Exhibit

157

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 Dry 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)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANTS' MOTION TO TRANSFER VENUE

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

REGULATIONS:

RULES:

OTHER AUTHORITIES:

INTRODUCTION

Defendants respectfully submit this memorandum in support of their motion to transfer this action to the United States District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1404(a). As explained below, all of the relevant factors that are indicative here weigh in favor of transfer. First, the Western District of Missouri is an appropriate forum for this case. Second, it is significantly more convenient for substantially all of the non-party and party witnesses, most of whom are located in or near Kansas City, Missouri. Third, substantially all of the relevant documents and data are similarly located in or near Kansas City. Fourth, transfer will facilitate the necessarily expeditious resolution of the action by permitting litigation in a less congested venue. In contrast, there is nothing that connects this case to this District of Columbia other than the mere presence of Plaintiff's attorneys. None of the operative facts of this case arose in this jurisdiction, and none of the known potential witnesses resides in Washington, D.C.

In this action, the Department of Justice seeks to enjoin the proposed acquisition by H&R Block, Inc. ("HRB") of 2nd Story Software, Inc. ("2SS"), alleging that the proposed transaction violates Section 7 of the Clayton Act. Under the terms of a timing agreement entered into by HRB, 2SS, and the DOJ, the DOJ must seek and obtain a preliminary injunction prohibiting the parties from closing after June 22, 2011, which is the last day of a 30-day standstill period during which the parties agreed not to close the transaction. Resolution of this matter will require a fast-paced period of document discovery, depositions, and a hearing lasting approximately eight to fifteen days, all of which will take place in a short time period.[1] An expedited schedule for resolving the DOJ's claims is particularly important in this action because of the business cycle

[1] *See, e.g., FTC v. CCC*, 605 F. Supp. 2d 26 (D.D.C. 2009) (allowing nine days of hearings and testimony of 10 witnesses); *United States v. Oracle*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (hearing 19 days of testimony, at least 20 plaintiffs' witnesses, and at least seven defendants' witnesses); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (allowing 10 days of hearings and 23 witnesses); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998) (allowing seven weeks of hearings and at least 27 witnesses).

in which HRB and 2SS operate, which will require timely integration of the combined companies in order to realize the anticipated benefits of the merger in time to deliver its new products to consumers before the next tax season, which begins January 1, 2012.

In light of the expected fast-paced schedule and the imminent need for a hearing before the Court, the convenience of the non-party and party witnesses, the parties, and the relative congestion of the proposed venues are factors of heightened importance. Each of those factors overwhelmingly supports the transfer of this action to the Western District of Missouri. As the DOJ has investigated the Transaction over the past several months, numerous witnesses from Kansas City and Iowa have had to travel approximately 1,000 miles to Washington, D.C. for depositions—including several depositions during the height of tax season. Now that this action is pending in federal court, this Court has the discretion to choose a more appropriate, convenient, and just location for the resolution of this matter.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Transaction

Plaintiff challenges the proposed acquisition by HRB, a Missouri corporation with headquarters in Kansas City, Missouri, of 2SS, a Delaware corporation with headquarters in Cedar Rapids, Iowa. HRB, through its subsidiaries, provides tax, banking, and business and consulting services. HRB's Tax Services segment provides income tax return preparation, electronic filing, and other services and products related to income tax return preparation to the general public primarily in the United States.

2SS is the maker of TaxACT, a suite of value-priced computer-based tax preparation products that allow individual taxpayers to prepare and file their tax returns without the assistance of a professional (i.e., do-it-yourself or "DIY" tax preparation). Following the merger,

the four founders of 2SS—Lance Dunn, Camela Greif, Jerome McConnell, and Alan Sperfslage, all of whom reside in Cedar Rapids, Iowa—will take leadership positions in HRB's digital tax division. The new digital tax division of the combined company will be located in Cedar Rapids.

HRB and 2SS negotiated the transaction entirely in Kansas City and Cedar Rapids, where the two companies have approximately 1,100 and 75 employees, respectively. Affidavit of Tony Gene Bowen in Support of Defendants' Motion to Transfer Venue ("Bowen Aff."), ¶¶ 3, 4. HRB's headquarters has been located in Kansas City for HRB's entire fifty-five year history. *Id.* All of HRB's executives are located in Kansas City, including those responsible for the digital tax business and the transaction at issue here. *Id.*, ¶ 4. A significant number of former, non-party HRB employees who have knowledge of the issues in this case and whom the DOJ has either contacted or sought documents from are located in Kansas City. *Id.*, ¶¶ 8-10. Moreover, Defendants' pre-merger analyses and competitive analyses generated in the ordinary course of business, including much of the documentary evidence cited by the DOJ in its complaint, were all created in Kansas City. *Id.*, ¶ 3.

B. The DOJ Investigation

HRB and 2SS filed premerger notifications with the DOJ and the Federal Trade Commission under the Hart-Scott-Rodino Act ("HSR Act") on October 25, 2010. On November 24, 2010, the DOJ issued "Requests for Additional Information Material" ("Second Requests") to HRB and TA IX L.P. (a firm with majority ownership of 2SS) pursuant to Section 7A(e)(1) of the Clayton Act, 15 U.S.C. § 18a and Section 803.20 of the Premerger Notification Rules and Regulations, 16 C.F.R. § 803.20. HRB and 2SS substantially complied with the Second Requests in February 2011.

Between February and May 2011, Defendants produced additional documents to the DOJ, and six of their executives traveled from Kansas City and Cedar Rapids to Washington, D.C. to appear at the DOJ for depositions. At those depositions, the witnesses explained how and why the transaction will result in dramatic efficiencies, enhance competition, and benefit consumers.

Specifically, Kansas City-based HRB witnesses explained that HRB's tax software has long suffered from high costs and expensive overhead, which has limited HRB's ability to challenge the market dominance of Intuit. Witnesses from HRB (Kansas City) and TaxACT (Cedar Rapids) explained how TaxACT, in contrast to HRB, has an extremely low cost platform and why HRB believes that it can use that low cost platform post-merger as the backbone for all of HRB's consumer products, including its premium products. Similarly, witnesses from both HRB and TaxACT explained why HRB will be able to take advantage of TaxACT's lower cost structure to obtain dramatic efficiencies compared to HRB's stand-alone costs and how those savings will enable HRB to invest substantially more capital in challenging Intuit, which has long dominated the premium segment of this business. Further, witnesses from HRB and TaxACT explained how HRB's acquisition of a low-cost, low-price brand will facilitate HRB's competing effectively in the low-priced, value segment of the market, something that HRB has been unable to do successfully to date.

In addition, the parties identified empirical data that showed that HRB's existing paid tax software products do not compete closely with those of TaxACT. Those data are located at the companies' respective headquarters in Kansas City and Cedar Rapids, as are the witnesses who can explain them. In sum, all of the relevant evidence that is relevant to the issues presented here and that directly involve HRB and TaxACT arises from people and documents that reside in Kansas City, Missouri or Cedar Rapids, Iowa.

HRB believes that the DOJ's allegations in this action derive from a premature rush to judgment based on a misunderstanding of the facts that are relevant and the drawing of unfair inferences from documents that are not relevant to the issues at hand. In particular, a fair hearing on the facts will show that HRB could not raise, and has no intention of raising, the price (or impairing the quality) of TaxACT's products, which must remain competitive in the value market segment. Indeed, in attempting to assuage the DOJ's stated concerns, HRB agreed to commit for a period of three years post-merger: (1) to continue to offer the TaxACT brand and TaxACT's current "free" federal filing for everyone" online business model and (2) to hold TaxACT's maximum pricing for tax return preparation products at current (2011) levels. The DOJ declined that offer, and instead brought the instant action on May 22, 2011. What is most pertinent for this motion is that the witnesses and documents that relate to the DOJ's factual allegations and to the proposed commitments identified above all reside in Kansas City and Cedar Rapids.

ARGUMENT

Defendants respectfully request that the Court transfer this case to the Western District of Missouri pursuant to 28 U.S.C. § 1404(a). As explained in detail below, undisputed facts make clear that the Western District of Missouri in Kansas City is the most appropriate, just, and convenient venue for this litigation.

A. The Applicable Standard Under § 1404(a)

Section 1404(a) vests the Court with discretion to transfer an action to any other district where it could have been brought "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). There is no doubt that traditional Section 1404(a) standards

apply in antitrust cases brought by the government. *See United States v. Nat'l City Lines, Inc.*, 337 U.S. 78, 84 (1949).

Indeed, in the past two years, federal antitrust agencies have filed several cases in inconvenient fora for obvious strategic reasons, and the district courts have repeatedly transferred them to more convenient venues pursuant to Section 1404(a). *See, e.g., FTC v. Lab. Corp. of Am., et al.*, 10 Civ. 2053 (D.D.C. Dec. 3, 2010) (Order and Transcript of Oral Argument ("Tr.")),[2] (hereinafter "*LabCorp*") (transferring a merger challenge filed by the FTC in the District of Columbia to the Central District of California, where the parties were based); *Cephalon, Inc.*, 551 F. Supp. 2d at 27-29 (transferring action from the District of Columbia to the Eastern District of Pennsylvania in part because the FTC's antitrust case had "no meaningful connection" to Washington, D.C.); *United States v. Microsemi Corp.*, No. 1:08cv1311 AJT/JFA, 2009 WL 577491, at *10 (E.D. Va. Mar. 4, 2009) (transferring merger challenge brought by DOJ in Virginia to California for the convenience of witnesses, regardless of the fact that there was no related proceeding pending in California, and not providing deference to the government's choice of forum where the operative facts took place in California); *FTC v. Watson Pharm., Inc.*, 611 F. Supp. 2d 1081, 1089-90 (C.D. Cal. 2009) (noting FTC's "choice of forum, while taken into account, is not a sufficiently strong factor to deny the motion to transfer" and transferring the case to the Central District of Georgia).

Defendants must make two showings to justify transfer. First, "the action at issue must be one that could appropriately have been brought in the requested transferee forum." *SEC v. Ernst & Young*, 775 F. Supp. 411, 413 (D.D.C. 1991); *see also Devaughn v. Inphonic*, 403 F. Supp. 2d 68, 71-72 (D.D.C. 2005); *Trout Unlimited v. United States Dep't of Agric.*, 944 F. Supp.

[2] The Court's decision in *LabCorp* was set forth in a one page Order referring back to the reasoning provided by the Court at oral argument. The relevant Order and Transcript are attached hereto at Exhibit A.

13, 16 (D.D.C. 1996). Second, Defendants must demonstrate that considerations of convenience and the interests of justice weigh in favor of a transfer. *New Hope Power Co. v. U.S. Army Corps of Engineers*, 724 F. Supp. 2d 90, 93 (D.D.C.); *Devaughn*, 403 F. Supp. 2d at 72; *Trout Unlimited*, 944 F. Supp. at 16. The Court may consider materials outside the pleadings in considering a motion to transfer under section 1404(a). *See, e.g., Starnes v. McGuire*, 512 F.2d 918, 933-34 (D.C. Cir. 1974).

B. The Western District of Missouri Is Unquestionably An Appropriate Forum In Which To Adjudicate The DOJ's Claims

This lawsuit could have been filed initially in the Western District of Missouri. The Clayton Act's venue provision provides, in relevant part, that "[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought… in the judicial district whereof it is an inhabitant [and] any district wherein it may be found or transacts business." 15 U.S.C. § 22. HRB "may be found" and "transacts business" in the Western District of Missouri, where it is incorporated and headquartered. 2SS similarly "transacts business" in that District through online sales and advertising. The Western District of Missouri is thus a proper venue for this action under the Clayton Act. *See, e.g., Cephalon, Inc.*, 551 F. Supp. 2d at 25 (finding it "plainly evident" that the FTC could have filed its suit in the Eastern District of Pennsylvania where Cephalon transacted business).

Antitrust regulatory agencies have often instituted enforcement proceedings in the district where one or both of the parties are located, further demonstrating that such a forum is appropriate. *See, e.g., United States v. Health Choice of Nw. Mo., Inc*., Civil Action No. 95-6171-CVSJ6, 1996 WL 773322 (W.D. Mo. Oct. 22, 1996) (DOJ filed complaint in the Western District of Missouri, where both Defendants had operations); *United States v. Assoc. of Family Practice Residency Dirs.*, Civ.A.No. 96-575-CV-W-2, 1996 WL 557841 (W.D. Mo. Aug. 15,

1996) (same for complaint filed by FTC); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213 (W.D. Mo. 1995) (same); *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (DOJ filed complaint in Northern District of California, where Defendant was based); *FTC v. Inova Health Sys.*, Docket No. 08-460 (E.D. Va. May 12, 2008) (FTC filed complaint in the Eastern District of Virginia, where the defendant's office was located); *FTC v. W. Refining, Inc.*, Docket No. 07-00352 (D.N.M. Apr. 12, 2007) (FTC filed complaint in New Mexico, where the defendant was headquartered); *FTC v. Equitable Res., Inc.*, Docket No. 07-00490 (W.D. Pa. Apr. 13, 2007) (FTC filed complaint in the Western District of Pennsylvania, where the defendant had its offices); *FTC v. Tenet Healthcare*, 17 F. Supp. 2d 937 (E.D. Mo. 1998) (FTC filed complaint in the Eastern District of Missouri, where both defendants had operations). Given this precedent, the Western District of Missouri—where both companies transact business and where the acquiring company resides—is clearly an available forum in this case.

C. The Balance Of Private And Public Interests Weighs Strongly In Favor Of Transfer To The Western District of Missouri

The second element of the Section 1404(a) transfer inquiry requires "an 'individualized, case-by-case consideration of convenience and fairness'" that "calls on the district court to weigh in the balance a number of case-specific factors." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). In undertaking this analysis, courts weigh factors related to "the private interests of the parties and witnesses" and factors related to "the public interest of justice." *Montgomery v. STG Int'l, Inc.*, 532 F. Supp. 2d 29, 32 (D.D.C. 2008).

The private interest factors that courts routinely consider include "(1) the plaintiff's choice of forum, (2) the defendant's choice of forum, (3) where the claim arose, (4) the convenience of the parties, (5) the convenience of the witnesses . . . and (6) the ease of access to

sources of proof." *Id.* at 32-33. The relevant public interest factors are "(1) the transferee's familiarity with the governing laws, (2) the relative congestion of each court, and (3) the local interest in deciding local controversies at home." *Id.* at 34.

There is ample precedent, both within this Circuit and beyond, for the transfer of antitrust actions and merger challenges based on the balance of these private interest and public interest factors. *See, e.g., LabCorp* Order and Transcript, attached at Exhibit A; *Cephalon*, 551 F. Supp. 2d at 32; *Watson Pharms*, 611 F. Supp. 2d at 1087-89; *Microsemi Corp.*, 2009 WL 577491, at *10; *United States v. Swift & Co.*, 158 F. Supp. 551, 560 (D.D.C. 1958). In this case, the majority of the factors supports transfer to the Western District of Missouri.

1. Plaintiff's Choice of Forum Should Be Afforded Little to No Deference

The DOJ's decision to file this action in the District of Columbia is not entitled to deference because this matter has no meaningful ties to Washington, D.C. Courts in this District have 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. Ry. Co.*, 523 F. Supp. 521, 524 (D.D.C. 1981); *see also Montgomery*, 532 F. Supp. at 33 ("[W]hen the connection between the controversy, plaintiff, and the forum are attenuated and lack a meaningful factual nexus, less deference is given" to plaintiff's choice of forum); *Schmidt v. Am. Inst. of Physics*, 322 F. Supp. 2d 28, 33 (D.D.C. 2004) ("[D]eference [to Plaintiff's choice of forum] is mitigated . . . [where the] forum has 'no meaningful ties to the controversy and no particular interest in the parties or subject matter.'") (citations omitted).

Here, the *only* link between the forum and this matter is the fact that the DOJ and its attorneys reside in Washington, D.C. However, courts in this District consistently have refused to give substantial deference to the forum choice made by federal agencies in enforcement

actions where—as here—the only connection between the case and the District of Columbia is the presence of the federal agency within the District. The court in *Cephalon*, for example, transferred an antitrust enforcement action brought by the Federal Trade Commission in part because:

> Here, apart from the fact that many of the FTC's prosecuting attorneys are located in this area, there are no meaningful ties between the District of Columbia and the events (or parties) that gave rise to this action . . . . To be sure, the FTC 'resides' in the District of Columbia in the sense that the agency's headquarters is located here. But beyond that, there is essentially no nexus between the District of Columbia and this controversy.

551 F. Supp. 2d at 26-27.

Consistent with this precedent, the DOJ's selection of this forum should be given little weight.

2. The Western District of Missouri Is The Most Appropriate Venue

In contrast to the DOJ's choice of forum, Defendants' proposed location—the Western District of Missouri—has a close nexus with this action. HRB, the acquiring company, is headquartered in Kansas City, Missouri, and 2SS is located relatively nearby in Cedar Rapids, Iowa. Morever, as described in more detail below, all of the material events giving rise to the challenged Transaction occurred in Kansas City or in close proximity to Kansas City, and virtually all of the key witnesses reside in Missouri or other states substantially closer to Kansas City than to the District of Columbia.

Courts in this District have placed great weight on the defendant's choice of forum in situations where, as here, the transferee district has significantly greater ties to the case than the venue in which the action was filed. For example, in *LabCorp*, where the FTC commenced an action in this District challenging the acquisition of a California-based corporation, Judge Roberts held:

> It seems to me that this action's ties to this district are comparatively insubstantial, but the ties to California are significant. Most of Westcliff's assets and operations are situated in California. There's no dispute about 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. Similarly, the *Cephalon* court concluded that the defendant's choice of forum weighed in favor of transfer because:

> Cephalon's primary base of operations is in the Eastern District of Pennsylvania. It is a Delaware corporation that merely maintains a very small public affairs office in the District of Columbia. None of the negotiations that led to the settlement agreements at the heart of this controversy took place in, or were in any other way related to, the District.

551 F. Supp. 2d at 26. And in *Schmidt*, the court found that the defendant's choice of forum was more appropriate because "a majority of material events occurred" there and because "relevant documents, witnesses and [defendant's] corporate offices are in [defendant's selected forum] supports [defendant's] choice of forum." *Schmidt*, 322 F. Supp. 2d at 34. Thus, as in these prior cases, the Defendant's choice of forum weighs strongly in favor of transfer.

3. The Facts Underlying this Case Transpired in Missouri and Iowa

All of the facts relating to the issues that are in dispute in this litigation arose in Missouri or Iowa:

- HRB, the acquirer, has its principal place of business in Kansas City, Missouri;
- 2SS has its principal place of business in Cedar Rapids, Iowa;
- the relevant current and former employees and their evidence are almost entirely located in Missouri or Iowa; and
- the acquisition agreement that is being challenged in this action was negotiated, drafted, and executed in Missouri and Iowa.

In sharp contrast, "no underlying operative facts arose in the District of Columbia." *Ernst & Young*, 775 F. Supp. at 414. The factor of where the underlying issues arose thus

weighs in favor of transferring this case to Missouri. *See Apple*, 602 F.3d at 914 (transferring case to Northern District of California in part because "'alleged wrongs' occurred in Northern California"); *Intrepid Potash-N. Mex., LLC v. Dept. of Interior*, 669 F. Supp. 2d 88, 95 (D.D.C. 2009) ("Transfer is supported when the material events that constitute the factual predicate for the plaintiff's claims occurred in the transferee district.") (quotation omitted).

4. The Convenience of the Parties and Witnesses Strongly Supports Transfer

The Western District of Missouri in Kansas City is a substantially more convenient location for the non-party and party witnesses in this case as well as for the parties. The categories of witnesses who would likely be called to testify at a preliminary injunction hearing include:

- the negotiators of the acquisition agreement on behalf of HRB and 2SS;
- HRB and 2SS employees who will testify regarding the business rationale for the proposed Transaction;
- HRB and 2SS employees and former employees who will testify regarding the documentary evidence allegedly supporting the DOJ's complaint;
- HRB and 2SS employees who will testify about competition;
- HRB and 2SS employees who will testify regarding low barriers to entry and opportunities for existing competitors to expand; and
- employees of non-party competitors who may be called upon to testify regarding competition and the relevant market.

The majority of the anticipated witnesses, therefore, will be current employees of HRB and 2SS. HRB is headquartered in Kansas City, and 2SS is located less than 300 miles away in Cedar Rapids, Iowa. In contrast, both HRB and 2SS are located approximately 1,000 miles from the District of Columbia. Maintaining this action in the current forum would be extremely burdensome, requiring numerous key employees at HRB and 2SS to fly across the country

repeatedly in order to testify during various phases of the litigation. Particularly in light of the fast-paced schedule of this action, the extensive travel that would be required for HRB and 2SS employees to testify in Washington D.C. is likely to lead to a substantial disruption in the companies' business. The primary executives responsible for developing and testing the companies' digital tax products would be forced to spend much of their time traveling, absent from their offices, during the time period in which the companies are preparing for the next tax season. *See* Bowen Aff., ¶ 13. By minimizing the travel that would otherwise be required of HRB and 2SS employees involved in this matter, a transfer to the Western District of Missouri would mitigate the disruption in HRB's and 2SS's business resulting from this litigation.

The Western District of Missouri would also be more convenient for most non-party witnesses. Many of the potential third-party witnesses are former HRB employees who reside principally in or around Kansas City, Missouri. *See* Bowen Aff., ¶¶ 8, 9. Other possible third-party witnesses are employees of Intuit, located in Mountain View, California, and FreeTaxUSA, located in Provo, Utah. Bowen Aff., ¶ 11. Direct flights between San Francisco, California (the closest airport to Mountain View) and Kansas City, Missouri are approximately half as expensive and about 35% shorter than direct flights between San Francisco and Washington, D.C. Direct flights between Salt Lake City, Utah and Kansas City, Missouri, are less expensive and two hours shorter than direct flights between Salt Lake City and Washington, D.C. At 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.

The convenience of witnesses is a key factor in determining whether a case should be transferred. *See, e.g.*, *Apple*, 602 F.3d at 913 ("If Apple's California witnesses were required to

travel to Arkansas, Apple would likely incur expenses for airfare, meals and lodging, and losses in productivity from time spent away from work," while the "witnesses will suffer the personal costs associated with being away from work, family, and community.") (quotation and citation omitted); *In re Genentech*, 566 F.3d at 1345 ("Because a substantial number of material witnesses reside within the transferee venue and the state of California, and no witnesses reside within the Eastern District of Texas, the district court clearly erred in not determining this factor to weigh substantially in favor of transfer."); *Ernst & Young*, 775 F. Supp. at 414 (granting transfer based in part on fact that "for the majority of witnesses, trial in Texas would be less burdensome than trial [in the District of Columbia]"); *Roberts*, 2007 WL 2007504, at *4 (holding that convenience of parties and witnesses "weighs in favor of transfer" because "more relevant witnesses reside in Northern California than in the District of Columbia."). Even in cases involving a much smaller differential in travel distances, courts have granted transfers based, in part, on witness convenience. *See, e.g.*, *Cephalon*, 551 F. Supp. 2d at 28 (finding that the witness convenience factor weighed in favor of transfer from the District of Columbia to the Eastern District of Pennsylvania); *Schmidt*, 322 F. Supp. 2d at 31-32 (transferring matter from the District of Columbia to the District of Maryland based largely on the convenience factor). Where, as here, the transferee forum would be significantly more convenient for all or nearly all of the witnesses, this factor weighs heavily in favor of transfer.

Further, courts have found that third-party witness convenience weighs even more heavily in favor of transfer in antitrust actions because 15 U.S.C. § 23 allows witnesses to be subpoenaed from "any other district" and thus nonparty witnesses could be forced to travel from distant forums. *See United States v. Gen. Motors Corp.*, 183 F. Supp. 858, 861-62 (S.D.N.Y. 1960) (noting that "[i]n a Government antitrust suit, the court must consider the welfare of

nonparty witnesses, because they are without the protection from subpoena to attend at places far from home normally afforded them by F.R. Civ. P. 45(e)" and because under 15 U.S.C. § 23 "they may be required to travel from any place in the country"); *see also Microsemi Corp.*, 2009 WL 577491, at *10 ("Given the substantial number of non-party witnesses located outside of this district, and the substantial travel that will be necessary even were this case to remain here, this district provides no real advantage to the Government with respect to securing the attendance of non-party witnesses through subpoena."). Because many of the third-party witnesses who may be compelled to testify in this matter likely reside in Missouri or locations closer to Missouri than to Washington, D.C., the convenience of these witnesses even more strongly supports transfer.

Any inconvenience to the DOJ's attorneys resulting from litigating this case in the Western District of Missouri rather than the District of Columbia is irrelevant to the analysis. *Cf. LabCorp* Tr. at 12-13 (FTC counsel: "[T]he convenience of counsel isn't really an issue that weighs in this [transfer] analysis –"; the Court: "Right"). Indeed, the DOJ has proven that it is fully capable of litigating antitrust actions in the Western District of Missouri. *E.g.*, *Health Choice of Nw. Mo.*, 1996 WL 773322; *Assoc. of Family Practice Residency Dirs.*, 1996 WL 557841.

In any event, however, any inconvenience to the DOJ's attorneys will be reduced by the fact that DOJ has an office in Kansas City, *see The United States Attorney's Office, Western District of Missouri,, available at:* http://www.justice.gov/usao/mow/index.html, and the Antitrust Division has a field office in Chicago covering both Missouri and Iowa, *see* http://www.justice.gov/atr/contact/offices.html. *See Microsemi*, 2009 WL 577491, at *7 n.11 (noting in transferring a case to the Central District of California in Santa Ana, California that

the Department of Justice's "Antitrust Division maintains one of its seven field offices in California"—specifically in San Francisco, a city almost 400 miles away); *see also Ernst & Young*, 775 F. Supp. at 415 (identifying as important the fact that the SEC had an office in Texas and had easily conducted its investigation in Texas from its main office in D.C.).

In the words of the *Roberts* court, any "'minor litigational inconveniences'" the DOJ may face in litigating this case in the Western District of Missouri are outweighed by the extreme inconvenience to the employees of HRB, 2SS, and potential third-party witnesses if this case is litigated in the District of Columbia. *Roberts*, 2007 WL 2007504, at *3 (quoting *Ernst & Young*, 775 F. Supp. at 415). This factor thus militates in favor of transfer.

5. The Ease of Access to Sources of Proof Weighs in Favor of Transfer

Ease of access to relevant evidence also supports transfer of this case. HRB is based in Kansas City, and many of the original documents and information related to the transaction and to the evolution of HRB's digital strategy are located there, as are the witnesses who can authenticate and explain them. Other original documents and information related to the transaction are in Cedar Rapids, Iowa, which is substantially closer to the Western District of Missouri than to the District of Columbia. While DOJ staff have obtained numerous documents in connection with the Second Request and have transported those documents to Washington, D.C., "the mere presence of certain documents in Washington does not change the location of the facts underlying this action." *Ernst & Young*, 775 F. Supp. at 415. To the extent that those documents are now in this forum, it is only because the DOJ "subpoenaed them to its D.C. office." *Id.*; *accord In re Apple, Inc.*, 602 F.3d at 914 ("A Plaintiff may not defeat a motion to transfer by shipping relevant documents to local counsel in its chosen venue.") (citing *In re*

Hoffman-La Roche Inc., 587 F.3d 1333, 1336-37 (Fed. Cir. 2009)). The ease of access to sources of proof in Missouri thus weighs in favor of transfer.

6. The Transferee Court's Familiarity With Governing Laws Is A Neutral Factor

The first public interest factor—the transferee court's familiarity with the governing laws—is neutral in this case, because the same federal antitrust laws govern regardless of the jurisdiction in which the litigation proceeds. *See, e.g.*, *Aftab v. Gonzalez*, 597 F. Supp. 2d 76, 83 (D.D.C. 2009) ("The transferee district is presumed to be equally familiar with the federal laws governing [Plaintiff's] claims . . . [therefore] [t]his factor is neutral."); *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 70, n.6 (D.D.C 2003) ("[T]he first public-interest factor is of little significance . . . [if] the plaintiffs base all of their claims on federal . . . law, and courts follow 'the principle that the transferee federal court is competent to decide federal issues correctly.'") (quoting *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.D.Cir 1987)).

7. The Relative Case Congestion in the District of Columbia Weighs in Favor of Transfer To The Western District of Missouri

The second public interest factor, which compares the congestion of the proposed venues, also weighs heavily in favor of transfer. This is particularly so in this case, where an expeditious trial is required. Although the Western District of Missouri has a somewhat shorter length of time from filing to disposition for civil cases than the District of Columbia (7.1 months compared to 8.4 months), it resolves civil cases from filing to trial in less than half the time taken in the District of Columbia (17.0 months compared to 41.2 months). *See* Federal Court Management Statistics 2010, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf. A difference of *two years* in the time from filing to trial weighs

heavily in favor of transfer to the Western District of Missouri. *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) (holding that fact that median time to trial was nearly two years less in transferee district weighed in favor of transfer from the District of Columbia); *Publ'ns Int'l Inc. v. HDA Inc.*, No. 06 C 6148, 2007 WL 1232199, at *4 (N.D. Ill Apr. 18, 2007) (finding that "[a]n eight-month difference certainly weighs in favor of (transfer)").

Aside from being more appropriate and efficient for this particular case, transferring this action from the District of Columbia would also alleviate the inevitable congestion that its courts suffer because of the presence of the Federal Government. As early as 1949, this district noted in an antitrust case that "the presence of Government agencies in Washington" created "an unusually heavy volume of Federal litigation" and "an exceedingly heavy docket" in the District. *United States v. E.I. Du Pont De Nemours & Co.*, 83 F. Supp. 233, 235 (D.D.C. 1949). Accordingly, the court transferred that case, noting that "[t]o try this law suit here would be unfair to local litigants, who are waiting to secure a trial of their cases, and who would be further delayed if this antitrust case were to be tried in the District of Columbia." *Id.* As a more recent decision observed, a denial of transfer in cases like this would give rise to the risk that the courts in this district will be "inundated" because "every enforcement action, regardless of where the underlying events took place, would be entertained in this District simply because the agency is located here." *Ernst & Young*, 775 F. Supp. at 415. This continuing burden on the District of Columbia's federal courts supports the transfer of this action to the Western District of Missouri where this matter has its origins, many of the witnesses reside, and much of the evidence is located.

8. The Local Interest in Deciding Local Controversies at Home Is A Neutral Factor

The final public interest factor, the local interest in deciding local controversies, is neutral here because this case does not present an essentially local matter. *See Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 52 n.8 (D.D.C. 2000) (holding that "because this controversy is not entirely or particularly local, this is not a compelling factor in this case."). Rather than being an issue unique to either the District of Columbia or the Western District of Missouri, the permissibility of HRB's proposed acquisition of 2SS will have a nationwide impact. *See Cephalon*, 551 F. Supp. 2d at 30-31 (noting that a case was not a local issue where the question was not unique to either of the proposed forums and had "nationwide significance, the resolution of which will have the same effect if rendered by this Court" or the transferee court"). As a result, this factor is of little weight in the transfer analysis beyond "the minimal[] interest in deciding issues relating to [HRB] in its 'home' federal district court." *Id.* at 31.

CONCLUSION

In summary, the relevant private interest and public interest factors this Court must consider in ruling on a transfer motion under Section 1404(a) weigh heavily in favor of transfer to the Western District of Missouri. That District is most convenient to the parties, is the location where almost all of the potential non-party and party witnesses and relevant evidence are located, and will likely provide the quickest resolution of this action. Because the issues in this case have no connection to the District of Columbia, there is no cogent rationale for requiring the parties to litigate in, and non-party witnesses to travel to and from, this inconvenient forum.

For the foregoing reasons, Defendants HRB and 2SS respectfully request this Court to transfer this action to the Western District of Missouri pursuant to 28 § U.S.C. 1404(a).

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Respectfully submitted,

/s/ Theodore C. Whitehouse

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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.

/s/ J. Robert Robertson

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J. Robert Robertson (DC Bar #501873)
(DDC Bar #IL0001)
Corey W. Roush (DC Bar #466337)
Benjamin F. Holt (D.C. Bar No. 483122)
Christian M. Rowan (DC Bar #978124)
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.