 (Memorandum of Points and Authorities in Support of Defendants’ Motion to Transfer Venue, at 4).

¹⁹⁴ Ex. 133 (Defs.’ Answer, at ¶ 58).

¹⁹⁵ Ex. 158 (HRB-DOJ-50264283); Ex. 159 (HRB 4c-01, at 2).

developed no specific [REDACTED] plans.¹⁹⁶ Also, Mr. Bowen said that TaxACT executives had estimated the incremental costs needed to achieve these efficiencies from [REDACTED], and he could not provide any understanding of how TaxACT came up with its results.¹⁹⁷

Defendants must show that the efficiencies are “merger specific to be cognizable as a defense” and that they “cannot be achieved by either company alone, because if they can, the merger’s asserted benefits can be achieved without the concomitant loss of a competitor.” *Heinz*, 246 F.3d at 722; *see also* Merger Guidelines § 10. [REDACTED]

[REDACTED]

[REDACTED]¹⁹⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁹⁹ *See Heinz*, 246 F.3d at 722 (D.C. Cir. 2001) (key issue is whether “Heinz could obtain the benefit of better recipes by investing more money in product development and promotion — say, by an amount less than the amount Heinz would spend to acquire Beech-Nut”). And as HRB’s then-CEO admitted to a board member, [REDACTED]

[REDACTED]²⁰⁰

Further, to the extent an efficiencies defense is viable, there must be a showing that the savings generated would be passed on to consumers. *See, e.g., Univ. Health*, 938 F.2d at 1223 (A defendant asserting efficiency defense “must demonstrate that the intended acquisition would

¹⁹⁶ Ex. 131 (HRB 30(b)(6) Dep. 60:8-61:18) [REDACTED] side of it needs significant project planning.”).

¹⁹⁷ Ex. 131 (HRB 30(b)(6) Dep. 65-69). The estimates were provided by TaxACT in the fall of 2010 and have not been updated. Ex. 131 (HRB 30(b)(6) Dep. 67:19-68:9).

¹⁹⁸ [REDACTED]

¹⁹⁹ Ex. 131 (HRB 30(b)(6) Dep. 144:6-145:9).

²⁰⁰ Ex. 161 (HRB-DOJ-00281972, at -73).

result in significant economies and that these economies ultimately would benefit competition and, hence, consumers”); *CCC Holdings*, 605 F. Supp. 2d at 74 (Defendant required to show that a “sufficient percentage of [] savings will accrue to the benefit of consumers to offset the potential for increased prices). HRB’s incentive post-acquisition will be to increase, not decrease its prices. Therefore, it can not show that any savings generated by the transaction will benefit its customers, and its efficiency defense can not rebut the United States’ *prima facie* case.

That Defendants’ efficiencies arguments are weak is not surprising. A month before Defendants announced the acquisition, a former head of HRB’s digital division explained that “Russ [Smyth, former CEO of HRB,] started this basically as a ploy to buy share...this isn’t really about there being any synergy at all with them.”²⁰¹

V. The Balance of Harms and the Public Interest Favor a Preliminary Injunction

Although the harm to competition from consummation of the merger would be irreparable, a preliminary injunction would not substantially injure HRB or TaxACT. This is not a hostile takeover, and Defendants can continue to operate as independent firms until a full trial on the merits can be held.²⁰² At most, Defendants can claim only a private harm to their respective businesses that may result from a delay in merging, in the unlikely event they ultimately prevail on the merits. But such private interests yield to the public interest in competition. *Cf. Heinz*, 246 F.3d at 727 n.25 (“Private equities do not outweigh effective enforcement of the antitrust laws. When the Commission demonstrated a likelihood of ultimate success, a countershadowing of private equities alone would not suffice to justify denial of a preliminary injunction barring the merger.” (quoting *Weyerhaeuser*, 665 F.2d at 1083)).

²⁰¹ Ex. 162 (HRB-DOJ-00277958). Mr. Bowen, the HRB employee designated for the efficiencies deposition, indicated that “synergies” and “efficiencies” are essentially the same thing and just a matter of semantics. Ex. 131 (HRB 30(b)(6) Dep. 248:22-249:2).

²⁰² The Government’s experience in merger cases is that Defendants who lose a preliminary injunction almost always abandon their deal, rather than litigate post-preliminary injunction.

Finally, there is a significant “public interest in effective enforcement of the antitrust laws.” *Heinz*, 246 F.3d at 726. Because the acquisition violates the antitrust laws, issuance of a preliminary injunction clearly serves the public interest. *See generally PPG*, 798 F.2d at 1508; *Weyerhaeuser*, 665 F.2d at 1083, 1085.

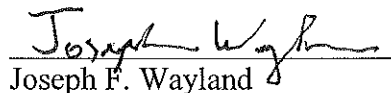
CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court grant the United States’ Motion for a Preliminary Injunction and prevent H&R Block from consummating its acquisition of TaxACT pending a full trial on the merits.

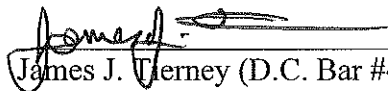
Dated this 1st day of August 2011.

Respectfully Submitted,

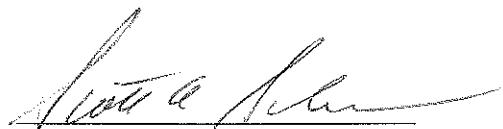
FOR PLAINTIFF UNITED STATES:



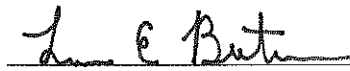
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I, Anthony D. Scicchitano, hereby certify that on August 1, 2011, I caused Plaintiff's Motion for a Preliminary Injunction, and all supporting documents, to be served by hand on the following counsel:

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