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

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE

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Plaintiff United States of America ("Plaintiff" or "United States") respectfully submits this memorandum of points and authorities in opposition to the motion by defendants H&R Block, Inc. ("H&R Block"), 2SS Holdings, Inc. ("2SS" or "TaxACT"), and TA IX L.P. ("TA") (collectively, "Defendants") to transfer venue in the above-entitled action from this Court to the Western District of Missouri.

INTRODUCTION

The underlying merger at issue in this case is a merger between sophisticated and substantial corporations located and incorporated in at least four different states and engaged in a nation-wide market. The merger agreement itself provides that any disputes concerning the agreement will be resolved in Delaware and expressly provides that none of the parties (who are the parties in *this* litigation) may object that Delaware is "an inconvenient forum" or that venue in Delaware is otherwise improper. Thus, Defendants' claim that it is not convenient to litigate a challenge to the merger in this District and that the Western District of Missouri is a more "just" forum should not be taken seriously.

Contrary to Defendants' assertions, the law in this Circuit is clear that, in general, a plaintiff's choice of forum is entitled to substantial weight and, in particular, the government's choice of venue in an antitrust case is entitled to heightened respect. Applying this standard here, Defendants' principal argument in favor of transfer — that it would be more convenient for one of the party's witnesses to litigate in their home city — does not come close to meeting Defendants' burden of showing that transfer is necessary in "the interest of justice." Neither this argument, nor any of Defendants' other arguments, provides any basis to undo the United States' choice of this District given the following facts:

- The District of Columbia is the Department of Justice's home forum;

- The District of Columbia has a significant interest in having this matter litigated in this forum, both because the matter directly implicates the Internal Revenue Service, which is headquartered in this venue, and because D.C. residents spend millions of dollars in the affected market;

- Key events noted in the Complaint, including TaxACT's maverick activities in the Free File Alliance, took place in this area;

- Several potential witnesses are located in Washington, D.C., and the surrounding area, including current and former employees of the IRS;

- Defendants and other potential witnesses are scattered throughout the country; and

- DOJ attorneys that worked on the investigation and are most familiar with the facts, and who will represent Plaintiff in this matter, all are based in this District, as are Defendants' counsel; relocating counsel to the Western District of Missouri for a multi-day hearing would impose significant costs on all parties.

And, as this Court has recently recognized, litigating this matter in another venue would unnecessarily cause the Antitrust Division (and thus American taxpayers) to incur significant additional expenses at a time of substantial budget constraints.

The only actual connection between this litigation and the Western District of Missouri is that H&R Block, one of three Defendants, has its headquarters there and, as a result, some witnesses may live in or near that District. The other supposed connections alleged by Defendants are illusory: (1) any documents located at H&R Block's offices not already produced during the pre-Complaint investigation are easily transmitted electronically, and, in any event, relevant documents have been created in many jurisdictions, including in or near the District of Columbia; and (2) the location of merger negotations has nothing to do with any issue in this case, which turns on the application of federal antitrust statutes to a nation-wide market, not any law concerning the interpretation or negotiation of merger contracts — and even if it did, the Defendants agreed that they would not litigate merger agreement disputes in the Western District of Missouri.

Nor is there any reason to transfer this motion simply because H&R Block's corporate executives (or the other Defendants) would prefer not to travel to Washington, D.C. for a hearing. These are sophisticated witnesses engaged in nation-wide commerce who could reasonably expect to be called upon to travel throughout the United States to address the company's legal and business issues, including, *e.g.*, a dispute concerning the terms of the merger agreement, which they agreed would be litigated in Delaware.

Finally, Defendants suggest throughout their submissions that they need a quick adjudication of the underlying claims and that this factor somehow weighs in favor of transfer. To the extent that Defendants' arguments are really about how expeditiously this matter should be handled, those are issues to be raised with the Court after venue has been resolved and are not appropriately considered as part of this Motion. Moreover, there simply is no basis in the general caseload statistics offered by Defendants to assert that a judge in the Western District of Missouri would be any more prepared to proceed at the expedited pace suggested by Defendants than this Court or any other judge in this District.

Simply put, the United States is entitled to deference in its choice of venue in this antitrust action, and Defendants have failed to show that the interests of justice require transfer to the Western District of Missouri. To rule otherwise would, as a practical matter, neuter the antitrust venue statute, 15 U.S.C. § 22, which gives the Government discretion in choosing where to file suit and would, in most instances, deprive the United States of its ability to file antitrust cases in its home forum of the District of Columbia.

FACTUAL AND PROCEDURAL BACKGROUND

Last year, an estimated 35 to 40 million taxpayers chose to prepare their U.S. federal and state tax returns using digital do-it-yourself tax preparation products ("Digital DIY Tax

Preparation Products"), either over the Internet or on their desktop computers. In the U.S. Digital DIY Tax Preparation Product market, the three largest firms (Intuit, the maker of TurboTax, H&R Block, and 2SS) service approximately 90% of all consumers. H&R Block's proposed acquisition of TaxACT, if allowed to proceed, would combine the second- and third-largest providers in that market and essentially create a duopoly among H&R Block and Intuit. The proposed acquisition would (1) eliminate aggressive head-to-head competition between H&R Block and TaxACT, and (2) increase the likelihood that the two remaining significant providers would substantially reduce competition through successful coordination; both in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. In the process, the transaction would also remove from the marketplace a maverick in TaxACT that has disrupted Intuit's and H&R Block's businesses, to the benefit of consumers, by offering functionally comparable products at lower prices. Indeed, H&R Block presentations note that a primary benefit for H&R Block in acquiring TaxACT is the "[e]limination of competitor," and that acquiring TaxACT would allow H&R Block to "eliminate the brand to regain control of industry pricing and avoid further price erosion."

Defendants assert that this transaction should not be enjoined because, *inter alia*, "HRB's existing paid tax software products do not compete closely with those of TaxACT." (Defs' Memo at 4.) However, Defendants' own documents include hundreds of admissions in which the companies consistently refer to each other as competitors, and monitor each other's pricing and product offerings in determining their own day-to-day business strategies. For example:

- In 2006, H&R Block's then-head of its Digital Business stated that H&R Block's "[o]nly real direct competitors are turbotax in san diego and taxact in cedar rapids";

- In 2007, TaxACT helped create an offering memorandum that stated that the "Company's major competitors for both desktop and Internet-based income tax

software and e-filing services include Intuit (the makers of TurboTax software) and H&R Block (the makers of TaxCut software)";

- In 2009, H&R Block executives made a presentation to their CEO and CFO in which they noted specifically that H&R Block launched a free online product "[t]o match competitor offerings and stem online share loss to Intuit and TaxAct"; and

- In late 2010, an H&R Block presentation noted that H&R Block had lowered the price of its premium software product offering by almost 30% specifically in order to better compete with free offerings from companies such as TaxACT.[1]

The reality is that Defendants' current position that H&R Block and TaxACT do not compete with one another is an argument that was manufactured in order to get this transaction past antitrust review. In fact, days before announcing the transaction, in an e-mail to top executives in the company (which eventually went to H&R Block's CEO), a senior H&R Block executive wrote: "[a]re we calling this the digital category or online category. I was thinking online category were the word [sic] of choice to get passed [sic] HSR approvals,[2] so you'll notice those changes within the docs." Similarly, in response to a criticism from a Board member that the press release announcing the deal was "weak," H&R Block's then-CEO explained that the release did not provide more detail on the true benefits of the transaction because H&R Block was "walking a little tightrope on this with HSR."

Currently, the United States and Defendants are operating under a timing agreement that provides that Defendants "will not close the merger for at least thirty (30) days after the filing of

[1] The notion that H&R Block and TaxACT are competitors is one that is also shared by other market participants and supported by data Plaintiff received during the course of its investigation.

[2] H&R Block's executive's statement regarding "HSR approvals" relates to the premerger notifications that Defendants were required to file with the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Act prior to closing their transaction. The referenced e-mail indicates that in its public statements regarding the transaction, H&R Block altered the definition of the relevant market in order to make antitrust approval more likely.

the complaint, during which time the [United States] and the [Defendants] will use best efforts to agree on a reasonable schedule for Preliminary Injunction Proceedings." (*See* Exhibit A to Declaration of Lawrence E. Buterman in Support of Plaintiff's Opposition to Defendants' Motion to Transfer Venue ("Buterman Declaration").) Plaintiff filed the Complaint in this matter on May 23, meaning that the parties have until at least June 22 to work out a schedule for Preliminary Injunction proceedings, including the filing of such papers. The Department of Justice has already sought to engage the Defendants in a discussion regarding scheduling, but the Defendants have indicated that they view this transfer motion as a prerequisite to scheduling discussions. Defendants' statement that the United States must seek and obtain a preliminary injunction prior to June 22 (Defs' Memo at 1) is both incorrect and wholly inconsistent with the plain language of the timing agreement.

ARGUMENT

A. STANDARD OF REVIEW

The standard for whether to transfer venue pursuant to § 1404(a) is well-established in this District. *See, e.g.*, *United States v. Second Chance Body Armor, Inc.*, Civ. A. No. 04-280, 2011 WL 1048183, at *2 (D.D.C. Mar. 24, 2011). As a threshold issue, the proposed transferee district must be one where the action initially could have been brought. *Id.* Next, the Court "must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to [the] private concerns [of the parties], come under the heading of 'the interest of justice.'" *Id.* (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988)). "The moving party has the burden of establishing that a transfer is proper . . . and the motion must not be lightly granted." *Miller v. Insulation Contractors, Inc.*, 608 F. Supp. 2d 97, 101 (D.D.C. 2009) (citing *Onyeneho v. Allstate Ins. Co.*, 466 F. Supp. 2d 1, 3

(D.D.C. 2006); 15 Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction* § 3848 at 163 (3d ed. 2007)). If the result of transfer would only serve to shift the balance of inconvenience, then the motion to transfer venue will be denied. *Bd. of Trs., Sheet Metal Workers Nat'l Fund v. Baylor Heating & Air Conditioning, Inc*., 702 F. Supp. 1253, 1259 (E.D. Va. 1988).

B. THE PRIVATE INTEREST FACTORS WEIGH AGAINST TRANSFER

In determining whether a case should be transferred under 1404(a), the private interest factors courts typically look to include: (1) the plaintiff's choice of forum; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to sources of proof. *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res., Inc.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002). Here, those factors militate against transferring this action to the Western District of Missouri.[3]

1. Plaintiff's Choice of Forum is Entitled to Substantial Deference

"The plaintiff's choice of a forum is 'a paramount consideration' in any determination of a transfer request." *Thayer/Patricof*, 196 F. Supp. 2d at 31 (quoting *Sheraton Operating Corp. v. Just Corporate Travel*, 984 F. Supp. 22, 25 (D.D.C. 1997)). As such, the "moving party bear[s] a heavy burden of establishing that plaintiff['s] choice of forum is inappropriate." *Malveaux v. Christian Bros. Servs.*, 753 F. Supp. 2d 35, 40 (D.D.C. 2010) (internal quotations omitted)

[3] Defendants do not dispute that the District of Columbia is a proper venue for this action under the Clayton Act. *See* 15 U.S.C. § 22 ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."). Likewise, Plaintiff does not dispute that the Western District of Missouri is a proper venue under 15 U.S.C. § 22.

(quoting *S. Utah Wilderness Alliance v. Norton*, 315 F. Supp. 2d 82, 86 (D.D.C. 2004); *Pain v. United Tech. Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980)).

"It is almost a truism that a plaintiff's choice of a forum will rarely be disturbed . . . unless the balance of convenience is strongly in favor of the defendant." *Gross v. Owen*, 221 F.2d 94, 95 (D.C. Cir. 1955). Deference to the plaintiff's choice of forum is particularly strong where the plaintiff has chosen his home forum. *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 11 (D.D.C. 2007); *see also Thayer/Patricof*, 196 F. Supp. 2d at 31. Moreover, courts have "accept[ed] as a general matter" that "the government's choice of venue in an antitrust case is entitled to heightened respect." *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 26 & n.2 (D.D.C. 2008) (internal quotations omitted) (citing *United States v. Brown Univ.*, 772 F. Supp. 241, 242 (E.D. Pa. 1991)); *see also United States v. Microsemi Corp.*, Civ. A. No. 08-1311, 2009 WL 577491, at *7 (E.D. Va. Mar. 4, 2009) ("Where venue is proper, a plaintiff[']s choice of forum is entitled to substantial weight, particularly where the plaintiff's choice of forum is authorized by the more liberal antitrust venue provision.").

Even the cases cited by Defendants recognize the general rule that the government's choice of venue is generally subject to deference. *See e.g.*, *Cephalon*, 551 F. Supp. 2d at 26; *Microsemi*, 2009 WL 577491, at *7. As these cases make clear, courts have deviated from the general rule only where there are exceptional circumstances such as:

- Pending litigation in the transferee district that is related to the transferred litigation and risk of inconsistent judgments. *See, e.g., FTC v. Watson Pharm., Inc.*, 611 F. Supp. 2d 1081, 1089 (C.D. Cal. 2009) (FTC litigation concerned the competitive effects of a settlement reached in a private patent infringement suit in the transferee district); *Cephalon*, 551 F. Supp. 2d at 29 (private antitrust class action litigation arising out of same underlying events was ongoing in transferee district); *FTC v. Lab. Corp. of Am.*, Civ. A. No. 10-2053 (D.D.C. 2010) (related bankruptcy litigation was ongoing in the transferee district).

- The plaintiff's venue choice is motivated by some larger strategic goal unrelated to the transferred litigation. *See, e.g.*, *Cephalon*, 551 F. Supp. 2d at 30 n.5, 31 (case had no logical connection to the District of Columbia, but rather was, in the court's opinion, brought in D.C. "to further its goal of obtaining a circuit split").

- The relevant market appears to be limited to the area near the transferee district. *See, e.g., Lab. Corp.*[4]

- The government plaintiff fails to file in its home district. *See, e.g.*, *Microsemi*, 2009 WL 577491, at *7 ("DOJ is not located in Virginia and the presence of an interested Government agency within this district does not transform this district into the Government's 'home' for the purposes of venue.").

None of these factors is present here: There is no related litigation pending in the Western District of Missouri; the relevant market is nation-wide; Defendants have failed to suggest any suspect motive for the United States' choice of venue; and the Antitrust Division has sued in its home forum, Washington, D.C. *See Microsemi*, 2009 WL 577491, at *7 (noting that the "home" forum for the Antitrust Division of the Department of Justice is Washington, D.C.).

Rather, as detailed below, the facts show that the decision to file in Washington, D.C. is entitled to deference not only because the Division filed in its home forum, but also because: (1) the investigation into this transaction was conducted in D.C.; (2) the District of Columbia has a significant interest in having this matter litigated in this forum, both because the matter directly implicates the Internal Revenue Service, which is headquartered in this venue, and because D.C. residents spend millions of dollars on Digital DIY Tax Preparation Products; (3) key events noted in the Complaint took place in this area; (4) potential witnesses are located in D.C. and the

[4] A copy of the transcript of the December 3, 2010 oral argument in *FTC v. Lab. Corp. of Am.* is contained in Exhibit A to Defs' Memo. As the court also made clear, California had significant connections to the litigation in that "the relevant geographic market that could suffer the anticompetitive effects" was in California, and the majority of the witness declarations that supported the FTC's TRO motion came from California. (Tr. at 38.)

surrounding area; (5) Defendants and other third-party witnesses are scattered across the country; and (6) litigating this matter in another district would result in unnecessary expenses for Plaintiff.

Given these facts, "plaintiff's choice of forum is entitled to substantial deference . . . which outweighs the deference conferred on [D]efendant[s'] choice of forum." *Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 180 (D.D.C. 2009) (internal citations omitted).

2. This District Has a Significant Nexus to the Facts Underlying This Case

The District of Columbia and the surrounding area have a significant nexus to the facts underlying the issues in this litigation. This litigation centers around a proposed acquisition in the Digital DIY Tax Preparation Market. The IRS, headquartered in Washington, D.C., regulates which of those software programs may be used for electronic filing purposes. The IRS also promotes the use of "IRS-tested and -approved tax software," such as H&R Block at Home and TaxACT, on its website. *See* http://www.irs.gov/efile/article/0,,id=226820,00.html (last visited May 31, 2011). And, Defendants' products are all used to create and/or file federal tax returns with the IRS in Washington, D.C.[5]

[5] The federal government has long supported the development and use of Digital DIY Tax Preparation Products as a means to collect income taxes and encourage the use of electronic communications in the conduct of business between the Government and citizens. The IRS has relied on a partnership with, and competition among, Digital DIY Tax Preparation Product providers to foster these objectives. As the Free File Alliance ("FFA") explains, in early November 2001 the Office of Management and Budget's Quicksilver Task Force, as part of its e-government initiatives, "instructed the IRS to provide free and secure online tax return preparation and filing services to taxpayers." http://www.freefilealliance.org/faqs. However, the Treasury Department has indicated that it does not want the IRS to enter into the tax software business, and the "government believes private industry, given the established expertise and experience in the field of electronic tax preparation, has a proven track record in providing the best technology and services available. *Id*. The FFA explains: "The Government believes a partnership with private industry will: provide taxpayers with higher quality services by using the existing expertise of the private sector; maximize consumer choice; promote competition within the marketplace; and meet objectives in the least costly manner to taxpayers." "The result was the formation of the Free File Alliance, LLC, a group of tax software companies who provide free commercial online tax preparation and electronic filing services." *Id*.

Additionally, activities at the heart of the specific allegations in this Complaint took place in Washington D.C. and the surrounding area. TaxACT is a "maverick" in the tax preparation industry that consistently has disrupted the market through low prices and innovative product offerings. (Compl. ¶ 3.) As alleged in the Complaint, the first major instance of TaxACT's maverick behavior that prompted a competitive reaction from H&R Block occurred through the Free File Alliance ("FFA"). The FFA is a public-private partnership between the IRS, headquartered in Washington, D.C., and participating tax preparers, to provide qualified individuals with the ability to prepare and electronically file their federal tax returns for free.[6] (Compl. ¶ 28.) As alleged in the Complaint, TaxACT disrupted the FFA by making its free offering available to everyone. (Compl. ¶ 28.) TaxACT's FFA offering threatened the profits of all Digital DIY Tax Preparation Product providers. Accordingly, though they matched TaxACT's offering, members of the FFA, including H&R Block and Intuit, lobbied the Government to limit the number of taxpayers to whom FFA members could offer free federal e-filing. Ultimately, the IRS, in October 2005, limited the type and the number of customers that could be offered a free product through the FFA. (Compl. ¶ 29.) These important activities took place in Washington, D.C. and the surrounding area.

In contrast, the only "fact" that Defendants point to that took place in the Western District of Missouri is that "the acquisition agreement that is being challenged in this action was negotiated, drafted, and executed in Missouri and *Iowa*" — in other words, in multiple locations, one of which is Missouri. (Defs' Memo at 11 (emphasis added).) But even if the merger negotiations had taken place solely in Missouri, that fact would not change the venue analysis since this case has nothing to do with any dispute arising from the negotiation or drafting of the

[6] The Free File Alliance itself is headquartered in nearby Clifton, Virginia.

merger agreement. Instead, this case concerns the *effect* of the merger, which, as alleged in the Complaint, will have anticompetitive effects across the country, not just in Missouri. Thus, Defendants have failed to show that most of the relevant events occurred in the forum in which they seek a transfer, and they have failed to meet their burden. *See Miller*, 608 F. Supp. 2d at 102 (where it was unclear in which forum "the more significant locus of material events" occurred, the movant had not demonstrated that the private interest factors favored transfer).[7]

3. The Convenience of the Parties Does Not Weigh in Favor of a Transfer

The convenience of the parties would not be served by a transfer to the Western District of Missouri. While a court may consider whether litigating in a particular forum would cause a party to suffer a hardship, such as from significant expense, *see Second Chance Body Armor*, 2011 WL 1048183, at *4, the party requesting transfer should provide documented proof of financial hardship, *see SEC v. Daly*, Civ. A. No. 05-55, 2006 WL 6190699, at *5 (D.D.C. Feb. 11, 2006). In reality, "[u]nless all parties reside in the selected jurisdiction, any litigation will be more expensive for some than for others." *Second Chance Body Armor, Inc.*, 2011 WL 1048183, at *4 (internal quotation omitted). "Thus, for this factor to weigh in favor of transfer, litigating in the transferee district must not merely shift inconvenience to the plaintiff[], but

[7] Defendants' reliance on *SEC v. Ernst & Young*, 775 F. Supp. 411, 414 (D.D.C. 1991) is misplaced. Defendants quote from a paragraph of the opinion that recounts Ernst & Young's argument as to why a transfer was warranted, and not a holding of the court. Similarly, Defendants' reference to *In re Apple, Inc.*, 602 F.3d 909, 914 (8th Cir. 2010), and *Intrepid Potash-N. Mex., LLC v. U.S. Dept. of the Interior*, 669 F. Supp. 2d 88, 95 (D.D.C. 2009) are of no consequence. In *Apple*, the company was alleged to have engaged in specific acts to harm a competitor that were carried out in the proposed alternative venue of the Northern District of California; in *Intrepid*, the controversy centered around a decision to permit land drilling in the proposed alternative venue, the District of New Mexico. Here, aside from the fact that *some* of the activities surrounding the merger agreement took place in Kansas City, Defendants have not pointed to any other underlying facts that tie this case to the Western District of Missouri.

rather should lead to an overall increase in convenience for the parties." *Id.; see also Daly*, 2006 WL 6190699, at *5.

Here, the parties are located throughout the country: Plaintiff is located in Washington, D.C., while Defendants are headquartered in Kansas City, Missouri (H&R Block), Boston, Massachusetts (TA), and Cedar Rapids, Iowa (2SS). Defendants' witnesses are similarly found throughout the country, including in Missouri, Iowa, California, and Connecticut. Thus, transfer of this matter to Missouri would do nothing more than shift inconvenience.

Moreover, contrary to Defendants' argument, the fact the U.S. Attorney has an office in the Western District of Missouri (*see* Defs' Memo at 15) "has little relevance to the § 1404(a) analysis in this case and does not bolster Defendant[s'] argument" because "[t]he investigation in this case was conducted from the Washington office." *Ernst & Young*, 775 F. Supp. at 415. And, contrary to Defendants' pronouncement (*see* Defs' Memo at 15), the convenience of Plaintiff is relevant. *See, e.g., United States v Bowdoin*, Crim. A. No. 10-320, 2011 WL 899357, at *7 (D.D.C. Mar. 16, 2011) ("Trial in Florida, however, would place an additional burden on the Government, whose counsel are located here in the District of Columbia. Given the funding emergency facing the Government, the Court declines at this time to treat it as an unlimited source of monies. When this factor is weighed, it is evenly balanced between the parties.").

And, critically, to the extent Defendants now claim that their convenience mandates that this matter be transferred to the Western District of Missouri, that claim is belied by the Defendants' merger agreement which includes a submission to jurisdiction provision which states that:

> [e]ach of the parties irrevocably agrees that any legal action or proceeding arising out of or relating to this Agreement . . . shall be brought and determined in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, if the Delaware Court of

> Chancery declines to accept jurisdiction over a particular matter, in any state or federal court within the State of Delaware), and each of the parties hereby irrevocably submits to the exclusive jurisdiction of the aforesaid courts . . . .

In the same paragraph, Defendants also agreed that in their litigations, neither party would be permitted to argue that Delaware was "an inconvenient forum" or that "the venue of such suit, action or proceeding [was] improper." Defendants could have chosen any jurisdiction for purposes of handling disputes regarding the transaction. And, given the great weight that Defendants now place on convenience, it is safe to assume that they would not have willingly agreed to have their disputes settled in an inconvenient location. Yet Delaware is as distant from Kansas City and Cedar Rapids as Washington, D.C. is; and Delaware is much less accessible than Washington, D.C. in terms of air travel.[8]

Finally, Defendants overstate the disruption to their businesses that litigating this matter in Washington, D.C. would entail. This is not the tax season, and while it would be necessary for Defendants' employees to travel to Washington to testify, there would be no need for them to remain in the District for the duration of the proceedings, as they are not named in this Complaint. *See Ernst & Young*, 775 F. Supp. at 414. Depositions of party deponents could occur in their home districts, unless Defendants' litigating counsel, *who are based in*

[8] When analyzing venue, courts consistently look to forum selection clauses in order to gauge parties' thoughts on what is an appropriate venue. *See, e.g., Marra v. Papandreou,* 216 F.3d 1119, 1123 (D.C. Cir. 2000) (A forum selection clause is a clear indication of venue preference and is in some sense an "*ex ante* agreement to waive venue objections to a particular forum."); *cf. Stewart Org.*, 487 U.S. at 29 (forum-selection clause considered as a factor in a section 1404(a) motion; "The presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court's calculus.").

Washington, D.C., prefer to conduct depositions in this District as they have done during pendency of the Division's investigation.[9]

For these reasons, the convenience of the parties mandates that this case not be transferred.

4. The Convenience of the Witnesses Does Not Weigh in Favor of a Transfer

There are several reasons why a transfer to the Western District of Missouri is not required based on the convenience of the witnesses.

First, the convenience of the witnesses is only considered "to the extent that the witnesses may actually be unavailable for trial in one of the fora." *Thayer/Patricof*, 196 F. Supp. 2d at 31 (quoting *Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr.*, 24 F. Supp. 2d 66, 71 (D.D.C. 1998)). For that reason, courts have disregarded arguments that witnesses will be inconvenienced by trial in Washington, D.C. when there is no indication that "critical witnesses would be unavailable for trial in the District of Columbia." *Malveaux*, 753 F. Supp. 2d at 41. Here, Defendants do not assert — because they cannot — that any witness will be unavailable for trial in the District of Washington, D.C., as under 15 U.S.C. § 23, this Court is permitted to authorize trial subpoenas to be issued nation-wide.[10]

[9] Defendants' arguments regarding convenience of the Western District of Missouri to 2SS are questionable. There appear to be no direct flights from Cedar Rapids, Iowa to either Kansas City, Missouri or Washington, D.C., and actual flight durations to both cities (including stops), appear to be similar. Moreover, according to Internet mapping programs, the drive from 2SS headquarters to the Federal Courthouse in Kansas City, Missouri is more than five hours, which is less than total time it takes to fly (including layovers) from Kansas City, Missouri and Cedar Rapids, Iowa to Washington, D.C.

[10] *See* 15 U.S.C. § 23 ("In any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: Provided, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles

Second, even to the extent the convenience of witnesses traveling to this District is considered by this Court, Defendants have failed to make their necessary showing. "To support its request for transfer under section 1404(a), a moving party must demonstrate (through affidavits or otherwise) what a non-resident witness will testify to, the importance of the testimony to the issues in the case, and whether that witness is willing to travel to a foreign jurisdiction." *Thayer/Patricof*, 196 F. Supp. 2d at 33. Indeed, even one of the primary cases relied upon by Defendants, *Microsemi*, makes clear that "courts have required those who seek or oppose transfer based on witness convenience to detail, in terms of location and testimony, those specific witnesses that are likely to testify." *Microsemi*, 2009 WL 577491, at *8; *see also Bowdoin*, 2011 WL 899357, at *6 ("The location of witnesses is not dispositive by itself — particularly where, as here, witnesses actually will come from all over. 'Generally, a naked allegation that witnesses will be inconvenienced by trial in a distant forum will not suffice for transfer . . . . [T]ransfer motions must identify the inconvenienced witnesses whom defendant[ ] propose[s] to call and contain a 'showing' of the proposed witnesses' testimony.'" (quoting *United States v. Haley*, 504 F. Supp. 1124, 1126 (D.C. Pa. 1981))). Here, Defendants have made no such showing. Rather, all that Defendants have done is provide some topics that Defendants expect "HRB and 2SS employees" to testify about, and state in a conclusory fashion that it would be burdensome for those unnamed witnesses to testify in Washington, D.C. (Defs' Memo at 12.) As the above caselaw makes clear, that is not enough to warrant a transfer.

Third, the convenience of witnesses does not warrant a venue transfer when the witnesses are employees of a party and their presence can be obtained by that party. *See Brown Univ.*, 772 F. Supp. at 243 (citing *Aloha Leasing v. Craig Germain Co.*, 644 F. Supp. 561, 564 n.4

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from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.").

(N.D.N.Y. 1986); *Jordan v. Delaware & Hudson Ry.*, 590 F. Supp. 997, 998 (E.D. Pa. 1984)). Here, Defendants suggest that the "majority of the anticipated witnesses . . . will be current employees of HRB and 2SS," and nowhere do Defendants suggest their presence cannot be obtained. (Defs' Memo at 12.)

Fourth, likely potential third-party witnesses in this matter are located in Washington, D.C.[11] and otherwise scattered throughout the country. As noted above, certain allegations concerning 2SS's maverick behavior relate to the FFA. Plaintiff anticipates it may call certain former IRS executives from the FFA to testify about the history of the organization, how TaxACT disrupted the FFA through its free offer, and how companies such as H&R Block responded. Additionally, Plaintiff currently anticipates that it may call as a third-party witness an employee from the IRS's Electronic Tax Administration who will provide a factual background into the history of electronic filing and the growth of the use of Digital DIY Tax Preparation Products — including the products of the Defendants. A third-party witness from the IRS may also be called to testify about data that the IRS maintains relating to the software products taxpayers use each year to prepare and electronically file their taxes, and how frequently taxpayers switch to a different product. Those IRS witnesses are all located in Washington, D.C. and the surrounding area. Outside of Washington, D.C., as Defendants acknowledge, potential third-parties are located throughout the country, including in California,

[11] Defendants assert that "[a]t the time of the parties' meet-and-confer regarding this motion, the DOJ named no potential third-party witnesses located in Washington D.C. for whom a proceeding in the current venue would be more convenient." (Defs' Memo at 13.) Defendants' statement is misleading and deceptive. On May 25, Plaintiff arranged a call with Defendants to discuss creating a joint scheduling order. During that call, Defendants refused to discuss scheduling, but rather notified Plaintiff, for the first time, that Defendants planned on filing the current venue motion the following day. During that call, J. Robert Robertson, counsel for defendants 2SS and TA IX L.P., asked Plaintiff whether any of Plaintiff's trial witnesses lived in Washington, D.C. Plaintiff simply informed Mr. Robertson that it was not prepared to discuss trial witnesses at that time.

Utah, and Georgia. (Def's Memo at 13.) Accordingly, the convenience of witnesses simply does not support a transfer to the Western District of Missouri.

5. Access to Sources of Proof Does Not Weigh in Favor of a Transfer

Courts in the District have noted that "the location of documents is increasingly irrelevant in the age of electronic discovery, when thousands of pages of documents can be easily digitized and transported to any appropriate forum." *Fanning v. Capco Contractors, Inc.*, 711 F. Supp. 2d 65, 70 (D.D.C. 2010); *see also Nat'l R.R. Passenger Corp. v. R & R Visual, Inc.*, Civ. A. No. 05-822, 2007 WL 2071652, at *6 (D.D.C. July 19, 2007) ("[T]echnological advances have significantly reduced the weight of the ease-of-access-to-proof factor."); *Brown Univ.*, 772 F. Supp. at 243 (holding that location of documents "is entitled to little weight" when the documents have been and can be easily transported). During the course of the United States' investigation, Defendants transmitted all of the produced documents to the Division electronically. Thus, to pretend, as Defendants now do, that the location or origination point of these documents has any practical impact on the parties' access to sources of proof is to ignore the reality of modern electronic data storage and communications, and the reality of modern e-discovery practice. Indeed, even were this case to be transferred to the Western District of Missouri, Defendants' documents presumably would nonetheless be routed through Defendants' attorneys (all of whom are located in Washington, D.C.) before they would be transmitted to Plaintiff and/or used at trial. *See Air Line Pilots Ass'n v. Eastern Air Lines*, 672 F. Supp. 525, 527 (D.D.C. 1987) ("No matter where the litigation proceeds, these materials will have to be photocopied and shipped to Eastern's lawyers who live and work in the District area and to ALPA's lawyers who likewise live and work in D.C. . . .").

In any event, during discovery, Defendants undoubtedly will seek Plaintiff's documents, including communications with third-parties. Those documents are located in Washington, D.C. Accordingly, the location of documents simply does not weigh in favor of a transfer.

C. THE PUBLIC INTEREST FACTORS WEIGH AGAINST TRANSFER

In addition to private factors, when analyzing a venue motion, courts should examine whether granting a transfer to another venue would serve the public interest. The public interest considerations that courts typically examine include: (1) the local interest in deciding local controversies at home; (2) the transferee's familiarity with the governing laws; and (3) the relative congestion of the calendars of the potential transferee and transferor courts. *Thayer/Patricof*, 196 F. Supp. 2d at 31-32.

1. The Local Interest in Deciding This Controversy Weighs Against Transfer

While this acquisition will affect taxpayers nation-wide (Defs' Memo at 19), the District of Columbia has a local interest in deciding this controversy because it may involve evidence produced from and concerning the activities of the IRS, an agency which is based in this venue, and the District's consumers will be harmed by this acquisition. Indeed, taxpayers in the District of Columbia spend millions of dollars on Digital DIY Tax Preparation Products. If this transaction is not permanently enjoined, those consumers will likely be harmed through increased product prices and decreased innovation. Accordingly, the District of Columbia has a significant interest in providing a forum for this matter. *See, e.g.*, *Second Chance Body Armor*, 2011 WL 1048183, at *2 (denying a motion to transfer venue from the District of Columbia to the Western District in Michigan in part because millions of dollars of harm had been suffered in the District); s*ee also Sierra Club*, 523 F. Supp. 2d at 13 (noting that "[t]here is a local interest in

having localized controversies decided at home," and that rationale also applies to federal matters as well).

Moreover, Plaintiff has a local interest in deciding this matter, given that venue here is based on the antitrust venue statute, 15 U.S.C. § 22. As the Supreme Court made clear in *United States v. National City Lines, Inc.*, Congress, in enacting Section 22, intended to give the United States discretion in choosing where to file suit, beyond the normal venue limitations that are contained in 28 U.S.C. § 1391. *See* 334 U.S. 573, 588 (1948). If this Court were to grant Defendants' motion to transfer to the Western District of Missouri, simply because one defendant is headquartered in that district, the practical results would be to render 15 U.S.C. § 22 moot, and, in most instances, deprive the United States of its ability to file antitrust cases in its home forum of the District of Columbia.

2. The Potential Transferee Court's Familiarity With Applicable Law Does Not Weigh in Favor of a Transfer

It is beyond dispute that the courts in this District have far greater experience in handling merger challenges brought by the FTC and the DOJ than the courts in the Western District of Missouri. While as a general matter all federal courts may be presumed to be competent to decide federal issues, Defendants notably do not cite to any antitrust cases in which the District of Missouri was deemed to have as much expertise with the antitrust laws as this District. Accordingly, this public interest factor cannot support a transfer.

3. Congestion of the Transferee Court Compared to the Transferor Court Does Not Weigh in Favor of a Transfer

Finally, the relative congestion in the District of Columbia as opposed to the Western District of Missouri does not support a transfer. The general Federal Court Management Statistics that Defendants point to regarding average time from filing of a complaint to

completion of trial (*see* Defs' Memo at 17) are irrelevant for determining whether a judge in the Western District of Missouri would be any more prepared to proceed at the expedited pace suggested by Defendants than this Court or any other judge in this District. Indeed, Defendants have already agreed in the timing agreement to proceed with a Preliminary Injunction hearing and not a trial. (*See* Buterman Declaration Exhibit A at ¶ 11 (Defendants "will not close the merger for at least thirty (30) days after the filing of the complaint, during which time the [United States] and the [Defendants] will use best efforts to agree on a reasonable schedule for Preliminary Injunction Proceedings.").) Accordingly, Defendants' arguments regarding relative congestion and average length of cases from filing to trial should be disregarded.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' motion to transfer this action to the Western District of Missouri.

Dated this 2nd day of June 2011.

Respectfully submitted,

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