

**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 EXPERT TESTIMONY OF HARRY BRIGNULL**

Harry Brignull holds a Ph.D. in cognitive science and has spent nearly two decades as a user-experience (“UX”) practitioner, advising organizations such as Spotify, Smart Pension, Microsoft, Lloyd’s Pharmacy, and Telegraph Media Group about the design of their online products. Tr. of Sept. 13, 2024, Depo. of Harry Brignull, 19:20-20:20; *id.* at 61:18-68:20 (transcript excerpts attached as Exhibit 1). He reviewed Respondents’ website and DIY Online Products during Tax Seasons 2022 and 2024 and will testify about Respondents’ troubling design practices, employing a “Dark Patterns” taxonomy developed by researchers from Princeton and the University of Chicago, Exh. 1 at 184:14-188:13; *id.* at 201:20-202:3.¹ Rather

¹ That Brignull coined the term “Dark Patterns” in 2010, as Respondents note, Mot. at 1, is a testament to his contributions to the UX field, as others have since adopted and expanded upon the term. In addition to the Princeton/Chicago taxonomy referenced above, another group of researchers, Gray *et al.*, have “published a paper describing an ontology of dark pattern taxonomies” within the past year or so, Exh. 1 at 187:13-16.

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than designating their own expert in website design and website user experience to rebut Dr. Brignull's testimony, Respondents have moved *in limine* to exclude it.² None of Respondents' objections approaches the high threshold for excluding expert testimony from a bench trial.³

First, Respondents claim that Dr. Brignull reviewed their "website exactly two times." Mot. at 1. In fact, Brignull estimated that he had spent two full workweeks reviewing the website in 2022, additional time in 2024, and at least 100 hours total on this matter. Exh. 1 at 164:6-166:12; *id.* at 223:10-16. In contrast, Dr. Keller, Respondents' primary rebuttal expert for Brignull, spent a total of 30-60 minutes watching someone else use a DIY Online Product on one occasion before forming her opinions. Exh. 2 at 50:2-55:7.⁴

Second, Respondents contend that Dr. Brignull is offering improper legal conclusions because Dark Patterns may be "deceptive." Mot. at 1. Respondents misunderstand the relevance of Brignull's testimony. Count III of the Complaint challenges Respondents' advertising as deceptive. But Brignull isn't offering opinions about Respondents' ads, he's opining on the design of Respondents' website and DIY Online Products, and whether Respondents deploy design techniques that lead users to take actions that benefit the online provider rather than the user. That design is the subject of the Complaint's unfairness counts, Counts I and II. One prong

² Respondents offer two marketing professors, Dr. Punam Keller and Dr. Itamar Simonson to rebut Dr. Brignull, but neither claims expertise in website design. *See* Tr. of Sept. 12, 2024, Depo. of Punam Keller, 11:8-9 (transcript excerpts attached as Exhibit 2); Tr. of Sept. 11, 2024, Depo. of Itamar Simonson, 17:3-4 (transcript excerpts attached as Exhibit 3).

³ *In re McWane, Inc.*, No. 9351, 2012 WL 3719035, at *3 (F.T.C. Aug. 16, 2012) ("The court's role as gatekeeper, pursuant to *Daubert*, to prevent expert testimony from unduly confusing or misleading a jury, has little application in a bench trial." (internal punctuation omitted)).

⁴ Respondents fault Dr. Brignull for not being a U.S. taxpayer, Mot. at 1, but Dr. Keller hasn't prepared her own tax returns for more than two decades, and instead hires a professional, Exh. 2 at 12:9-22.

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of Section 5's unfairness test asks whether the substantial injury caused by a challenged practice is reasonably avoidable by consumers, and that is what Brignull's testimony will address.⁵

Third, Respondents complain about overlap between Dr. Brignull's report and the Complaint. Mot. at 2 & Exh. D.⁶ But that overlap speaks to the relevance of Brignull's testimony: he is indeed familiar with, and will be opining on, the website and DIY Online Products at issue, in contrast with the lack of familiarity with them displayed by some of Respondents' experts. And Respondents should hardly be surprised if Brignull's extensive 2022 review of Respondents' website and DIY Online Products may have informed the allegations included in the 2024 Complaint.⁷

Conclusion: Complaint Counsel respectfully request that the Court deny Respondents' motion.

Dated: October 10, 2024

Respectfully submitted,

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⁵ To the extent that Brignull does use words like "deceive," he is using them in the context of his design expertise, not as a lawyer. See Exh. 1. at 151:11-152:14.

⁶ Lacking a persuasive argument, Respondents resort to offering four sets of scare quotes in a mere two-sentence stretch. Mot. at 2.

⁷ None of the cases Respondents cite suggests that Brignull's testimony should be excluded.

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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 Expert Testimony of Harry Brignull electronically using the FTC's E-Filing system, and I caused courtesy copies to be sent via email to:

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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 13, 2024
Deposition of Harry Brignull

Filed Under Seal

Exhibit 2

Excerpted Transcript of the September 12, 2024 Deposition of Punam Keller

Filed Under Seal

Exhibit 3

Excerpted Transcript of the September 11, 2024 Deposition of Itamar Simonson

Filed Under Seal