

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

In the matter of

H&R BLOCK INC.,
a corporation,

HRB DIGITAL LLC,
a limited liability company, and

HRB TAX GROUP, INC.,
a corporation.

DOCKET NO. 9427

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION IN
LIMINE TO EXCLUDE SURVEY AND EXPERT TESTIMONY OF SARAH BUTLER**

Sarah Butler is a consumer survey expert who designed and conducted survey research in this matter to assess the extent to which *ineligible* respondents believe they can use H&R Block's Free Online product. Butler Depo. Tr. 102:6-16 (true and correct transcript excerpts attached as Exhibit 1). Respondents' Motion *in Limine* ("MIL") seeks to exclude Butler's survey and expert opinions as unreliable; but Respondents have not come close to meeting the high burden to exclude any of Butler's testimony. Contrary to Respondents' claims, Butler used well-established, reliable survey design in this matter, including proper questions "that help[]...evaluate whether or not the respondent, in fact, could file for free." Butler Depo. Tr. 102:14-16. Any questions that this Court may have about her survey methodology can be appropriately addressed at the hearing.

Respondents want to exclude Butler’s expert opinions because they rely upon responses to Butler’s Survey Question 4,¹ which Respondents mischaracterize as suffering from facial and latent ambiguity. *See* MIL at 2-3. Respondents’ attempt to exclude evidence harmful to their case is inappropriate and unfounded.

First, as a general rule, it cannot be concluded preliminarily – outside the context of the hearing – that the purported flaws of Question 4 are so severe that the entire survey should be excluded as unreliable. *FTC v. LendingClub Corp.*, No. 18-cv-02454, 2020 U.S. Dist. LEXIS 95703, at *37 (N.D. Cal. June 1, 2020) (“[I]ssues of methodology, survey design, reliability...critique of conclusions, and the like go to the weight of the survey rather than its admissibility.” (quoting *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252 (9th Cir. 2001))). Rather, the “perceived flaws in an expert’s testimony...should be...tested in the crucible of the adversarial system, not [serve] as the basis for truncating that process.” *In re McWane, Inc.*, No. 9351, 2012 WL 3719035, at *4 (F.T.C. Aug. 16, 2012) (citations omitted).

Second, Respondents’ assertion that Question 4 is facially ambiguous and “capable of two different meanings” is a disingenuous and unpersuasive

¹ Q.4 Based on what **you** [heard and saw in the commercial/reviewed on these webpages], do **you** think **you** can file **your** 2023 taxes for free online with H&R Block?

1. Yes
2. No
3. I would need more information
4. Don’t know/unsure

See MIL at 1-2 (emphasis added).

mischaracterization.² MIL at 2. As Butler testified in deposition, the “language [of Question 4] is specific to the individual respondent,” and if the intent was to ask about “anyone or consumers or people, [Butler] would have used that language.” Butler Depo. Tr. 342:22-343:11. Furthermore, it would be both counter-intuitive and contrary to the presumption of consistent usage for Question 4 to include four references to “you[r]” in “two different” senses. *See* fn. 1, *supra*.

Third, Respondents’ contention that responses to follow-up Question 5 asking “What makes you say that?” further confirm the ambiguity of Question 4 because they purportedly “answer[ed] it in a manner **not intended** by Butler” is silly. MIL at 2 (emphasis in original). Respondents cobble together all of *five* open-ended responses of a total 1,338 open-ended responses³ to Question 5 to declare Question 4 as ambiguous and the survey unreliable. *See* MIL at 2 and Exh. A. Butler testified during deposition, such responses are more suggestive of survey respondents’ inattentiveness or “misinterpretation of the language [of Question 4]” than indicative of ambiguity. Butler Depo. Tr. 160:2-12, 350:9-351:9, 352:10-353:10, 354:8-19. She further testified, based upon her review and analysis of the open-ended data, that she did not observe a pattern of responses suggesting that Question 4 was ambiguous. Butler Depo. Tr. 160:2-163:18. Rather, the pattern of responses to Question 5 demonstrates that survey respondents

² Respondents’ also assert – without citation – that “nearly 50% of the population” can file their taxes for free online with H&R Block.

³ *See* MIL, Exh. C (Expert Report of Sarah Butler (“Butler Report”), ¶¶ 76-77, 86-87).

understood the multiple references to “you[r]” in Question 4 *personally*.⁴ Furthermore, Butler’s pre-test of the survey questionnaire “to ensure that respondents would understand the survey and be able to provide reliable data” also reinforces that “respondents had no difficulty understanding the questions...” MIL, Exh. C (Butler Report ¶¶ 63-67).

Conclusion. For the foregoing reasons, Respondents’ Motion *in Limine* should be denied.

Dated: October 10, 2024

Respectfully submitted,

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⁴ See, e.g., MIL, Exh. C (Butler Report ¶¶ 77, fn. 96 & 97, and 88, fn. 111 & 112) (noting reasons personal to respondents) and (Rebuttal Report of Sarah Butler ¶ 98) (citing numerous open-ended responses with multiple references to “I” and “my”).

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2024, I filed the foregoing Complaint Counsel's Opposition to Respondents' Motion *in Limine* to Exclude Survey and Expert Testimony of Sarah Butler electronically using the FTC's E-Filing system, and I caused courtesy copies to be sent via email to:

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*Secretary of the Commission
Clerk of the Court*

Hon. Jay L. Himes
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
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Administrative Law Judge

I further certify that on October 10, 2024, I caused the foregoing document to be served via email on:

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Exhibit 1

**Excerpted Transcript of the
September 17, 2024 Deposition
of Sarah Butler**

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THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of
H&R BLOCK INC., DOCKET NO. 9427
a corporation,

HRB DIGITAL LLC,
a limited liability company, and
HRB TAX GROUP, INC.,
a corporation.

CONFIDENTIAL
September 17, 2024
9:05 a.m. EDT

Videotaped deposition of SARAH BUTLER,
held at the offices of Jones Day, 51 Louisiana
Avenue, N.W., Washington, D.C., before Misty
Klapper, Registered Merit Reporter, Certified
Realtime Reporter, Certified Shorthand Reporter
and Notary Public.

1 A. Yes.

2 Q. Okay. And then question 5 that
3 followed in both surveys was the same. And
4 question 5 says, What makes you say that, right?

5 A. That's correct.

6 Q. Okay. And so when we looked back at
7 the purpose for your surveys, which was to
8 measure the level of deception, that is, how many
9 people would be led to believe that they could
10 file for free when -- when they couldn't, based
11 on H&R Block's advertising, these two questions
12 sort of really get to the heart of what you were
13 trying to determine, correct?

14 A. These two questions in conjunction
15 with a question that helps me evaluate whether or
16 not the respondent, in fact, could file for free.

17 Q. Fair enough. They're list -- that's
18 fair. There's a poster of a question where you
19 made a determination about whether someone
20 actually was eligible to use the free product,
21 correct?

22 A. I would say respondents classified

1 A. No.

2 Q. Okay. Did you see any evidence in
3 any of the data that you collected from your
4 survey that your survey respondents found that
5 question to be ambiguous and capable of more than
6 one interpretation?

7 A. Again, is it possible that you can
8 identify a respondent who appears to have
9 misinterpreted the question based on some
10 subjective open-ended response? Maybe. But
11 that's certainly not a pattern of responses I
12 identified in the data.

13 Q. Okay. Not -- I don't -- I'm not
14 asking what I found. We're going to talk about
15 that later.

16 A. Sure.

17 Q. My question was, did you, Dr. Butler,
18 see any evidence in any of the data you collected
19 from your survey, your commercial survey, that
20 your survey respondents found that question to be
21 ambiguous and capable of more than one
22 interpretation?

1 A. That is not a pattern of data or
2 responses I identified.

3 Q. Did you look for it?

4 A. I certainly review the open-ended
5 data for many aspects, and that's not a pattern
6 of responses I identified.

7 Q. Okay. But my question is different.
8 My question is, did you specifically review the
9 open-ended data looking for whether or not your
10 survey respondents found question 4 to be
11 ambiguous and capable of more than one
12 interpretation?

13 A. So when I review open-ended data, I
14 don't limit myself to reviewing that data for,
15 you know, only responses of a certain answer.
16 I'm reviewing that data as an expert and looking
17 at patterns of responses.

18 Q. Okay. You know Dr. Simonson
19 criticized this question in his expert report,
20 saying that, in fact, it is ambiguous and that
21 there is evidence that your respondents thought
22 it was capable of more than one interpretation,

1 correct?

2 A. I think Dr. Simonson identified one
3 respondent. And he's offering a subjective
4 opinion as to what that respondent intended to
5 mean in their open-ended response. And I
6 certainly think the interpretation of that
7 response in and of itself can be questioned.
8 So --

9 Q. But my question is, after
10 Dr. Simonson identified one person that he
11 thought clearly showed that the question was
12 ambiguous, did you, Dr. Butler, go back and do an
13 assessment of the open-ended question data to see
14 if there was a pattern that indicated that same
15 ambiguity?

16 A. Certainly from reviewing the
17 open-ended -- so if your question is simply did I
18 go back on the basis of one example that
19 Dr. Simonson found that I think he's
20 misinterpreting and do some other separate
21 analysis, no.

22 Q. Okay.

1 A. Did I look at the open-ended data
2 when I originally conducted my analysis in my
3 report, yes. And it's not a pattern I observed
4 in the data.

5 Q. Okay. So sitting here today, your
6 testimony is there is not a pattern in the data
7 that you collected that indicates that question 4
8 used in both of your surveys is ambiguous and
9 capable of different interpretations; is that
10 your testimony?

11 A. So my testimony is, is there is not a
12 pattern that would suggest that the research is
13 unreliable to the extent there are responses that
14 suggest or may indicate, again, based on an
15 open-ended response, that some set of respondents
16 had differential interpretations. That's another
17 purpose of a control, because it would control
18 for those types of responses.

19 Q. But, see, here's the problem,
20 Dr. Butler, with an ambiguous question. How do
21 you know how your respondents interpreted that
22 question? For example, if I asked you an

1 Based on what you heard and saw in the
2 commercial, do you think you can file your 2023
3 taxes for free online with H&R Block. And the
4 question allowed them to say yes, no, I would
5 need more information or I don't know/unsure,
6 correct?

7 A. Yes.

8 Q. Okay. Did you consider that your
9 respondents had interpreted this question to be
10 asking not whether they personally could file
11 their taxes online for free, but, rather, whether
12 anyone could file their taxes online for free
13 with H&R Block?

14 A. Sorry, the question was did I
15 consider?

16 Q. Um-hmm.

17 A. No. And so, certainly, I pretested
18 the question and the questionnaire to ask whether
19 respondents understood the questions. And the
20 question references do you think you can file
21 your 2023 taxes. So it's not suggesting one or a
22 consumer. So the language is specific to the

1 individual respondent.

2 Q. Do you allow for the possibility,
3 sitting here today, Dr. Butler, that a rational
4 person, i.e. me, could read that question
5 differently as, are you asking whether anyone can
6 file their taxes for free using H&R Block?

7 MR. BROWN: Objection to form.

8 THE WITNESS: Well, as a survey
9 expert, if I had intended the question to
10 ask do you think anyone or consumers or
11 people, we would have used that language.

12 But, in fact, the question
13 specifically asks do you think you can
14 file your 2023 taxes. So there are three
15 references there to the individual taking
16 the survey.

17 BY MS. HOGAN:

18 Q. Okay. So let's look at what some of
19 your respondents actually thought of that
20 question, because -- let me ask you this one more
21 time:

22 Sitting here today as -- as an expert

1 respondent answered yes, correct?

2 A. Yes.

3 Q. And then when asked, What makes you
4 say that, this respondent answered, quote, If you
5 have a basic return, no rental property or did
6 not buy or sell any stocks, then, yes. Anything
7 other than the very basic, then, no, correct?

8 A. Yes.

9 Q. Okay. And then when asked, Based on
10 this commercial, do you think you have a simple
11 return, this respondent answered no, correct?

12 A. That's correct.

13 Q. Okay. So this respondent is telling
14 you he personally -- he or she personally --
15 can't file for free, correct, but somebody might
16 be able to, right?

17 A. This person says they don't believe
18 they have a simple return, but indicated to Q4
19 that they believe they could file their taxes for
20 free.

21 Q. Which means they understood the
22 question to be applying to someone other than

1 themselves, correct?

2 A. So, again, this person, perhaps,
3 unlike the one above, is not using the language
4 of simple return. So this person -- and, again,
5 we see in terms of data patterns there is a
6 difference between simple returns and filing for
7 free. To the extent that some respondents are
8 inattentive, that's part of the role of the
9 control.

10 Q. Okay, Dr. Butler. So you are
11 disagreeing with my representation that this
12 question clearly indicates that this respondent
13 understood question 4 to be asking whether anyone
14 could file for free, but then clearly indicated
15 to you that I can't file for free, correct? You
16 disagree with that?

17 MR. BROWN: Objection to form.

18 THE WITNESS: So in response to Q4,
19 which is the question about do you think
20 you can file your taxes for free online,
21 this respondent said yes.

22 Then in response to Q5, they

1 answered, If you have a basic return, no
2 rental property, then you can; other than
3 that -- other than the very basic, then,
4 no.

5 BY MS. HOGAN:

6 Q. Right. And then they indicated they
7 did not have a simple or basic return, right?

8 A. They indicated they did not have a
9 simple return.

10 Q. Okay. I'll move on.

11 Let's go on to respondent 11189.

12 When asked, Based on what you heard or saw in the
13 commercial, do you think you can file your 2023
14 taxes for free online with H&R Block, this
15 respondent answered yes, correct?

16 A. Yes.

17 Q. Okay. And when asked, What makes you
18 say that, the respondent answered, Some people
19 can, some people cannot, correct?

20 A. That's correct.

21 Q. And then when asked, Based on this
22 commercial, do you think you have a simple

1 return, the respondent answered no, correct?

2 A. That's correct.

3 Q. Okay. Now, did -- did you see
4 similar data in your web page survey results?

5 A. Again, are there similar responses?
6 There may be to the extent that our respondent is
7 inattentive at any particular question or --
8 sorry, Counsel -- or gives a response that also
9 seems to reference, more generally, how the rules
10 may apply to consumers, yes.

11 Q. How do you know that this is
12 inattentiveness? How -- why are you concluding
13 that these survey respondents are inattentive
14 based on these very clear answers they're giving
15 you?

16 MR. BROWN: Objection to form.

17 BY MS. HOGAN:

18 Q. Isn't it just as likely, Dr. Butler
19 that they understood the question perfectly, they
20 just interpreted it differently than you
21 intended?

22 A. So, for example, if you take

1 respondent 11189 and you look at the response
2 that that individual gave in terms of why do you
3 think you -- people -- why do you think --
4 sorry -- you can file for free, that respondent
5 simply said, Some people can, some people cannot.
6 That's not a definitive response that they
7 misinterpreted the question.

8 Q. I'm not saying they misinterpreted
9 the question. That's not my question at all.
10 I'm not indicating that these three -- and these
11 are just three that I could find last night --
12 misinterpreted the question.

13 I think they read the question and
14 understood it perfectly. They just interpreted
15 it differently than you intended.

16 Would you allow for that possibility,
17 based on these answers?

18 A. I think that is a misinterpretation
19 of the language that the question asks. The
20 question asks respondents, Based on what you
21 heard and saw in the commercial, do you think you
22 can file your 2023 taxes for free online with H&R