

PUBLIC

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF 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
PUBLIC VERSION**

**RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF
HARRY BRIGNULL**

Respondents move *in limine* to exclude the opinions and testimony of Complaint Counsel's expert Harry Brignull ("Brignull") as improper legal conclusions unsupported by any reliable methodology. Brignull, who has never once filed taxes in the United States or done any work in the tax industry whatsoever, conducted no research or surveys of H&R Block users, but instead reviewed various pages of H&R Block's website exactly two times and concluded that they contain so-called "dark patterns."

First, Brignull's opinions that H&R Block's website pages contain "dark patterns"—a term coined by Brignull himself—are improper legal conclusions.¹ As Brignull concedes, he uses "dark patterns" interchangeably with "deceptive" designs or patterns, and "deceptive" is a term that has a legal definition. *See* Ex. A, Brignull Deposition Transcript at 157:8-21; *see also* Ex. B, Brignull Report at 71; Ex. C, Screenshots of Brignull's website Deceptive.Design (claiming that

¹ Moreover, "dark patterns" is an incendiary phrase, as Brignull acknowledged, and objectionable on that basis. Brignull Tr. at 157:22-159:18.

PUBLIC

“[d]eceptive patterns [are] also known as “dark patterns”). Whether or not website pages are deceptive is an issue of law for this Court to decide. *See In the Matter of Rambus Inc.*, 2003 WL 21223850, at *3 (F.T.C. Apr. 21, 2003). Legal conclusions, including whether practices are “deceptive,” “manipulative,” or “misleading,” **cannot** qualify as expert testimony. *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 558 (C.D. Cal. 2014) (excluding expert testimony because “[f]alse’ and ‘deceptive’ are judicially defined terms. Accordingly, [the expert’s] use of these terms constitutes the offering of an improper legal opinion that usurps the role of the court.”); *In re Motor Fuel Temp. Sales Pract. Litig.*, 2012 WL 3611010, at *3 (D. Kan. Aug. 22, 2012) (“expert witnesses may not express legal conclusions, i.e. they may not opine whether certain conduct is ‘deceptive’ or ‘unconscionable’”); *Hershey v. Pac. Inv. Mgmt. Co.*, 697 F. Supp. 2d 945, 951 (N.D. Ill. 2010) (“As to [the expert’s] proffered opinions that certain of [defendant’s] conduct was ‘manipulative,’ the Court finds that these are inappropriate legal conclusions, and are thus, inadmissible.”); *F.T.C. v. Stefanchik*, 2007 WL 4570879, at *1 (W.D. Wash. Feb. 15, 2007) (excluding expert testimony because opinions that materials are “unfair, false, misleading, or deceptive” “appears to do nothing more than render an opinion on the ultimate legal issue”). Accordingly, on this basis alone, Brignull’s opinions and testimony must be excluded.

Second, Brignull’s opinions merely (a) restate allegations from the Complaint, (b) describe screenshots of the H&R Block website, and (c) repeat information from FTC’s undercover telephone calls and live chats with H&R Block. Specifically, as shown in the attached chart comparing Complaint allegations with Brignull’s Report (Ex. D), Brignull merely relies on the same points stated in the Complaint to conclude that H&R Block’s practices include “dark” or “deceptive” patterns. The remainder of Brignull’s “analysis” and “findings” simply summarize screenshots of H&R Block’s website (Brignull Rpt. ¶¶ 37-45, 50-51, 53-55) and transcripts of the FTC investigator’s calls and chats with H&R Block’s customer service, such as length of each call

PUBLIC

or chat (*id.* ¶¶ 58-60, 63), even though the FTC agent herself is being called to testify. None of that is proper expert testimony, as experts “must testify to something more than what is ‘obvious to the layperson.’”² *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 871 (7th Cir. 2001) (quoting *Ancho v. Pentek Corp.*, 157 F.3d 512, 519 (7th Cir. 1998)); *see U.S. Alliance Grp., Inc. v. Cardtronics USA, Inc.*, 645 F. Supp. 3d 554, 560-62 (E.D. La. 2022) (“Without more than credentials and a subjective opinion, an expert’s testimony that ‘it is so’ is not admissible.”); *Rowe Ent., Inc. v. William Morris Agency, Inc.*, 2003 WL 22272587, at *10-11 (S.D.N.Y. Oct. 2, 2003) (excluding proffered expert testimony based only on complaint and case materials). As such, the Court should exclude Brignull’s testimony.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court exclude Harry Brignull’s opinions, reports, deposition testimony, and live testimony at trial.

² Considering Brignull fails to provide any actual opinion, instead merely offering legal conclusions and repeated allegations and proffered evidence, it follows that Brignull fails to apply any methodology—much less a reliable one—in concluding that H&R Block’s website and online DIY tax product include “dark patterns.” *See Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296 (11th Cir. 2014); *Prince v. Michelin N. Am., Inc.*, 248 F. Supp. 2d 900 (W.D. Mo. 2003).

PUBLIC

Dated: October 3, 2024

Respectfully submitted,

By: /s/ Erika Whyte

Courtney Lyons Snyder
Kasey Tuttle
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
Tel: (412) 394-7910
clsnyder@jonesday.com
ktuttle@jonesday.com

Joseph Boylan
JONES DAY
555 S. Flower Street
Los Angeles, CA 90071
Tel: (910) 639-1886
jboylan@jonesday.com

Erin Sindberg Porter
JONES DAY
90 South Seventh Street
Suite 4950
Minneapolis, MN 55402
Tel: (612) 217-8926
esindbergporter@jonesday.com

Antonio F. Dias
Erika Whyte
Angela Korge
JONES DAY
600 Brickell Avenue, Suite 3300
Miami, FL 33131
Tel: (305) 714-9800
afdias@jonesday.com
ewhyte@jonesday.com
akorge@jonesday.com

Carol A. Hogan
JONES DAY
110 North Wacker Drive Suite 4800
Chicago, IL 60606
Tel: (312) 269-4241
chogan@jonesday.com

Hashim M. Mooppan
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3744
hmmooppan@jonesday.com

Amanda L. Dollinger
JONES DAY
250 Vesey Street,
New York, New York 10281-1047
Tel: (212) 326-3475
adollinger@jonesday.com

PUBLIC

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF 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

**STATEMENT PURSUANT TO
ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Pursuant to Additional Provision No. 4 of the March 22, 2024 Scheduling Order, Respondents H&R Block Inc., HRB Digital LLC, and HRB Tax Group, Inc. (“Respondents”) hereby submit this Statement representing that Counsel for Respondent has conferred with Complaint Counsel in a good faith effort to resolve the issues raised by this motion. The parties corresponded by telephone on October 1, 2024 concerning this motion but were unable to reach an agreement.

Dated: October 3, 2024

By: /s Erika Whyte

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF 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

**[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION *IN LIMINE* TO
EXCLUDE EXPERT TESTIMONY OF HARRY BRIGNULL**

Upon consideration of Respondents' October 3, 2024 Motion *In Limine* to exclude the opinions and testimony of Harry Brignull,

IT IS ORDERED that the motion is GRANTED.

IT IS FURTHER ORDERED that the expert report submitted by Harry Brignull and his opinions and testimony related thereto are excluded from evidence in this proceeding, and Complaint Counsel are precluded from offering such opinions or testimony.

ORDERED:

Jay L. Himes
Administrative Law Judge

Date: _____

PUBLIC

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF 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

**DECLARATION OF ERIN SINDBERG PORTER IN SUPPORT OF RESPONDENTS'
MOTION *IN LIMINE* TO EXCLUDE REPORT AND RELATED TESTIMONY AND
OPINIONS OF HARRY BRIGNULL**

I, Erin Sindberg Porter, declare as follows:

1. I am a Partner at Jones Day, counsel for Respondents in the above-captioned proceeding.
2. I submit this declaration in support of Respondents' motion *in limine* to exclude the opinions and testimony of Harry Brignull, filed on October 3, 2024 (the "Motion").
3. Attached as **Exhibit A** is a true and correct copy of an excerpt from the transcript of the deposition of Harry Brignull. Because the Transcript has been designated by Complaint Counsel as Confidential and Non-Public, Exhibit A has been filed under seal.
4. Attached as **Exhibit B** is a true and correct copy of the expert report of Harry Brignull. Because the Report has been designated by Complaint Counsel as Confidential and Non-Public, Exhibit B has been filed under seal.
5. Attached as **Exhibit C** is a true and correct copy of screenshots of portions of the website Deceptive.Design taken October 2, 2024.
6. Attached as **Exhibit D** is a true and correct copy of a chart comparing the

PUBLIC

allegations in the May 9, 2024 Complaint with the expert report of Harry Brignull. Because the Report has been designated by Complaint Counsel as Confidential and Non-Public, Exhibit D has been filed under seal.

7. Attached as **Exhibit E** is a true and correct copy of an excerpt of the rebuttal expert report of Harry Brignull. Because the Report has been designated by Complaint Counsel as Confidential and Non-Public, Exhibit E has been filed under seal.

8. Please see attached for a true and correct copy of the February 26, 2024 Protective Order Governing Confidential Material.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3rd day of October, 2024, in Minneapolis, Minnesota.

By: /s/ Erin Sindberg Porter

Erin Sindberg Porter

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2024, I caused the foregoing document to be served electronically using the FTC's e-Filing system, which will send notification of such filing to:

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable Jay L. Himes
Administrative Law Judge
600 Pennsylvania Ave., NW
Suite H-110
Washington, DC 20580

I further certify that on October 3, 2024, I caused the foregoing document to be served via email to:

Claire Wack
Federal Trade Commission
600 Pennsylvania Avenue,
NW Washington, DC 20580
cwack@ftc.gov

Simon Barth
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
sbarth@ftc.gov

Christopher E. Brown
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
cbrown3@ftc.gov

Joshua A. Doan
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
jdoan@ftc.gov

Counsel Supporting the Complaint

Dated: October 3, 2024

Respectfully submitted,

By: /s/ Erika Whyte
Erika Whyte

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

| | | |
|----------------------------------|---|-----------------|
| _____ |) | |
| In the Matter of |) | |
| |) | |
| H&R Block Inc., |) | |
| a corporation, |) | |
| |) | Docket No. 9427 |
| HRB Digital LLC, |) | |
| a limited liability company, and |) | |
| |) | |
| HRB Tax Group, Inc., |) | |
| a corporation, |) | |
| |) | |
| Respondents. |) | |
| _____ |) | |

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

Commission Rule 3.31(d) states: “In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section.” Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 26, 2024

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation “CONFIDENTIAL – FTC Docket No. 9427” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL – FTC Docket No. 9427” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an

order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

PUBLIC

EXHIBIT A
FILED UNDER SEAL

EXHIBIT B
FILED UNDER SEAL

EXHIBIT C



Deceptive Patterns

[Types](#) [Laws](#) [Cases](#) [Hall of shame](#) [Reading list](#) [Submit](#) [About](#)

[Read the book](#)

What are deceptive patterns?

Deceptive patterns (also known as “dark patterns”) are tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up for something. For example:

- ⚡ Trick wording
- ⚡ Sneaking
- ⚡ Obstruction



Our mission

Origin

This website (formerly darkpatterns.org) was started in 2010, born out of Harry Brignull's passion for addressing the growing issue of deceptive design practices in the digital world. Recognising the negative impact these manipulative patterns had on users, Harry was inspired to start a campaign that would expose these unethical practices, educate the public, and foster a more transparent digital landscape.

PUBLIC



History

This website was previously called darkpatterns.org and the category of deceptive design practice was referred to as “dark patterns”. Under advice from Kaushalya Gupta and the Tech Policy Design Lab of the World Wide Web Foundation, the name was changed to deceptive.design and the term was changed to “deceptive patterns”. The change reflects a commitment to avoiding language that might inadvertently carry negative associations or reinforce harmful stereotypes.

EXHIBIT D
FILED UNDER SEAL

EXHIBIT E
FILED UNDER SEAL