UNITED STATES OF AMERICA v. H&R BLOCK, INC. et al Doc. 65

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)

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION *IN LIMINE* TO PRECLUDE ADMISSION OF DEFENDANTS' PROPOSED REMEDIES

Defendants' response to Plaintiff's motion *in limine* to exclude evidence of Defendants' offer to fix TaxACT's prices at current levels for three years further supports the conclusion that the offer is irrelevant to whether the proposed transaction should be preliminarily enjoined. Defendants' "guarantee" is really no guarantee at all. Indeed, Defendants *admit* that "neither Plaintiff nor the Court would monitor [] Defendants' compliance with the Guarantee."[1] Thus, it is nothing more than a self-serving statement made for purposes of litigation that bears no resemblance to the authority Defendants cite in support of their argument, and should be afforded no weight by the Court.[2] Consumers are entitled to rely on competition to deliver competitive prices and high quality services. Empty promises are no substitute for competition.

[1] Defendants' Memorandum in Opposition to Plaintiff's Motion in Limine ("Opp. Resp.") (Docket #53) at 7.

[2] *See Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) (Posner, J.) ("[p]ost-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.").

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In arguing to the contrary, Defendants rely heavily on cases and settlements that involved consent *decrees*.[3] Those are simply inapposite. As Defendants admit, there is a difference between their offer to fix TaxACT's prices and "what would happen if the Department of Justice and Defendants entered into a formal settlement or this Court ordered such a remedy."[4] That difference is that a formal settlement or court-order would enable both the Court and the United States to monitor Defendants' compliance with their offer. Here, there would be no such assurance.

Nor is Defendants' offer relevant to the likelihood of anticompetitive effects post-transaction. Defendants' offer focuses solely on *TaxACT*, ignoring the fact that Defendants acknowledge that key motivations for the transaction are eliminating *H&R Block's* need to compete based on price, and raising *H&R Block's* prices.[5] Neither is addressed by Defendants' offer to fix TaxACT's prices.[6]

Defendants' contention that their offer is relevant to the irreparable harm prong of the preliminary injunction standard also is mistaken. Not only does Defendants' offer provide no

[3] *FTC v. Butterworth*, 946 F. Supp. 1285, 1298 (W.D. Mich. 1996); *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1073-74 (S.D.N.Y. 1969). To the extent that the *Atlantic Richfield* case involved a *divestiture* decree, it only serves to prove Plaintiff's point that divestiture, not empty promises, is the preferred remedy in an antitrust enforcement action.

[4] Opp. Resp. at 7.

[5] *See* Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction (Docket #56), at 3, 15. Today, a significant portion of HRB's customers start their returns using HRB's free product. An overwhelming majority of those customers are able to complete their returns without upgrading. *Id.* at 2 & n.3; *see also* GX 296-7; GX 619. If HRB ceases to aggressively market its free product, those same consumers are likely to be harmed by the transaction.

[6] Another potential anticompetitive effect not addressed by Defendants' offer is that Defendants will market TaxACT less frequently. Defendants contend that Plaintiff cites to the entire "338-page" Camela Greif transcript in support of this argument. This is not correct. Plaintiff cited to GX 55 (Greif Dep. 82:1-85:22; 317:1-319:22), which contains eight pages of that transcript, including the relevant testimony. In any event, the relevant citation is to GX 55, in particular Greif Tr. 317:16-318:16.

assurance that there will be no harm,[7] but irreparable harm is presumed in a government-initiated merger case once the United States has shown there is a reasonable probability that the transaction is likely to substantially lessen competition.[8] Defendants' offer, outside of implicitly acknowledging that competition will be lessened, has no relevance to the key issue of this case: whether there is a reasonable probability that the proposed transaction violates Section 7 of the Clayton Act. Therefore, Defendants should not be able to present evidence of their offer at the hearing.

[7] Defendants' claim that their offer demonstrates that the "market will . . . remain the same post transaction," Opp. Resp. at 4, proves the point. TaxACT is a maverick that regularly forces disruptive change in the digital do-it-yourself tax preparation market. Only an injunction that preserves TaxACT as an independent, competitive force will truly keep competitive conditions the same pending a trial on the merits.

[8] *FTC v. Weyerhaeuser*, 665 F.2d 1072, 1082 & n.23 (D.C. Cir. 1981) (R.B. Ginsburg, J.); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1429 (W.D. Mich. 1989).

Dated this 19th day of August, 2011.

Respectfully Submitted,

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