

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

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

*Defendants.*

Civil Action No. 11-00948 (BAH)  
Judge Beryl A. Howell

**REDACTED VERSION  
FOR PUBLIC FILING**

**JOINT PRE-HEARING STATEMENT**

In accordance with Rule 16.5(b) of the Local Rules of the United States District Court for the District of Columbia, this Court's Standing Order for Civil Cases, and this Court's July 6, 2011 Joint Scheduling and Case Management Order, the Parties herein provide their Joint Pre-hearing Statement.

**I. Statement of the Case**

This action has been brought by the United States in order to both preliminarily and permanently enjoin H&R Block, Inc., ("HRB") from acquiring 2SS Holdings, Inc. ("TaxACT"). HRB is a corporation organized and existing under the laws of Missouri, with its headquarters in Kansas City, Missouri. TaxACT, an entity partially owned by TA IX L.P. ("TA"), is a corporation organized and existing under the laws of Delaware and headquartered in Cedar Rapids, Iowa. TA is a limited partnership organized and existing under the laws of Delaware and headquartered in Boston, Massachusetts. The United States contends that the proposed acquisition would substantially lessen competition in the alleged market for digital do-it-yourself preparation products in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Defendants disagree with the United States' contention and alternatively contend that the proposed

transaction would be good for competition and consumers. This Court has subject matter jurisdiction to hear this suit under 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337, and 1345.

## II. Statement of Claims

The United States will prove at the hearing that there is a reasonable probability that HRB's proposed acquisition of TaxACT will substantially lessen competition, and thus violates Section 7 of the Clayton Act, 15 U.S.C. § 18. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998). HRB and TaxACT are the second- and third-largest digital do-it-yourself tax preparation ("Digital DIY") firms, respectively. The Digital DIY market is already highly concentrated, with the three largest firms—HRB, Intuit, and TaxACT—controlling over 90% of the market, resulting in an HHI of 4,291.<sup>1</sup> If the acquisition is approved, the HHI will increase by approximately 400. Thus, the acquisition is presumptively unlawful. *FTC v. H.J. Heinz Corp.*, 246 F.3d 706, 716 (D.C. Cir. 2001) (3 to 2 merger with HHI increase of 510 from 4,775 created presumption of anticompetitive effects by "wide margin"). HRB's acquisition of one of its "primary competitors," TaxACT, would further lessen competition in the Digital DIY market, resulting in higher prices, lower quality, and reduced innovation for consumers.

The United States will show HRB's acquisition of TaxACT has a reasonable probability of substantially lessening competition in the Digital DIY market in the following ways:

*Unilateral Effects.* The proposed acquisition is likely to result in anticompetitive unilateral price increases and quality reductions. Defendants are close competitors who have similar advertising messages and target similar customers. Both HRB and TaxACT aggressively compete for free and low-cost customers. Post-acquisition, HRB acknowledges that it intends to

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<sup>1</sup> 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.

stop competing on price and withdraw its own low-cost offerings from the Digital DIY market.

*Coordinated Effects and Elimination of a Maverick.* A central concern of antitrust law is that “increased concentration raises a likelihood of interdependent anticompetitive conduct.” *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986). The Digital DIY market is already vulnerable to coordination because: pricing can easily be monitored; transactions in the market are small and numerous; there are regular opportunities for communications between HRB and Intuit; and there is a history of prior attempts by HRB at coordination. Nonetheless, TaxACT has transformed the Digital DIY market through its innovative marketing strategies, low prices, improved quality, and introduction of an entirely free Digital DIY product. The Digital DIY market will become more conducive to coordination if TaxACT is no longer a market participant because the acquisition will “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).

Defendants maintain that these competitive harms should be tolerated because it has offered to fix TaxACT’s prices and offerings for three years. This “defense” is irrelevant to the issue of liability under Section 7 of the Clayton Act. *Cardinal Health, Inc.*, 12 F. Supp. 2d at 65. Moreover, this offer fails as a potential remedy. Customers would still lose the improved quality and greater innovation that they received from an aggressive, independent TaxACT. Further, it appears HRB intends to raise its prices post-acquisition, which is not addressed by the offer.

Entry and expansion is unlikely to replace TaxACT’s competitive presence in the Digital DIY market. Significant marketing expenditures, brand awareness, and a strong reputation are needed to become a meaningful competitor. Several industry participants have testified that building the brand recognition and consumer trust necessary to grow in the market requires tens of millions in dollars in advertising annually, and would take several years, if possible at all. The

proposed acquisition will only serve to make entry or expansion *more* challenging.

Nor is this anticompetitive transaction saved by Defendants' purported efficiencies. Defendants' efficiencies claims fail to meet the well-settled legal standard under Section 7, which requires Defendants to prove efficiencies that are "extraordinary" and "verifiable" after "rigorous analysis." *Heinz*, 246 F.3d at 721. Further, Defendants have not even attempted to show, as they must, that their purported efficiencies would be passed on to consumers. *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 74 (D.D.C. 2009).

### **III. Statement of Defenses**

As detailed in the Answer filed on July 7, 2011, Defendants deny the allegations set forth by Plaintiff. Specifically, Defendants state that the transaction will benefit consumers (rather than harm them as alleged) by resulting in lower prices and/or better services. Defendants further aver that Plaintiff's alleged market definition is incorrect and inconsistent with Plaintiff's own Merger Guidelines. Defendants aver that the properly defined relevant antitrust product market is all methods of tax preparation because other forms of tax preparation, such as assisted tax preparation and pen-and-paper, compete more closely with the digital products at issue than do other products within Plaintiff's proposed relevant market. Moreover, Defendants deny that the transaction would result in any anticompetitive unilateral effects (even assuming Plaintiff's alleged market) because H&R Block and TaxACT are not close substitutes and the merger is likely to lead to substantial, incremental, merger-specific efficiencies. Defendants deny that the transaction would result in any anticompetitive coordinated effects because TaxACT is not a unique "maverick" in the antitrust sense of the term and the industry exhibits significant structural barriers to coordination. Finally, Defendants aver that in the unlikely event that the transaction were to result in an anticompetitive price increase, several competing firms are

poised to expand and/or reposition to take advantage of such a profit opportunity and render that price increase unprofitable. Defendants further note that the Complaint fails to state a claim on which relief can be granted particularly because it asserts a market definition that includes federal and state filings, but does not allege market shares that take into account state filings. Defendants further assert that the contemplated relief would harm consumers by denying them the benefits of the transaction and the relief is thereby not in the public interest. Defendants further assert that the efficiencies resulting from this transaction, which could not be achieved absent this transaction, outweigh any and all claimed anticompetitive effects.

#### **IV. Witnesses to Be Called at Hearing**

##### ***A. Plaintiff's Witnesses***

##### **1. Mark Ernst**

Mr. Ernst is the former Chairman and Chief Executive Officer of HRB. He became CEO in January 2001 and Chairman of HRB's Board of Directors in September 2002 — positions he served in until December 2007. Mr. Ernst also is a former Deputy Commissioner of the IRS.

Mr. Ernst is expected to testify at the hearing that:

- While he was CEO at HRB, HRB viewed TaxACT as a serious digital competitor, and a threat to HRB's digital business;
- HRB was concerned that countering TaxACT's free online product with its own would cannibalize HRB's paid Digital DIY tax preparation product;
- Within HRB, the company never viewed its Digital DIY business as competing with forms of manual tax preparation, and never set its prices or adjusted its quality based on competition with manual tax preparation;
- Fillable forms are small, niche program that are not a constraint on Digital DIY;
- Digital DIY and assisted tax preparation are not in direct competition, but rather are complementary—with switching largely resulting from changes in a filers' tax complexity; and

- HRB and Intuit lobbied for restrictions to be placed on FFA offers after the FFA went free-for-all.

## **2. Alan Bennett**

Mr. Bennett was President and Chief Executive Officer of HRB from July 2010 to May 2011. Mr. Bennett also served as HRB's Interim Chief Executive Officer from November 2007 to August 2008. As HRB's CEO, Mr. Bennett negotiated the TaxACT acquisition. Mr. Bennett is expected to testify as to competition in the Digital DIY market during his tenure at HRB, as well as his rationale for attempting to acquire TaxACT. Mr. Bennett also is expected to testify as to the relationship between Digital DIY and assisted tax preparation.

## **3. Adam Newkirk**

Mr. Newkirk is the Director of Reporting and Corporate Analytics for HRB's Digital Tax business. Mr. Newkirk created a number of analyses in connection with this acquisition, and helped prepare analyses that were presented to the Department of Justice in connection with Plaintiff's investigation. As head of HRB's Corporate Analytics for its Digital business, Mr. Newkirk authored a number of documents that discuss and analyze TaxACT as a digital competitor, as well as documents that note that post-acquisition, HRB will have an increased ability to coordinate with Intuit. Those same documents discuss that a rationale for purchasing TaxACT was preventing another company from acquiring TaxACT and further lowering Digital DIY prices.

## **4. Lance Dunn**

Mr. Dunn is President and Founder of TaxACT. Mr. Dunn is expected to testify as to TaxACT's formation, product offerings, marketing and history of competition in the Digital DIY market. Mr. Dunn also is expected to testify as to TaxACT's plans regarding managing both

HRB's and TaxACT's digital businesses should this acquisition not be enjoined, as well as how TaxACT contributed to the efficiencies calculations for this transaction.

## **5. Phyllis Gattos**

Ms. Gattos is the Chief of Strategy and Innovation for the Electronic Tax Administration and Refundable Credits Office, within the Wage and Investment Division of the Internal Revenue Service. Ms. Gattos is expected to provide background testimony into the history and growth of e-filing, and the qualifications companies such as HRB and TaxACT must meet in order to become an authorized e-file provider.

*Defendants object to Plaintiff's planned use of Ms. Gattos as a witness at the hearing. In her deposition, Ms. Gattos confirmed that she has "no information that [she] believe[s] is relevant to the DOJ's case apart from what counsel has told [her]." (Gattos Dep. at 45:18-22). That fact alone is sufficient to exclude Ms. Gattos from serving as a witness at the hearing. Nevertheless, Ms. Gattos also confirmed that she has no personal knowledge of any of the relevant facts alleged by Plaintiff involving the IRS where she is employed; no personal knowledge regarding the Free File Alliance (FFA) or the Electronic Tax Administration (ETA) during the time period relevant to Plaintiff's allegations (Gattos Dep. at 89:11-90:13); and no personal knowledge of the current FFA competitors' offerings (or even their identities) or the IRS' current requirements for FFA participants (Gattos Dep. at 88:17-89:3; 111:8-14).*

## **6. Paul Mamo**

Mr. Mamo is Deputy Director of Submission Processing in the Wage and Investment Division of the Internal Revenue Service. In 2002, Mr. Mamo was one of the IRS individuals who worked to help create the Free File Alliance ("FFA"). Mr. Mamo is expected to provide

testimony regarding the formation of, and early history of, the FFA, including TaxACT's maverick behavior within the FFA.

**7. Dr. Rick Warren-Boulton (Expert)**

Dr. Warren-Boulton is a Principal at Microeconomic Consulting & Research Associates, Inc., and is the Plaintiff's primary economic expert. Dr. Warren-Boulton is expected to testify that Digital DIY tax preparation is the appropriate market definition in this case, and that manual filing and assisted tax preparation are not within the product market. Dr. Warren-Boulton also is expected to testify that the transaction, by eliminating a maverick in the Digital DIY market, will lead to both unilateral and coordinated anticompetitive effects.

**8. Dr. Mark Zmijewski (Expert)**

Dr Zmijewski is the Leon Carroll Marshall Professor of Accounting and Deputy Dean at The University of Chicago Booth School of Business; and Founder and Principal, Navigant Economics. Dr. Zmijewski is expected to testify that the vast majority of Defendants' claimed efficiencies are insufficiently verifiable and that Defendants have not shown that they can only be achieved through the proposed acquisition. Dr. Zmijewski is also expected to testify that HRB's history of failing to achieve efficiencies does not support its ability to realize its claimed efficiencies with the current transaction.

**9. Dr. Ravi Dhar (Expert)<sup>2</sup>**

Dr. Dhar is the George Rogers Clark Professor of Management and Marketing at the Yale School of Management; and Director of the Yale Center for Customer Insights. Dr. Dhar examined the 2011 litigation survey that Defendant's expert, Dr. Meyer, relied upon in her report for purposes of market definition. Dr. Dhar is expected to testify that the survey is

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<sup>2</sup> In accordance with Paragraph 5 of the Joint Scheduling and Case Management Order, Plaintiff also may call fact rebuttal witnesses at the hearing.



fundamentally flawed because it both fails to ask a question relevant to any issue in this proceeding, and never gives survey recipients the opportunity to respond “don’t know/no opinion.” Additionally, Dr. Dhar is expected to testify that the survey’s response rate is astonishingly low (never more than 2.5%), causing bias and further calling into question its reliability. Moreover, because it asks only closed-ended, leading questions, Dr. Dhar is expected to testify that the survey is not credible. Dr. Dhar also examined a 2009 HRB pricing simulator that Dr. Meyer relies upon in her report in analyzing customer switching and diversion. Dr. Dhar is unable to analyze, based on the information Defendants have provided, whether the survey methodology underlying the price simulator was properly designed and implemented and whether survey results are accurate, reliable and valid.

***B. Defendants’ Witnesses***

1. *Alan Bennett*, former CEO and President, H&R Block Management LLC, will provide testimony regarding his reasons as CEO for pursuing the acquisition of TaxACT, including but not limited to his belief that TaxACT would make H&R Block a stronger competitor and that the anticipated efficiencies will allow H&R Block to achieve significant cost savings. Mr. Bennett will also testify that his intent in pursuing the transaction was (a) to have the TaxACT brand remain separate from the H&R Block brand, (b) to [REDACTED], and (c) to have Lance Dunn, current President of TaxACT, run all of H&R Block’s Digital Business.

2. *Tony Gene Bowen*, Vice President and Chief Financial Officer, Digital Tax Solutions, HRB Tax & Tech Leadership LLC, will testify that TaxACT is being acquired so that H&R Block will have a tax preparation product in the low-end/value segment and in order to generate merger-specific efficiencies. He will also testify about the history of the transaction,

including when H&R Block considered purchasing TaxACT in 2009. He will further testify about his changing views over the course of due diligence about the TaxACT platform and the fact that he now believes (and believed as early as July 2010) that H&R Block will be able successfully to [REDACTED] and to thereby gain significant efficiencies. Mr. Bowen will also provide testimony regarding the details of the expected efficiencies and will explain why those efficiencies are transaction-specific.

3. *William Cobb*, CEO and President, H&R Block Management LLC, will provide testimony regarding his rationale as current CEO for continuing to pursue this transaction, including but not limited to his belief that TaxACT will make H&R Block a stronger competitor and that the anticipated efficiencies will allow H&R Block to achieve significant cost savings. He will also testify that his intent post-transaction is (a) to have the TaxACT brand remain separate from the H&R Block brand, (b) to [REDACTED], and (c) to have Lance Dunn, current President of TaxACT, run all of H&R Block's Digital Business. He will further testify that he believes that H&R Block competes against all forms of tax preparation in trying to obtain and retain customers.

4. *Lance Dunn*, President, 2<sup>nd</sup> Story Software, Inc., will testify that he understands that he is to head the Digital business of H&R Block post-transaction. He will explain his intentions in running that business, including his intent to maintain and even lower prices and his intent to innovate all products for which he has responsibility. Mr. Dunn will also testify about the merger-specific efficiencies and how he plans to make sure that those efficiencies are achieved. He will also provide background and details regarding TaxACT, including details about TaxACT's growth and expansion in the industry and about the fact that he perceives that TaxACT primarily competes against companies offering similarly priced

products and against the “Free” offers made by almost all online providers (regardless of the ultimate cost of their products). Mr. Dunn will also explain that he does not believe that TaxACT currently services as a maverick in the industry or that the “Free” offers made by TaxACT five and six years ago were particularly unique or game-changing for the industry. He will also testify regarding the growth of “Free” in the industry, its current prevalence, and his perception of its future. Mr. Dunn will also testify

5. *Cammie Greif*, Chief Marketing Officer, 2<sup>nd</sup> Story Software, Inc., will provide testimony regarding the companies against whom TaxACT has traditionally competed both for customers and marketing space. She will also testify generally about marketing in this industry as well as about the use of “Free” offers as a marketing technique, the prevalence of such offers, and their likely future.

6. *Jason Houseworth*, Senior Vice President, Digital Tax Solutions, HRB Tax & Tech Leadership LLC, will testify that post-transaction he understands that Lance Dunn will take over Mr. Houseworth’s position and that Mr. Houseworth will transition to a different part of H&R Block or will work with Mr. Dunn to ensure that the transaction is a success. Mr. Houseworth will also testify that the transaction will make H&R Block a stronger competitor in that it will give H&R Block a “fighter” brand and will allow H&R Block to [REDACTED]. He will also testify about his belief that those cost savings will be passed on to consumers in the form of cheaper and/or better products and services. He will also provide testimony about past pricing and how cost savings in the Digital business were passed on to consumers. Mr. Houseworth will further testify about the history of the transaction, including when H&R Block considered purchasing TaxACT in 2009.

7. *Dane Kimber*, Co-founder and Vice President, TaxHawk, Inc., will provide testimony regarding the history and business of his company TaxHawk, which operates several websites offering tax preparation products, including one called FreeTaxUSA. Mr. Kimber will testify that FreeTaxUSA offers customers the ability to prepare their federal taxes for no charge, and can service over 95% of e-filing taxpayers with its free federal product. Mr. Kimber will explain that if H&R Block decided to raise the price of TaxACT's product post-merger, or reduce the scope of TaxACT's free offering, FreeTaxUSA would be able to expand to serve dissatisfied customers. He will further testify that TaxHawk maintains a technology infrastructure that would allow it to expand its customer base [REDACTED] without any significant expenditures. Mr. Kimber will also testify about the robustness of the TaxHawk/FreeTaxUSA product, and the innovativeness of his company and its products. Mr. Kimber will testify regarding his marketing practices, his use of Internet search and related marketing techniques, and his experience in advertising "Free" tax return preparation. Mr. Kimber will also testify about his views on TaxHawk's competition, particularly with respect to less expensive digital tax preparation products.

8. *James B. Rhodes ("Brian")*, Manager of Online Applications, TaxSlayer, LLC, will testify that if H&R Block decided post-transaction to eliminate the TaxACT brand, raise TaxACT's prices, or diminish TaxACT's services TaxSlayer would seek to serve the dissatisfied customers. He will also testify that TaxSlayer could [REDACTED] the number of customers that it currently serves without any significant expenditures and could easily and inexpensively further expand capacity if the demand arose. He will also testify about the robustness of the TaxSlayer product, the innovative TaxSlayer advertising programs, and TaxSlayer's increased success over the last several years. Mr. Rhodes will also testify about the power of "Free

advertising,” about his views on competition among companies providing inexpensive tax preparation services, and about whether TaxACT has been a particularly innovative competitor.

9. *Dr. Christine Siegwarth Meyer*, Vice President at National Economic Research Associates, Inc., will testify that in her expert opinion that the proposed transaction is unlikely to lead to harm to consumers in the form of higher prices or a decrease in quality or innovation, and that these conclusions are consistent with HRB’s stated rationale and strategy regarding the transaction. She will testify that in her expert opinion the product market alleged by Plaintiff is not a relevant antitrust product market because the test that Plaintiff’s economic expert relies upon is invalid, the data he relies upon do not answer the relevant question of how consumers would react to a change in price, and he ignores relevant data. She will also testify that in her expert opinion the data and documents indicate that the proper relevant antitrust market is all methods of tax preparation because other forms of tax preparation, such as assisted tax preparation and pen-and-paper, compete more closely with the digital products at issue than do other products within Plaintiff’s proposed relevant market. Further, she will testify that in her expert opinion the parties’ market shares are not high enough to trigger a presumption of anticompetitive effect under the Herfindal-Hirschman Index (HHI). She will also testify that in her expert opinion the transaction is unlikely to lead to unilateral increases in price on any of the merging parties’ products because the evidence demonstrates that the merging parties are not particularly close competitors; the merger is likely to lead to substantial, incremental, merger-specific efficiencies; and free products serve an important marketing role for the merging parties and others in the industry. She will also testify that in her expert opinion the transaction is unlikely to lead to an increase in coordination because the industry exhibits significant structural barriers to coordination and TaxACT is not and did not act as a maverick in the economic sense.

Finally, she will testify that in her expert opinion there are several companies that can and would enter/expand if H&R Block eliminated TaxACT, raised TaxACT's prices, and/or reduced TaxACT's services post-transaction.

**C. *Joint Agreement Regarding Witnesses***

The Parties will each provide to the Court (and to one another) no later than September 1, 2011, declarations summarizing the direct testimony of their expert witnesses. Each declaration for each expert witness will be no longer than 10 pages double-spaced. The Parties will each endeavor to take no longer than an hour in putting on the direct testimony of their respective fact witnesses and no longer than 1.5 hours in putting on their respective expert witnesses.

**V. Exhibits**

Exhibits have been identified separately by the Parties pursuant to the Court's July 6, 2011 Joint Scheduling and Case Management Order.

**VI. Deposition Designations**

Deposition designations have been identified separately by the Parties pursuant to the Court's July 6, 2011 Joint Scheduling and Case Management Order.

**VII. Damages**

Not applicable in this case.

**VIII. Requests for Other Relief**

Not applicable at this stage in the case.

**IX. Undisputed/Stipulated Facts**

**A. *Parties to the Transaction***

1. H&R Block, Inc., 2SS Holdings, Inc. and the various shareholders of 2SS Holdings, Inc. entered into an Agreement and Plan of Merger on October 13, 2010. Pursuant to

that Agreement, H&R Block, Inc. has agreed to pay approximately \$287.5 million to acquire 2SS Holdings, Inc.

2. H&R Block, Inc. is a corporation organized and existing under the laws of Missouri; it is headquartered in Kansas City, Missouri. H&R Block, Inc., through its subsidiaries, (collectively “H&R Block”) provides various tax preparation products and services, including products and services available in its and its franchisees’ various offices as well as online (over the Internet) and in retail boxed software.

3. 2SS Holdings, Inc. is a corporation organized and existing under the laws of Delaware; it is headquartered in Cedar Rapids, Iowa. 2SS Holdings, Inc., through its subsidiaries, (collectively “TaxACT”) generally provides tax preparation products and services online under the brand “TaxACT.” In addition, in Tax Season 2010, a retail software product bearing the brand name “TaxACT” was offered at Staples retail stores.

***B. The Industry***

4. “Tax Season” (“TS”) refers to the period of time in which customers typically file taxes for a given year. The most recent Tax Season was Tax Season 2011.

5. “Tax Year” (“TY”) refers to the year for which taxpayers filed returns. The most recent Tax Year was Tax Year 2010.

6. In Tax Season 2011, taxpayers filed returns for Tax Year 2010.

7. Approximately 140 million Americans filed tax returns with the Internal Revenue Service (“IRS”) in Tax Season 2011/Tax Year 2010.

8. Individuals can prepare and file their federal and state income taxes either on their own or with assistance. Those who prepare and file their taxes on their own can do so manually (without using any online or software products), or they can utilize an online or software

product. Those who are assisted typically either hire an accountant or go to a retail tax office to have their taxes prepared.

9. Individuals who prepare their taxes manually can do so by hand (with pencil, paper and a calculator) or can use online forms provided by the IRS. This method of preparation is referred to by many names in this case, including unassisted, manual, pen-and-paper, and pencil-and-paper.

10. Individuals who utilize commercial online or software products can obtain those products by buying software from retail stores, by downloading software, or by using online programs. These products are collectively referred to as digital or “Digital DIY” products in this case.

11. Almost all providers of digital products offer some product for free with the hope that the taxpayer will pay for additional products offered by that provider.

**C. *Relevant Product Market***

12. The relevant geographic market is worldwide.

**D. *Use of “Free” Marketing in this Industry***

13. The Free File Alliance (“FFA”) was formed in late 2002 as a public-private partnership between the IRS and participating tax preparers.

14. Through the FFA, FFA members (providers of online tax preparation services) offer free federal tax preparation services through an IRS-sponsored website.

15. In Tax Season 2003/Tax Year 2002, the FFA’s first tax season, its approximately thirteen independent members were permitted to offer free federal products to whatever taxpayers they wanted so long as the FFA eligibility criteria as a whole covered 60% of all taxpayers.



16. In Tax Season 2011/Tax Year 2010, seventeen companies offered free federal tax preparation products through the FFA.

The Parties continue to confer in hopes that they can reach agreement on additional stipulated facts.

**X. Stipulations regarding Authenticity of Documents and Exhibits**

Pursuant to Paragraph 30 of the Court's July 6, 2011 Joint Scheduling and Case Management Order, the Parties have agreed that all documents not already challenged that were produced by parties and non-parties are presumed to be authentic and business records within the meaning of Fed. R. Evid. 901 and 803(6).

**XI. Description of Demonstrative Evidence, Physical Evidence or Videotape Evidence**

Pursuant to Paragraph 26 of the Court's July 6, 2011 Joint Scheduling and Case Management Order, demonstrative exhibits will be served on all counsel at least two (2) business days before any such use (unless good cause exists). At the hearing, the parties do not plan on introducing portions of videotape testimony taken during discovery.

**XII. Motions in Limine**

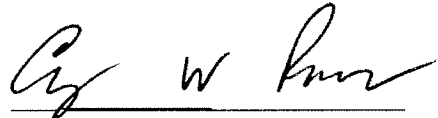
Pursuant to Paragraph 31 of the Court's July 6, 2011 Joint Scheduling and Case Management Order, non-expert pre-hearing motions, including pre-hearing motions in limine, were due on August 12, 2011 and any Oppositions thereto are due no later than August 18, 2011.

At this time, neither Party has any basis to reasonably anticipate that any motions in limine will arise at the hearing.

Respectfully submitted,

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