UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, U.S. Department of Justice Antitrust Division 450 Fifth Street, NW, Suite 7100 Washington, DC 20530 Plaintiff, v. H&R BLOCK, INC. One H&R Block Way Kansas City, MO 64105; 2SS HOLDINGS, INC. 5925 Deep Creek Lane NE Cedar Rapids, IA 52402; and TA IX L.P. 64 Willow Place Suite 100 Menlo Park, CA 94025 Defendants.	)	Civil Action No. 1:11-cv-00948 (BAH)

REPLY MEMORANDUM IN FURTHER SUPPORT OF
DEFENDANTS' MOTION TO TRANSFER

INTRODUCTION

There is no good reason – nor has the Department of Justice identified any good reason – for this matter to proceed in the District of Columbia. Indeed, DOJ concedes that venue in the Western District of Missouri is proper, Opposition Memorandum at 7 n.3, and does not contest that most of the witnesses are in or far closer to Kansas City, where H & R Block is located, than to D.C., *id*. at 12-17. At bottom, DOJ's Opposition to the present Motion to Transfer completely overstates the interests that the District of Columbia has in this matter while underplaying the convenience of the Western District of Missouri.

For instance, DOJ claims, without any apparent evidence or citation, that TaxACT's online tax product offering "occurred" in Washington, D.C., *id.* at 11, and that there are unnamed witnesses in Washington, D.C., *id*. at 17. First, TaxACT sells its online products from Cedar Rapids, Iowa; H & R Block does the same from Kansas City, Missouri. Second, DOJ has still not identified any specific witnesses from D.C. – and even the potential, vague witnesses that DOJ suggests it "anticipates it may" call are government employees and are thus to be considered party witnesses. *United States v. Microsemi Corp*., No. 1:08cv1311, 2009 WL 577491 at *10 (E.D. Va. Mar. 4, 2009) ("Government employees… are treated more appropriately as party witnesses [in a case brought by the Government] than non-party witnesses for the purposes of Section 1404(a)"). In short, there are no identified witnesses from D.C., nor is there any proffer as to what the unidentified potential witnesses would testify.

Ultimately, DOJ's argument boils down to the underlying fact that DOJ is headquartered in D.C. and that DOJ prefers to try this case in D.C. even though the companies at issue and their employees are not located anywhere near D.C. DOJ's arguments should be rejected and the case should be litigated in the forum that has the greatest connection to the matter – where the

conduct being challenged is allegedly taking place – and which is most convenient for the witnesses (not the lawyers). That forum is the Western District of Missouri.

ARGUMENT

I. Courts Do Not Defer to the Plaintiff's Choice of Forum Where, as Here, that Forum Has Little to No Connection to the Dispute

DOJ essentially argues that its choice of forum should receive "substantial deference" because it is the government and it chose its home forum. Opp. Mem. at 8. The case law clearly holds that these arguments do not support denial of a transfer motion where – as here – the plaintiff's chosen forum has little relationship to the facts at issue in the case.

This Court long ago acknowledged that Section 1404(a) corrected the "inherently unfair" preference afforded previously to the government's choice of forum. *See United States v. E.I. Du Pont De Nemours & Co.*, 83 F. Supp. 233, 234–35 (D.D.C. 1949) ("[I]t has been recognized by many that the existence of this preferential position of the Government was inherently unfair and needed modification in order that the Government and defendants might approach some degree of equality in this respect and that the defendants would have some rights in this matter."). Moreover, courts in this District consistently refuse to give substantial deference to the forum choice by federal agencies in enforcement actions where – as here – the only real connection between the case and the District of Columbia is the presence of the agency in D.C.[1] Indeed, this Court has made clear that, "where the action has little contact with the chosen forum the plaintiff's right to select becomes much less important." *Franklin v. S. Railway Co.*, 523 F. Supp. 521, 524 (D.D.C. 1981); see also *Schmidt*, 322 F. Supp. 2d at 33 ("[D]eference [to plaintiff's choice of forum] is mitigated . . . [where the] forum has 'no meaningful ties to the controversy

[1] DOJ's citation of *United States v. Bowdoin*, Crim A. No. 10-320, 2011 WL 899357, at *7 (D.D.C. Mar. 16, 2011) is clearly inapposite. *Bowdoin* is a criminal case, and therefore the court was assessing a transfer motion under Rule 21(b) of the Federal Rules of Criminal Procedure. The relevant factors in a criminal case include the "location of counsel," *id.* at *4, which is not a factor for the Court to consider in this civil case.

and no particular interest in the parties or subject matter.'") (citations omitted).

Even the cases cited by DOJ in its Opposition support the proposition that the plaintiff's forum choice should not receive deference in cases where there is little connection between the facts and the forum. For example, the Opposition quotes *Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 180 (D.D.C. 2009), for the proposition that the plaintiff's choice should receive "substantial deference" that "outweighs the defendants' choice." However, the rest of the paragraph preceding DOJ's quote tells the whole story: "When there is only an attenuated connection between the controversy and the plaintiff's chosen forum and that forum is not the plaintiff's home forum, the deference afforded to the plaintiff's choice is diminished." *Id.* at 179-80. As discussed below, DOJ has failed to allege any cognizable relationship between the District and this case other than the presence of DOJ's attorneys. DOJ's forum choice should not receive deference on this basis.

II. DOJ's Attempt to Use the IRS and FFA to Create the Illusion of a Nexus to D.C. Is Wrong

DOJ's argument that the District of Columbia has a "significant nexus to the facts underlying the issues in this litigation" has two primary components: (1) some unnamed IRS personnel are located in D.C. and (2) some of TaxACT's alleged "maverick" behavior "took place in Washington, D.C. and the surrounding area" because it "occurred through" the Free File Alliance ("FFA"), which is headquartered near (although not in) D.C. These assertions are neither true nor relevant.

DOJ's Opposition confuses the IRS's headquarters, which are located on Constitution Avenue in the District, with the potentially relevant IRS employees and divisions, none of which is located in D.C. DOJ asserts that "Defendants' products are used to create and/or file federal tax returns with the IRS in Washington, D.C.," Opp. Mem. at 10, but the fact is that ***none*** of the

tax returns prepared using Defendants' products are e-filed to Washington, D.C. Instead, they are sent to IRS's e-file processing centers, one of which is located in ***Kansas City, MO*** – the very district to which Defendants propose to transfer this case. The others are located in Austin, TX; Philadelphia, PA; Fresno, CA; and Andover, MA. *See* Exhibit A (IRS Publication 1346). In fact, during the relevant time period IRS has *never* had an e-file processing center in D.C. Moreover, the advisory committee of the Electronic Tax Administration ("ETA"), the division that oversees IRS's e-file system, is located throughout the country, and no member of the committee resides in D.C. *See* http://www.irs.gov/efile/article/0,,id=213859,00.html.

Furthermore, DOJ is wrong to base its argument on the convenience of some unknown IRS employees that it refers to as "third party witnesses." As part of the federal government, IRS employees are considered party witnesses. "Government employees… are treated more appropriately as party witnesses [in a case brought by the Government] than non-party witnesses for the purposes of Section 1404(a)." *Microsemi Corp.*, 2009 WL 577491 at *10.[2] The relevance of testimony from these hypothetical witnesses and the need for them to attend a live hearing is, moreover, speculative at best – the same background information could likely be obtained from employees or former employees of the Defendants.

DOJ also argues that D.C. has a strong nexus to the dispute because the FFA is located near D.C.,[3] and TaxACT's alleged "maverick" behavior – a "free for everyone" offer – occurred on the FFA website. Opp. Mem. at 11; Compl. ¶ 28. On the contrary, TaxACT's "free for everyone" offers have ***all*** been executed on websites hosted by TaxACT on its own servers in

[2] DOJ also apparently believes that Washington, D.C. is a proper forum because D.C. residents pay taxes and therefore purchase tax software. *See* Gov. Br. at 2, 9. Given that there are individuals throughout the country, including in Missouri, who also purchase tax software, DOJ's argument makes no sense in the context of explaining why D.C. is more appropriate than Missouri.

[3] DOJ notes in a footnote that the FFA is not actually located in D.C., but is "in nearby Clifton, Virginia." Opp. Mem. at 11 n.6.

Cedar Rapids, IA. Decl. of Lance Dunn (June 2, 2011) at ¶3. As the IRS website clearly indicates, customers must go to the TaxACT website, which is served out of Cedar Rapids, if they want to use a TaxACT product. Indeed, when a potential customer clicks on the FFA page link for TaxACT, the resulting page shows a disclaimer clearly stating that "you will leave the IRS web site and enter a privately owned web site created, operated, and maintained by a private business." *See* Exhibit B. The IRS could not be more clear that TaxACT's "free for everyone" offer has nothing to do with the IRS website. In short, none of the TaxACT offers that DOJ alleges (and the Defendants dispute) constitute "maverick" behavior was actually served on a website run by the IRS or the FFA.

Furthermore, the fact that the FFA is located near D.C. (in Virginia) is irrelevant to DOJ's claim that D.C. has a strong nexus to the operative facts. The FFA's Virginia office does not provide "missing connections between the Government and this district." *Microsemi Corp.*, 2009 WL 577491 at *7 (finding that DOJ's nearby offices in D.C. did not provide a connection between the Government and the Eastern District of Virginia).

III. Every Key Witness Regarding the Intent and Likely Effects of the Transaction Is Located in Kansas City or Nearby

DOJ implies that relevant employees of Defendants ("party witnesses") and Defendants' witnesses are "located throughout the country," including Missouri, Iowa, California, the District of Columbia, and Connecticut. Opp. Mem. 13.[4] However, DOJ's own conduct belies this assertion. DOJ has not identified potential party witnesses in any location outside of Kansas City

[4] As an initial matter, Defendants are aware of only one witness who could possibly be construed as being located in Connecticut. Such a characterization is a stretch. That witness, the most recent former CEO of H&R Block, maintains an office in Kansas City.

or Cedar Rapids.[5] Importantly, *all of the party witnesses* deposed by DOJ during the course of its merger investigation were located in Kansas City, Missouri and Cedar Rapids, Iowa, with the majority of those witnesses located in Kansas City.[6] Furthermore, *every document* cited by DOJ in its opposition brief was created in Kansas City or Cedar Rapids (three in Kansas City and one in Cedar Rapids) by persons residing in or around Kansas City or Cedar Rapids.[7] Thus, the preview into its case that DOJ provided in the Opposition demonstrates exactly why this case should be heard in Kansas City – the authors and thus the potential witnesses regarding the key documents are all in Kansas City and Cedar Rapids. As those documents make clear:

1) Defendants' analysis of the merger, including its efficiencies and competitive effects occurred in Kansas City and Cedar Rapids, Opp. Mem. at 4, Decl. of Tony Bowen (May 27, 2011) ¶¶ 3, 6, 8;

2) Defendants' analysis of competition, including the key documents, occurred entirely in Kansas City and Cedar Rapids, *id.*;

3) The events surrounding H&R Block's pricing decisions, which are essential to Plaintiff's case, occurred in Kansas City, and the H&R Block employees who made those decisions reside in or around Kansas City, Opp. Mem. at 5;

4) TaxACT's decision to pursue business strategies that the Plaintiff incorrectly calls "maverick activities" occurred entirely in Cedar Rapids, Decl. of Lance Dunn (June 2, 2010) ¶ 7.

In addition, TaxACT's analyses of pricing and FFA offers and its creation of new FFA offers occurred entirely in Cedar Rapids, Iowa. *Id*. at ¶ 8. As a result, all of the employees

[5] DOJ ambiguously argues that it "anticipates it may" call IRS employees who are in D.C. as witnesses, Opp. Mem. at 17, but does not name any such potential witnesses or even affirmatively state its intention to do so. DOJ will presumably file a preliminary injunction motion with accompanying evidence. At this stage, it should know and be able to identify specific witnesses that will support its position. Its refusal to do so – even in a filing to this Court – is telling.

[6] Lance Dunn and Camela Greif are located in Cedar Rapids, Iowa. Decl. of Lance Dunn (June 2, 2010) ¶ 2. Adam Newkirk, Tony Bowen, Jason Houseworth, and Alan Bennett are located in Kansas City, Missouri. Decl. of Tony Bowen (May 27, 2011) ¶7.

[7] All of the current employees whose documents the DOJ requested are located in Kansas City, Missouri or Cedar Rapids, Iowa. Decl. of Tony Bowen (May 27, 2011) ¶8; Decl. of Lance Dunn (June 2, 2010) ¶ 2.

involved in those analyses and offers are in Cedar Rapids. Because all of the witnesses regarding the key documents – as identified by DOJ – are in Kansas City and Cedar Rapids, the case should be transferred. DOJ's position that many of the documents are already in D.C. does not help when the documents cannot speak for themselves. Witnesses who wrote them and who are over a thousand miles away from here will need to testify about these events.

IV. The Fact That DOJ Alleges a National Market Does Not Support Retaining Venue in DC

DOJ asserts that the fact that the alleged relevant market is national militates in favor of having the case heard in D.C. Opp. Mem. at 9. That assertion is incorrect. If the District of Columbia was the preferred venue for all cases in which a national relevant market was alleged, many of the cases that have been transferred in the past five years should have been brought and heard in D.C. They were not. Indeed, the antitrust issues raised in *Cephalon*, *Watson*, *Microsemi*, and other recently transferred antitrust actions all involved national markets, but that did not weigh in favor of litigation in Washington, D.C. *See F.T.C. v. Watson Pharms., Inc.*, 611 F. Supp. 2d 1081 (C.D. Cal. 2009) (transferring case that was brought in California to Georgia despite allegation of a national market); *F.T.C. v. Cephalon*, 551 F.Supp.2d 21 (D.D.C.2008) (transferring the case to Pennsylvania despite allegation of a national market); *Microsemi Corp.*, No. 1:08cv1311, 2009 WL 577491 (transferring a case brought in Virginia to California despite allegations of a national market).

Where there is no allegation of a local market, what matters most for Section 1404(a) is where the operative facts of the specific transaction and witnesses are located. While the government seeks to distinguish this Court's *LabCorp* decision because it involved a local market in California, in fact the Court in *LabCorp* recognized that the fact that the transaction in that case involved California companies who planned the transaction in California was an

important factor in favor of transfer. The Court, in granting transfer, noted that "the sale agreement, the asset purchase agreement, was reached in California and executed out there, and it appears that the discussions and the analysis that led to that agreement being executed occurred in California as well." *LabCorp* Tr. at 37-38.

As we have explained, the transaction at issue here was conceived, planned, evaluated, and is proposed to be implemented in Kansas City and Cedar Rapids. That is what is relevant under 1404(a) for evaluating the proper venue for this action.

V. DOJ's Reference to the Forum Selection Clause in the Merger Agreement is a Red Herring

DOJ's argument (Opp. Mem. at 13-14) that the standard Delaware forum selection clause in the parties' merger agreement somehow bears on the issues before this Court is a complete red herring. TaxACT, the company that H&R Block seeks to acquire, is a Delaware corporation. As a result, disputes relating to TaxACT's management or the process leading to its sale would be governed by Delaware law. Accordingly, the merger agreement specifies that Delaware law governs the terms of that agreement, and the parties included a provision common to agreements regarding Delaware companies that the Delaware Court of Chancery—a court that has unique experience applying the laws of Delaware to corporate disputes—should hear any case arising under the merger agreement. While that forum is indisputably inconvenient for the parties, none of whom has employees in Delaware, litigating complex issues of local Delaware law in a state court outside of Delaware would not make sense. None of that has anything to do with whether a federal antitrust case, in which the principal and largest defendant is domiciled in Missouri, ought to be litigated in Missouri rather than D.C.

Accordingly, the fact that the parties agreed to litigate a dispute among themselves that would be governed by local state law in the *only available forum* with expertise in that local state

law is of no relevance to the underlying Motion.

VI. The Public Interest Factors Either Support Transfer or Are Neutral

A. The Local Interest In Deciding Local Controversies Is A Neutral Factor Because This Case Presents No Issue Of Particular Local Interest

DOJ's attempt to transform this case into an issue of local interest for the District of Columbia strains any reasonable interpretation of "local interest." As Defendants point out in their opening brief, the local interest in deciding local controversies at home is simply "not a compelling factor in this case" because "this controversy is not entirely or particularly local." *See Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 52 n.8 (D.D.C. 2000). Rather, this action involves a transaction between two corporations with customers in districts across the country, any of which could claim the "local interest" that Plaintiff finds in the District of Columbia. As a result, this factor is neutral because the Western District of Missouri has at least as much local interest than this Court's home district.

That Plaintiff *may* ultimately present "evidence produced from and concerning the activities of the IRS", Opp. Mem. at 19, does not create a unique local interest. The IRS conducts business nationwide and has physical locations nationwide, including in Kansas City, Missouri. In fact, District of Columbia residents were directed to mail their completed 2010 tax returns to the IRS in Kansas City. Moreover, any role the IRS plays in these proceedings is likely to be tangential at best. As the documents cited in Plaintiff's Opposition attest, much of this case turns on the interpretation of evidence and documents created and held by individuals in Kansas City.

Nor does the allegation that some D.C. consumers will be harmed by the transaction render this case local to D.C. There is no suggestion that residents of Washington D.C. will be subject to any unique harm from the proposed transaction. Indeed, a court in this District

recently held that where an antitrust action involves nationwide issues, and therefore the alleged harm would have a similar impact on customers in districts throughout the country, the case was not a local controversy. *See Cephalon*, 551 F. Supp. 2d at 30-31.[8] This case centers on the future of H & R Block's digital business in Kansas City, Missouri, and a federal court there should be the best one to hear this case.

Finally, there is no support for the government's notion that this matter presents an issue of local interest because venue was premised on the antitrust venue statute, 15 U.S.C. § 22. Section 22 simply widens the pool of permissible districts in which an antitrust action may be filed; it by no means assures that the government may litigate in the District of Columbia or accords preference to the District of Columbia as a forum. Congress could easily have provided for exclusive venue in the District of Columbia for antitrust actions brought by the government, but it chose not to do so. *See, e.g.*, Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, s. 408(b)(3), 115 Stat. 230 (2001) (prescribing venue in the District Court for the Southern District of New York for suits under the Act). Instead, Congress enacted Section 22 against the backdrop of Section 1404(a), which permits a change of venue for the convenience of the parties and witnesses and the interests of justice. Thus, Section 22 ensures that both the District of Columbia and the Western District of Missouri are available venues in this case. That provision has no bearing on the issue of whether this case should be transferred pursuant to Section 1404(a).

B. This District's Experience In Handling Merger Challenges Is Immaterial – The Courts' Respective Familiarity With The Law Is A Neutral Factor

[8] This is also not a case where the allegedly illegal behavior specifically targeted D.C. or its residents, such as in *Second Chance Body Armor*, on which the government relies, where the false claims that formed the basis suit occurred in D.C. *United States v. Second Chance Body Armor, Inc.*, Civ. A. No. 04-280, 2011 WL 1048183 (D.D.C. Mar. 24, 2011).

DOJ's observation that the courts in this District have more experience handling merger challenges is immaterial to whether the respective courts have more familiarity with the applicable law. "[C]ourts follow 'the principle that the transferee federal court is competent to decide federal issues correctly.'" *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 70, n.6 (D.D.C 2003) (quoting *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.D.Cir 1987)); *see also Second Chance Body Armor*, 2011 WL 1048183, at *2 ("All federal courts are presumed equally familiar with the law governing the plaintiffs' [federal] claims, and this factor does not weigh either for or against transfer."). Indeed, courts in this District have specifically rejected arguments that experience with specialized types of cases renders a forum more familiar with the law. *See, e.g., Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42 (D.D.C. 2006). Because only federal laws are at issue in this case, familiarity with the applicable law is a neutral factor.

C. Court Management Statistics Are Relied On By Transferor Courts In Expediting The Litigation and Promoting Judicial Efficiency

Plaintiff's bald assertion that the Federal Court Management Statistics are irrelevant to the determination of which court would handle the matter more expeditiously is flatly contradicted by the case law and common sense. Plaintiff tellingly declines to rebut the cases cited by the Defendants that explicitly rely on these very statistics in evaluating whether the transferee court would be able to bring the case to a final disposition more rapidly and serve the judicial efficiency interests of the entire court system. *See Parkridge 6, LLC v. U.S. Dep't of Transp.*, No. 09-cv-01478, 2009 WL 3720060, at *3 (D.D.C. Nov. 9, 2009); *Publ'ns Int'l Inc. v. HDA Inc.*, No. 06 C 6148, 2007 WL 1232199, at *4 (N.D. Ill. Apr. 18, 2007) (both utilizing the Federal Court Management Statistics to find that lower median times to disposition and trial weighed in favor of transfer). And again, Plaintiff's case, *Second Chance Body Armor*,

undermines Plaintiff's position, as the court there also examined data regarding median disposition time. 2011 WL 1048183, at *2. Plaintiff cites to no authority for its contention that these commonly used district-wide statistics are somehow less relevant in this case.

Moreover, Plaintiff's distinction that this matter is not proceeding to a "trial" but a "Preliminary Injunction hearing" is unfounded for two reasons. First, as Plaintiff well knows, the preliminary injunction hearing is tantamount to a trial here because the standard for a preliminary injunction is the "likelihood of success on the merits," which is virtually the same as for a permanent injunction. *See Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 546 n.12 (1987) (disregarding the distinction between a trial on the merits and a preliminary injunction hearing and noting that "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."). As a practical matter, all parties will likely conduct extensive discovery before the preliminary injunction hearing and call significant numbers of witnesses at the hearing to demonstrate the "likelihood of success on the merits" or otherwise, making the preliminary injunction hearing a "trial" for all intents and purposes. Second, the parties or the court may elect to consolidate the preliminary injunction hearing and the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

Dated: June 2, 2011

Respectfully submitted,

/s/ J. Robert Robertson
J. Robert Robertson (DC Bar #501873)
(DDC Bar #IL0001)
Corey W. Roush (DC Bar #466337)
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Tel: 202 637 5600
Fax: 202 637 5910
Attorneys for Defendants 2SS Holdings, Inc. and TA IX L.P.

/s/ Theodore C. Whitehouse
Theodore C. Whitehouse (DC Bar #298331)
David K. Park (DC Bar #446159)
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006
Tel: (202) 303-1000
Fax: (202) 303-2000
Attorneys for Defendant H&R BLOCK, INC.