IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

H&R Block Eastern Enterprises, Inc., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 13-0072-CV-W-FJG
Intuit, Inc.,	)	
Defendant.	)	

ORDER

Pending before the Court is plaintiffs' motion for preliminary injunction (Doc. No. 5). Plaintiff seeks injunctive relief restraining defendant from (1) broadcasting, publishing, or disseminating, in any form or in any medium, the advertisements comprising the advertising Campaign referenced in the Complaint (Doc. No. 1); (2) broadcasting, publishing, or disseminating, in any form or in any medium, any promotional or advertising materials containing any use of H&R Block's intellectual property, including without limitation the "H&R Block" name and other federally-registered trademarks owned by H&R Block, in a manner that is likely to cause confusion, or to cause mistake, or to deceive; and (3) broadcasting, publishing, or disseminating, in any form or in any medium, any advertisement that claims, directly or implicitly, that: (a) More people filed their tax returns through Defendant than through H&R Block and other major tax return preparation companies combined; (b) H&R Block relies upon temporary and seasonal workers while

Defendant does not; (c) H&R Block's tax preparers are untrained, unqualified, or inexperienced. See Doc. No. 5.

I. Background

At issue in this case are two television advertisements for TurboTax software. These advertisements are known as "Master Plumber" and "Return Expert." See Complaint, Doc. No. 1, ¶ 26; Plaintiffs' hearing exhibits (hereinafter "Pltf. Ex.") 62 and 91 (Master Plumber, transcript and video) and 63 and 96 (Return Expert, transcript and video). These advertisements have appeared nationwide since mid-January 2013. In "Master Plumber," a man and woman are standing in a kitchen while a plumber sits on the floor working on the kitchen sink. The plumber introduces himself to the husband by saying "I'm Bob. We talked at the tax store; I did your taxes." The husband responds, "I. . . I thought you were a tax expert." The plumber responds, "Today I'm a master plumber." See Pltf Ex. 62 and 91. In "Return Expert," a woman is in a clothing store standing in front of a mirror when a sales associate approaches her. When asked by the woman at the mirror whether they had met, the sales associate responds, "Last week at the tax store; I did your taxes!" When the customer asks, "I thought you were an expert with returns?" the sales associate responds, "Oh, I am – especially after the holidays." See Pltf. Ex. 63 and 96.

In both commercials, a voiceover then begins saying "Major tax stores advertise for preparers with no tax experience necessary." A disclaimer also appears, saying "Education/experience at tax stores varies. Major tax store preparers are trained and must meet IRS minimum competency requirements." The voiceover continues, "At TurboTax, you only get answers from CPAs, EAs, or tax attorneys – all real tax experts." Pltf. Ex. 91

and 96. Later, both commercials assert in writing and in voiceover "More Americans trusted their federal taxes to TurboTax last year," and then just the voiceover continues, ". . . than H&R Block stores and all other major tax stores combined." Id. A graph, marked red for TurboTax and green for H&R Block, appears during this sequence. Id. A disclaimer at the bottom of the screen states "Comparison based on U.S. sales & industry estimates for in-store returns prepared through 4/30/12." Id.

Plaintiffs argue that these advertisements are false and/or misleading under the Lanham Act, that defendant has infringed on their trademark, and that defendant has unfairly competed against them under Missouri law.

II. Standard

The Eighth Circuit uses a four-prong test to determine whether to grant preliminary injunctive relief. See Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981). The Court considers: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest. Id.

There are five elements that must be met to state a Lanham Act false advertising claim such as the one made in Count I of the Complaint. Failure to establish any one of the five elements of the prima facie case is fatal to the claim. The elements are: (1) Defendant made false statements of fact about its own or another's product [including either (a) literally false factual commercial claims; or (b) literally true or ambiguous factual claims "which implicitly convey a false impression, are misleading in context or [are] likely to

deceive consumers," see United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998)]; (2) the statement "actually deceived" or had the "tendency to deceive a substantial segment" of its audience [proof on this element is not necessary if the statement is literally false]; (3) the deception created was material [again, proof on this element is not necessary if the statement is literally false]; (4) defendant caused the statement to enter interstate commerce[1]; and (5) plaintiffs have been or are likely to be injured as a result of the false advertisement. Allsup, Inc. v. Advantage 2000 Consultants Inc., 428 F.3d 1135, 1138 (8th Cir. 2005). See also Filtration Solutions Worldwide, Inc. v. Gulf Coast Filters, Inc., No. 08-0102-FJG, 2010 WL 2134274, *5 (W.D. Mo. May 26, 2010).

Plaintiffs make a claim for trademark infringement in Count II of their Complaint. Under the Lanham Act,

> Any person who shall, without the consent of the registrant use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided [which include, among others, injunctive relief].

15 U.S.C. § 1114(1)(a).

Plaintiffs make a claim in Count III of their Complaint for unfair competition under Missouri common law. "To constitute unfair competition in respect to a trade name two elements must be present. The name must have acquired the mentioned secondary meaning or significance that identifies the plaintiff, and the defendant must have unfairly

[1] Defendant does not contest this element.

used the name or a simulation of it to the prejudice of plaintiff's interests." Cornucopia, Inc. v. Wagman, 710 S.W.2d 882, 888 (Mo. Ct. App. 1986). In addition,

> [i]n order to make out a case of unfair competition it is not necessary to show that any person has been actually deceived by the defendant's conduct, it being sufficient to show that such deception will be the natural and probable result of his acts are such as are calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the particular trade to which the controversy relates."

Pan American Realty Corp. v. Forest Park Manor, Inc., 431 S.W.2d 144, 149 (Mo. 1968).

III. Discussion

The Court will immediately turn to consideration of the likelihood of success on the merits, and considers plaintiffs' Lanham Act false advertising claim made in Count I of the Complaint.[2] The first element that must be met for plaintiffs' Lanham Act claim is that defendant made either literally false commercial claims or literally true or ambiguous commercial claims that "implicitly convey a false impression, are misleading in context or [are] likely to deceive consumers." Buetow v. A.L.S. Enterprises, Inc., 650 F.3d 1178, 1185 (8th Cir. 2011). Plaintiffs indicated in their prehearing brief that they would demonstrate that at least the following false or misleading claims are made expressly or implicitly in the commercials:

[2] Notably, plaintiffs indicate in their pre-hearing brief (Doc. No. 75) that they have demonstrated a likelihood of success on Counts II and III of their complaint for the same reasons as for Count I, and therefore do not argue separately as to these counts. See Doc. No. 75, p. 5, n.1. No separate evidence regarding Counts II and III was presented at the preliminary injunction hearing. Therefore, the Court will consider only the likelihood of success on Count I of the complaint, with the understanding that plaintiffs' claims for preliminary injunctive relief fail for the same reasons as discussed with relation to Count I.

1) H&R Block tax professionals are not experts in tax preparation

2) Unlike H&R Block, TurboTax hires only tax advisors who are experts in tax preparation

3) Unlike H&R Block, TurboTax does *not* hire seasonal, part-time tax advisers

4) Consumers who use TurboTax will have their questions answered only by a CPA, Enrolled Agent ("EA"), or tax attorney

5) TurboTax CPAs, EAs, and tax attorneys will guide consumers through every step of the software being used to prepare their tax returns

6) TurboTax is used by more Americans to file their tax returns than any of the products or services offered by H&R Block and other major retail tax preparation services

Doc. No. 75 at pp. 2-3. The Court will consider each of these messages in turn.

A. H&R Block tax professionals are not experts in tax preparation

Initially, the Court notes that this claim is not expressly made within either of defendant's advertisements. See Pltf. Ex. 62, 63, 91, and 96. Instead, the express statement that appears in the advertisements is "Major tax stores advertise for preparers with no tax experience necessary," with a disclaimer saying "Education/experience at tax stores varies. Major tax store preparers are trained and must meet IRS minimum competency requirements." Id. Although plaintiffs make much of their training programs for tax preparers in their first year and beyond, training is not the same thing as experience. It is not false or misleading for defendant to draw consumers' attention to the true statement that certain consumers who go to major tax stores could have their taxes prepared by someone who has no prior work experience preparing taxes. Although plaintiff makes much of its first-year employees' training to know when to ask questions and bring customers to a more experienced tax preparer, the Court notes that plaintiffs' complexity level rating

system only allows first year tax professionals to prepare returns with a level one complexity rating. Testimony of Jan Marrs, March 4, 2013, Tr. 157:12-158:23.[3] Ms. Marrs testified that "if someone comes in and doesn't have any of the next level of complexity, say, owning a home or Social Security, they're assigned a complexity level of one." March 4, 2013, Tr. 158:12-15. A tax return that does not include itemized deductions related to home ownership is a very basic tax return, and one that does not require much expertise to complete, so the Court finds that it is not misleading to point out that certain tax store employees may lack experience. Additionally, the evidence shows that prior or current experience as a plumber or a store clerk would not be disqualifying for employment by plaintiffs. See Testimony of Amy McAnarney, March 4, 2013, Tr. 271:24 – 272:6. Therefore, the Court finds that the statements made in the advertisements and the implications that can be drawn from them are not false or misleading.

To the extent that plaintiffs argue that their expert, Dr. Carol A. Scott's survey shows approximately 21% of consumers are likely to be deceived into believing that H&R Block tax preparers are not skilled in tax preparation, see Scott testimony, March 4, 2013, Tr. 76:6-18, the Court finds that her conclusions are unreliable. First of all, as noted by defendant's expert, Dr. Stephen M. Nowlis, Dr. Scott bases all of her ultimate conclusions on the results of closed-ended questions which all portray defendant in a positive light and plaintiffs in a negative light. Nowlis testimony, March 5, 2013, Tr. 122:24 – 124:5, 125:6-

[3] The Court is basing its citations to the transcript on rough drafts prepared on March 7 and 8, 2013, as the court reporter for this matter is involved in trial again the week of March 11, 2013 and is unable to have a file transcript prepared prior to the date of this Order. Therefore, it is likely that the page and line numbers on the final transcripts may not precisely match the citations in this Order.

126:14. The Court concurs with defendant that these sorts of questions are leading and/or create an improper demand effect, and therefore, the questions on the survey are improper under the law. Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 778 (7th Cir. 2007); Scott Fetzer Co. v. House of Vacuums Inc., 381 F.3d 477, 488 (5th Cir. 2004); Millennium Import Co. v. Sidney Frank Importing Co., Inc., No. Civ.03-5145, 2004 WL 1447915 *8 (D. Minn. June 11, 2004). Furthermore, Dr. Scott did not consider survey respondents' answers to her open-ended questions in formulating her opinion about consumer deception (in which, when asked what the main message(s) of the commercial were, only about 3-5% of consumers reported any opinion regarding H&R Block (Pltf. Ex. 218, Ex. 4D)). Dr. Scott did not base her closed-ended questions on ideas naturally developed through respondents' answers to verbatims (see Nowlis testimony, March 5, 2013, Tr. 126:15 – 127:1); instead, it appears likely that her questions were constructed for a litigation purpose alone. Nor did Dr. Scott ask a filter question about whether respondents believed the ad communicated anything to them about H&R Block. Nowlis testimony, March 5, 2013, Tr. 115:21-25. Thus, the results of the closed-ended questions asked by Dr. Scott could include people who formed no opinion on H&R Block after viewing the commercial. Nowlis testimony, March 5, 2013, Tr. 116:3-7. Further, as noted by defendant's expert, the control commercial used by Dr. Scott did not mention plaintiffs in any way, so that the control commercial did not capture "all the noise," which could include the noise[4] revolving around people's reactions to hearing the words "H&R Block" in the test. See Control Commercial, Pltf. Ex. 99; Nowlis

[4] Dr. Nowlis testified that "noise" can include "lots of different things, pre-existing beliefs, all sorts of other things. If you think about it in terms of medical terminology, it's sort of like a placebo. It captures things that aren't due to the stimulus itself." Nowlis testimony,

testimony, March 5, 2013, Tr. 102:3-103:3. Therefore, the Court finds that plaintiffs are unable to demonstrate a likelihood of success on their claim that the implied claim that "H&R Block tax professionals are not experts in tax preparation" is false or misleading under the Lanham Act.

B. Unlike H&R Block, TurboTax hires only tax advisors who are experts in tax preparation

Again, this statement does not appear expressly in the advertisements. See Pltf. Ex. 62, 63, 91, and 96. The advertisements, instead, state, "Major tax stores advertise for preparers with no tax experience necessary." A disclaimer also appears, saying "Education/experience at tax stores varies. Major tax store preparers are trained and must meet IRS minimum competency requirements." The voiceover continues, "At TurboTax, you only get answers from CPAs, EAs, or tax attorneys – all real tax experts." Id. These express claims in the advertisement are not literally false. Furthermore, the claim that plaintiffs believe to be implied in the advertisement is not deceptive or misleading. In particular, Intuit employee Michael Stadler testified that all TurboTax employees answering tax questions since January 2011 are CPAs, EAs or tax attorneys. Stadler testimony, March 4, 2013, Tr. 205:3-6; 212:22 – 213:3. In tax year 2012, the ratio was 53% CPAs, 43% EAs, and 4% attorneys. Stadler testimony, March 4, 2013, Tr. 214:2-11. Although plaintiffs point out that other types of questions (such as software questions) might be answered by those who are not experts in tax preparation, Intuit has a system in place where calls regarding tax questions are routed to one of its tax advisors. Stadler testimony, March 4, 2013, Tr. 225:20 – 227:11. Mr Stadler also testified that, of the 215 employees

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March 5, 2013, Tr. 102:6-12.

who had CVs in Intuit's files, 100 percent had prior tax experience. Stadler testimony, March 4, 2013, Tr. 218:11-16. Mr. Stadler testified that the average years of tax experience for Intuit's tax advisors was over 14 years before being hired by Intuit. Stadler testimony, March 4, 2013, Tr. 221:1-15.

Furthermore, to the extent that plaintiffs rely on the Scott Report for the conclusion that at least 18% of consumers are likely to be deceived into believing that TurboTax CPAs, EAs, and tax attorneys have more experience in preparing returns than H&R Block tax preparers, see Testimony of Dr. Scott, March 4, 2013, Tr. 76:19-25, the Court finds Dr. Scott's conclusions to be unreliable as the control commercial was improper and nowhere mentioned H&R Block or the expertise of defendant's employees as EAs, CPAs, or tax attorneys. See Pltf. Ex. 99. See also Nowlis testimony, Tr. 102:3-103:3. The Court also finds Dr. Scott's conclusions unreliable for the additional reasons set forth in Section III.A., above. Therefore, the Court finds that plaintiffs are unable to demonstrate a likelihood of success on their claim that the express or implied message "Unlike H&R Block, TurboTax hires only tax advisors who are experts in tax preparation" is false or misleading under the Lanham Act.

C. Unlike H&R Block, TurboTax does *not* hire seasonal, part-time tax advisers

Again, the Court notes that this message does not expressly appear within defendant's challenged advertisements at all; instead, this message could only be found to be implied. See Pltf. Ex. 62, 63, 91, and 96. Plaintiffs' only evidence that this message appears in the advertisements at all is the Scott Report, which concludes that at least 16% of consumers are likely to be deceived into believing that TurboTax does not hire seasonal,

part-time tax advisors. See Scott testimony, March 4, 2013, Tr. 77:13-16. As discussed earlier, the methodological flaws apparent in the Scott report make Dr. Scott's conclusions unreliable. The Court, therefore, finds that plaintiffs are unable to demonstrate a likelihood of success on their implied claim that "Unlike H&R Block, TurboTax does not hire seasonal, part-time tax advisers," could be found false or misleading under the Lanham Act.

D. Consumers who use TurboTax will have their questions answered only by a CPA, Enrolled Agent ("EA"), or tax attorney.

This is one of the few claims that expressly appears within the advertisements, which state, "At TurboTax, you only get answers from CPAs, EAs, or tax attorneys – all real tax experts." See Pltf. Ex. 62, 63, 91, and 96. However, this claim does not appear to be false. In particular, Intuit employee Michael Stadler testified that all TurboTax employees answering tax questions since January 2011 are CPAs, EAs or tax attorneys. Stadler testimony, March 4, 2013, Tr. 205:3-6; 212:22 – 213:3. Although plaintiffs point out that other types of questions (such as software questions) might be answered by those who are not experts in tax preparation, Intuit has a system in place where calls regarding tax questions are routed to one of its tax advisors. Stadler testimony, March 4, 2013, Tr. 225:20 – 227:11.

Further, to the extent that plaintiffs argue that the content of this statement is misleading using the Scott report (see Scott testimony, March 4, 2013, Tr. 77:1-7), for the reasons stated above the methodological flaws in that report make its conclusions unreliable. Therefore, the Court finds that plaintiffs are unable to demonstrate a likelihood of success on their express and implied claims that the advertising statement "Consumers who use TurboTax will have their questions answered only by a CPA, Enrolled Agent

("EA"), or tax attorney" is false or misleading under the Lanham Act.

E. TurboTax CPAs, EAs, and tax attorneys will guide consumers through every step of the software being used to prepare their tax returns

This message does not expressly appear in defendant's advertisements at all. See Pltf. Ex. 62, 63, 91, and 96. Therefore, to the extent it is present, such message could only be considered an implied message. Plaintiffs' only evidence that this message is present in the advertisements is the Scott report, which they argue demonstrates at least 16.8% of consumers are likely to be deceived into believing that TurboTax CPAs, EAs, and tax attorneys will provide step-by-step assistance in preparing tax returns. See Scott testimony, March 4, 2013, Tr. 77:8-12. However, for the reasons discussed above, the Court finds the Scott report to have methodological flaws that make its conclusions unreliable. Accordingly, the Court finds that plaintiffs are unable to demonstrate a likelihood of success at demonstrating that the implied claim "TurboTax CPAs, EAs, and tax attorneys will guide consumers through every step of the software being used to prepare their tax returns," even appears in the challenged advertisements such that it could be found to be false or misleading under the Lanham Act.

F. TurboTax is used by more Americans to file their tax returns than any of the products or services offered by H&R Block and other major retail tax preparation services

The Court notes that the express statement made in the advertisements is actually the opposite of the statement plaintiffs argue was made. The statement in the advertisements is "More Americans trusted their federal taxes to TurboTax last year than H&R Block stores and all other major tax stores combined." Pltf. Ex. 91 and 96. This statement is true. Although plaintiffs argue that the comparison with tax stores found in the

disclaimer is literally false as defendant has no tax stores, it is well known that defendant does not have tax stores and only sells software. The Court also agrees with defendant that the comparison between software and in-store filing is a proper comparison to make, as defendant's core business is software whereas plaintiffs' core business (and the one that is referenced in the advertising) is in-store services.

To the extent that plaintiffs argue that the Scott report demonstrates that the advertisements are misleading, the Court agrees with defendant that the Scott report suffers from methodological flaws. For one, the Scott report actually found in one of its closed-ended questions that there was essentially no difference in the numbers of consumers who believed the above statement in the test advertisements versus the control advertisement. Scott testimony, March 4, 2013, Tr. 77:17-25. As noted by Dr. Nowlis, this consumer response to Dr. Scott's survey does not support her conclusion that the advertisements were misleading. See Nowlis testimony, March 5, 2013, Tr. 129:20 – 131:9. Dr. Scott only received results that she believed showed the advertisements were misleading when she asked a follow-up question after asking the survey participants to watch the commercial yet again, and this time "pay particular attention to the chart at the end of the commercial" (test commercial) or just "pay particular attention to the end of the commercial" (control commercial). Scott testimony, March 4, 2013, Tr. 79:10-81:18; Pltf. Ex. 219, p. 5, Q8. According to defendant's expert, this test design is very unusual and unnatural, and is unnecessary as her own results already showed zero net confusion on this issue. Nowlis testimony, March 5, 2013, Tr. 131:12 – 132:8. Overall, this appears to be

another example of questions asked that were results-driven, rather than natural follow-up on consumer perception. Again, the Court finds Dr. Scott's results to be unreliable.

At best, the survey demonstrates that the survey respondents were confused and misunderstood the advertisements. "[T]he Lanham Act protects against misleading and false statements of fact, not misunderstood statements." Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 394 (8th Cir. 2004)(citing Mead Johnson & Co. v. Abbott Laboratories, 201 F.3d 883, 886 (7th Cir. 2000)). Accordingly, the Court finds that plaintiffs are unable to demonstrate a likelihood of success on their claim that the statement "TurboTax is used by more Americans to file their tax returns than any of the products or services offered by H&R Block and other major retail tax preparation services" is even present in the advertisement, and they are unable to demonstrate a likelihood of success at demonstrating that the claims that are made in the advertisements are false or misleading under the Lanham Act.

G. Remaining Elements of Lanham Act False Advertising Claim

The remaining contested elements of plaintiffs' Lanham Act claim pled in Count I are that (1) the statement actually deceived or had the tendency to deceive a substantial segment of the audience; (2) the deception was material; and (3) plaintiffs have been or are likely to be injured as a result of the false advertisement. For the same reasons as stated above, plaintiffs are unable to demonstrate a likelihood of success on the merits on these elements as well.

H. Remaining *Dataphase* Factors

With respect to the other Dataphase factors, the Court finds that, on balance, they

either weigh in favor of defendant or are neutral. In particular, the Court notes that regardless as to whether a presumption of irreparable harm applies in Lanham Act cases (or whether that line of cases has been overruled by more recent Supreme Court precedent),[5] such a presumption could only apply where the Court has found a likelihood of success on the merits. See Charter Communications, Inc. v. Sw. Bell Tel. Co., 202 F. Supp. 2d 918, 929 (E.D. Mo. 2001)(finding "Once a plaintiff has made a showing of likelihood of success under the Lanham Act, the court presumes that the plaintiff will be irreparably harmed," (emphasis added)).

Therefore, plaintiffs' motion for a preliminary injunction (Doc. No. 5) is **DENIED.**

IV. Conclusion

Therefore, for all the foregoing reasons, plaintiffs' motion for a preliminary injunction (Doc. No. 5) is **DENIED**.

IT IS SO ORDERED.

/s/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
Chief United States District Judge

Dated: March 11, 2013.
Kansas City, Missouri.

[5] See the cases cited in plaintiffs' and defendant's post-hearing briefs, Doc. Nos. 105 and 112, respectively.