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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. BAZAARVOICE, INC., *Defendants*.	CASE NO.: 13-cv-00133 WHO **DEFENDANT'S PROPOSED CONCLUSIONS OF LAW**

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DEFENDANT'S PROPOSED CONCLUSIONS OF LAW

I. JURISDICTION AND VENUE

1. On January 10, 2013, the United States of America, acting under the direction of the Attorney General of the United States by and through its Antitrust Division, filed this action in the Northern District of California, against Bazaarvoice, Inc. ("Bazaarvoice") in connection with Bazaarvoice's June 2012 acquisition of PowerReviews, Inc. ("PowerReviews"), under Section 15 of the Clayton Act, 15 U.S.C. § 25, alleging violations of Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. This Court has subject matter jurisdiction under Section 15 of the Clayton Act, 15 U.S.C. § 4 and 25, and 28 U.S.C. §§ 1331, 1337, and 1345.

3. This Court has personal jurisdiction over the Bazaarvoice because Bazaarvoice transacts business and is found within this District.

4. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b) and (c).

II. THE PLAINTIFF HAS FAILED TO PROVE A VIOLATION OF SECTION 7 OF THE CLAYTON ACT

A. PLAINTIFF BEARS THE BURDEN OF PERSUASION ON ALL ELEMENTS OF A SECTION 7 VIOLATION

5. In order to prove a violation of Section 7 of the Clayton Act, the government must demonstrate that the challenged transaction is likely to "substantially . . . lessen competition or tend to create a monopoly" in a properly defined "market for a particular product in a particular geographic area." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 n.1 (D.C. Cir. 1990).

6. Section 7 recognizes that buying competitors is not only permissible in most instances, but "contributes to market stability and promotes the efficient allocation of resources." *United States v. Syufy Enters.*, 903 F.2d 659, 673 (9th Cir. 1990). The government therefore must prove that there is a "reasonable probability" of substantial competitive harm; a mere possibility of

harm is insufficient to prove a Section 7 violation. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 616-17, 622-23 (1974) ("§ 7 deals in 'probabilities,' not 'ephemeral possibilities.'") (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)); *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 180 (D.D.C. 2001).

7. Plaintiff bears the burden of proving each element of a Section 7 claim and the ultimate burden of persuasion at all times. *Baker Hughes*, 908 F.2d at 982-83; *see FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051-52 (8th Cir. 1999) ("government has the burden of proving the relevant geographic market"); *SunGard*, 172 F. Supp. 2d at 181. If, on-balance, the transaction is not likely to substantially lessen competition, the government cannot carry its burden. *Baker Hughes*, 908 F.2d at 982-83.

8. The government relies extensively on the 2010 *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and Federal Trade Commission. U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES (2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (hereinafter *"Horizontal Merger Guidelines"* or *"Guidelines"*). While the *Horizontal Merger Guidelines* can be a useful tool for practitioners, they are not binding in any way on the courts. *See IGT v. Alliance Gaming Corp.*, 702 F.3d 1338, 1345 n.3 (Fed. Cir. 2012). *See also United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1117 (N.D. Cal. 2004) ("Although the Guidelines' discussion . . . may be a helpful start, the factors described therein are not sufficient to describe a unilateral effects claim."). Nevertheless, citations to the *Horizontal Merger Guidelines* are generally appropriate to reference principles the government cannot dispute. *See, e.g., United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984).

B. STANDARDS FOR EVALUATING POST-MERGER AND PRE-MERGER CHALLENGES

9. Since passage of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, in 1976, most governmental merger challenges have been made before the merger in question was consummated. That is because the HSR Act requires advance reporting to the antitrust agencies of

mergers meeting certain minimal dollar reporting thresholds, allowing the agencies to go to court to prevent, in advance, the consummation of mergers feared to violate Section 7.

10. A small number of mergers, however, have been challenged post-consummation since then, even though those mergers were too small in dollar value to meet the advance notification requirements of Hart-Scott-Rodino. This case involves a consummated merger.

11. The standard on which the government relies is this case is the traditional standard for evaluating mergers, as established by *Baker Hughes* and numerous other cases. *See Baker Hughes*, 908 F.2d at 982-83. Under this traditional "burden-shifting" framework, the government must establish a cognizable relevant product market, demonstrate market shares that give rise to anticompetitive effects, and show probable adverse effects on customers in the market as a whole. *Id.* at 981. Over the past four decades, this is the approach that courts have applied in analyzing mergers that have not been consummated. This approach can also be applied to mergers that have been consummated, as it was before the HSR Act was passed.

12. In cases involving consummated mergers, however, the Ninth Circuit has articulated an alternative methodology that can obviate the need to analyze all the many factors in the traditional burden-shifting approach. *See Syufy*, 903 F.2d at 665-69. Under *Syufy*, if evidence post-merger shows (1) that price competition and innovation in the affected product market continue at the same level, and/or (2) that affected customers have testified the merger is not harmful, and/or (3) that entry is easy, a violation of Section 7 of the Clayton Act has not been established and the traditional approach can be bypassed. *Id.*

13. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that the government has failed to satisfy the requirements of *Syufy*, thereby warranting judgment in favor of the defendant. Even if the government had satisfied *Syufy*, however, the government's case fails equally under the traditional pre-consummation legal framework.

III. UNDER THE CONTROLLING NINTH CIRCUIT *SYUFY* STANDARD, POST-MERGER EVIDENCE DEMONSTRATES THAT THE ACQUISITION OF POWERREVIEWS BY BAZAARVOICE HAS NOT HARMED COMPETITION

14. The purpose of the antitrust laws is the protection of consumer welfare. *E.g.*, *Rebel Oil Co. v. Atl. Richfield Co. Inc.*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke [antitrust scrutiny] until it harms consumer welfare."). In this case, the "consumers" are the customers who buy (or supply their own) ratings and reviews. The customers' views of the transaction are therefore especially important, as it is their interests that Section 7 is designed to protect. The government itself concedes that "[c]ustomers typically are the best source, and in some cases they may be the only source, of critical information on the factors that govern their ability and willingness to substitute in the event of a price increase." U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, COMMENTARY ON MERGER GUIDELINES, at 9 (2006) (http://www.justice.gov/atr/public/guidelines/215247.pdf); *see also* U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 2.2.2 (2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (hereinafter "*Horizontal Merger Guidelines*" or *"Guidelines"*) ("Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself"). Here, testimony elicited from customers about their opinion of a consummated merger is particularly relevant to the ultimate question of whether a transaction violates Section 7 of the Clayton Act. *United States v. Syufy Enters.*, 903 F.2d 659, 669 (9th Cir. 1990) ("Perhaps the most telling evidence of Syufy's inability to set prices came from movie distributors, Syufy's supposed victims.").

15. Where post-merger evidence demonstrates that a transaction has not harmed competition, predictions of the future are not required. The record of what has actually happened – such as proof of entry and aggressive post-merger competition – enables the Court to "bypass as surplusage the hundreds of pages of expert and lay testimony" regarding pre-merger market

conditions. *Syufy*, 903 F.2d at 665; *see also United States v. General Dynamics Corp.*, 415 U.S. 486, 506 (1974).

16. Evidence of actual entry and expansion post-merger may also warrant entry of judgment against the government. *United States v. Syufy Enters.*, 712 F. Supp. 1386, 1401 (N.D. Cal. 1989) (Orrick, J.), *aff'd*, 903 F.2d 659 (9th Cir. 1990) (holding that a merger did not give rise to a Clayton Act violation because entry and expansion occurred "during the same period in which the government would [have] like[d] the Court to believe that Syufy was exercising its greatest monopoly power").

17. The Court's foregoing findings of fact establish, and the customer testimony confirms, that, after the acquisition of PowerReviews by Bazaarvoice, quality-adjusted prices have not increased to any customer; prices to many customers have declined; new firms have entered the product rating and review business ("PRR" or "R&R"); and numerous other firms are poised to enter or expand rapidly were prices ever to rise. The customer testimony and other record evidence overwhelmingly attest to the continued vigor of competition in the provision of ratings and reviews. On the facts of this case, as in *Syufy*, that evidence is dispositive. *See Syufy*, 903 F.2d at 665-69; *see also United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1421-23 (S.D. Iowa 1991).

18. Therefore, under the applicable legal standard established by *Syufy* for analyzing post-consummation merger challenges, the Court concludes that Bazaarvoice's acquisition of PowerReviews does not violate Section 7 of the Clayton Act.

IV. EVEN UNDER THE *BAKER HUGHES* PRE-CONSUMMATION MERGER CHALLENGE RUBRIC, PLAINTIFF FAILS TO DEMONSTRATE THAT THE TRANSACTION VIOLATES SECTION 7 OF THE CLAYTON ACT

19. Even apart from the framework articulated in *Syufy*, the government has not met its burden to prove that this acquisition violates Section 7 of the Clayton Act under the traditional burden-shifting approach.

20. In applying that framework, the government must first establish a prima facie case to obtain a presumption that the merger will substantially lessen competition.

California v. Am. Stores Co., 872 F.2d 837, 841-42 (9th Cir. 1989), *rev'd on other grounds,* 495 U.S. 271 (1990).

21. The government establishes a prima facie case by proof of (a) the relevant product market; (b) the relevant geographic market; and (c) that the merger will produce "undue concentration" in the relevant market. If such a prima facie case is established, the burden of going forward then shifts to the defendant to produce evidence either (a) demonstrating that the merger will not, in fact, lessen competition, or (b) undermining the evidence relied on by the government to support its prima facie case. Once the defendant has met its burden of production, the government must demonstrate that, on the record as a whole, the merger is likely to lessen competition substantially in the relevant market. The burden of persuasion rests, at all times, with the government. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990); *FTC v. H.J. Heinz*, 246 F.3d 708, 715 (D.C. Cir. 2001); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175 (N.D. Cal. 2004). As developed below, the Court concludes that the government has not established any aspect of its prima facie case and that, even if it had established all the essential elements, the record as a whole demonstrates that the merger will not lessen competition in any relevant market.

A. PLAINTIFF'S PRODUCT MARKET DEFINITION FAILS AS A MATTER OF LAW

22. The first element the government must establish is the relevant product market. *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995); *see also FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) ("Merger analysis begins with defining the relevant product market."); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (citing *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 182-93 (D.D.C. 2001)); *United States v. Engelhard Corp.*, 970 F. Supp. 1463, 1466 (M.D. Ga. 1997), *aff'd*, 126 F.3d 1302 (11th Cir. 1997).

23. The relevant product market identifies the products and services with which the defendant's products compete. *See FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009).

24. To determine the relevant product market, courts consider whether two products serve the same purpose, are reasonably interchangeable, and whether and to what extent purchasers substitute one product for another. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997).

25. Customers need not replace one product with another for the products to be competitive and in the same relevant product market. That other products affect the price of a particular product is sufficient to put those other products in the same market, even if customers continue to use the particular product. Rather, the test of market definition turns on reasonable substitutability. This requires the court to determine whether or not products have "reasonable interchangeability" based upon "price, use and qualities." *Oracle*, 331 F. Supp. 2d at 1131 (citing *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956)).

26. A product grouping, or "cluster market," can often be a relevant product market, even where the components of the group are not themselves substitutes for each other. Thus, for example, in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356-57 (1963), the Supreme Court held that the relevant market was "commercial banking" products or services – a market that included products such as checking accounts and savings deposits accounts that were conveniently supplied together but were not in themselves substitutes.

27. A group of products together will typically comprise a market where:

(1) the products or services serve the same broad function. *United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966); *Sci. Prods. Co. v. Chevron Chem. Co., Inc.*, 384 F. Supp. 793, 799 (N.D. Ill. 1974);

(2) customers use different combinations of the products or services. *Grinnell*, 384 U.S. at 572-73; *United States v. Rockford Mem. Corp.*, 717

F. Supp. 1251, 1260 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990) (Posner, J.);

(3) the products or services are functionally integrated. *United States v. Hughes Tool Co.*, 415 F. Supp. 637, 641-42 (C.D. Cal. 1976);

(4) suppliers can shift the same production resources to supply different products or services in the relevant market. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995); *Hughes Tool*, 415 F. Supp. at 642; *IGT v. Alliance Gaming Corp.*, 702 F.3d 1338, 1347 (Fed. Cir. 2012);

(5) a full line of products or services "has economic significance well beyond the various [individual] products and services involved." *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 361 (1970); *JBL Enters., Inc. v. Jhirmack Enter., Inc.*, 698 F.2d 1011, 1016-17 (9th Cir. 1983); or

(6) the industry recognizes the group of products or services to be a market. *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1204 (9th Cir. 1997) (citing *Brown Shoe*, 370 U. S. at 294).

As the Court's Findings of Fact indicate, each of these factors has been established here.

28. In differentiated product markets, differences in product characteristics are not a sufficient basis to exclude products from the market. *See Oracle*, 331 F. Supp. 2d at 1120 (citing *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (Legge, J.), *aff'd sub. nom., Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, 895 F.2d 1417 (9th Cir. 1990)); *IGT*, 702 F.3d at 1346-47.

29. Changes in the industry must also be considered in defining the relevant market. *United States v. Syufy Enters.*, 712 F. Supp. 1386-87, 1397 (N.D. Cal. 1989) (Orrick, J.), *aff'd*, 903 F.2d 659 (9th Cir. 1990) (rejecting narrow market definition where "the government has given little, if any, consideration to the vast and rapid technological changes in the industry"). The

record in this case clearly establishes the convergence of PRR services with other types of social marketing.

30. Based on these considerations, and as detailed in the Court's Findings of Fact, the relevant product market cannot be confined narrowly to ratings and reviews; it must include, at least, other aspects of social marketing, such as Q&A, forums, gamification, and social sign-in.

31. The government's narrow ratings and reviews market fails equally because the government has admittedly excluded considerations of supply substitution. The Ninth Circuit is clear that "defining a market on the basis of demand considerations alone is erroneous. A reasonable market definition must also be based on 'supply elasticity.'" *Rebel Oil*, 51 F.3d at 1436 (citations omitted); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 691 (9th Cir. 1976); *accord Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1410-11 (7th Cir. 1995) (Posner, J.) ("[T]he definition of a market depends on substitutability on the supply side as well as on the demand side."). Accordingly, because other types of social marketing providers (such as those offering Q&A, forums, gamification, and social sign-in) would rapidly begin supplying ratings and reviews were R&R prices to rise, a relevant product market that excludes those supply substitutes is necessarily improper. The Court's Findings of Fact demonstrate that there are little to no barriers to entry in the creation of a ratings and reviews product such that this expansion would be achieved rapidly and with ease.

32. The Court therefore concludes that the government has not met its burden of proving the relevant market it has alleged. Judgment must be entered for the defendant on that basis alone.

B. PLAINTIFF HAS FAILED TO ESTABLISH A PROPER RELEVANT GEOGRAPHIC MARKET UNDER THE LAW

33. The geographic market defines the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*,

365 U.S. 320, 327 (1961). Courts must consider "'that geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition" and this "must involve a dynamic as opposed to static analysis of where consumers could practicably go, not on where they actually go." *California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057, 1068 (N.D. Cal. 2000), *aff'd sub nom., State of Cal. v. Sutter Health*, 217 F.3d 846 (9th Cir. 2000) and *amended*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001) (quoting *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995)). The geographic market includes all revenues from all sellers in the relevant product market. *Oracle*, 331 F. Supp. 2d at 1164-65.

34. In this case, the government tries to limit the relevant geographic market to customers in the United States. That limitation fails. The government concedes that the market includes all sellers, wherever located, but only to the extent of their sales into the United States. Its claim is that the relevant market is U.S.-only because a hypothetical R&R monopolist could "discriminate" by "targeting" U.S. customers for price increases.

35. The government's argument fails for many reasons. First, it proves much too much. If ratings and reviews really were a product with no substitutes as the government claims, a hypothetical R&R monopolist could "target" price increase to anyone, anywhere, at any time. Under this approach, for example, the block in Minneapolis where Best Buy is headquartered would be a relevant geographic market because a price increase could be "targeted" to that block in Minneapolis.

36. Second, a limitation to U.S. customers ignores the principle of supply substitution. It is well established that, if foreign firms easily can repurpose their capacity to the United States, then that capacity must be included in the market. *See, e.g., Rebel Oil Co.*, 51 F.3d at 1436; *Gulf States Reorganization Grp., Inc. v. Nucor Corp.*, No. 11-14983, --- F.3d ---, 2013 WL 3490824, at *3 (11th Cir. July 15, 2013). Here, the government provided no evidence that the sales of foreign sellers could not be repurposed to the United States.

37. Third, a simple application of the government's "hypothetical monopolist" test demonstrates the error in limiting the market to the United States. A hypothetical monopolist

selling only to U.S. customers would exclude, for example, the sales of Bazaarvoice outside the U.S., and would require a finding that Bazaarvoice itself could not repurpose those sales to the U.S. That conclusion is quite obviously wrong and demonstrates the government's error.

38. And finally, even where the government alleges that sellers can price discriminate against customers based on geographic location with no possibility for arbitrage, and that there is a local component to the sale, courts have held that the market is world-wide. *Oracle*, 331 F. Supp. 2d at 1162, 1164-65.

39. Accordingly, the government has failed to meet its burden of proving a relevant geographic market. Again, judgment may be entered for the defendant on that basis alone.

C. THE GOVERNMENT HAS FAILED TO ESTABLISH UNDUE CONCENTRATION IN A PROPERLY DEFINED RELEVANT MARKET

40. Even assuming that the government's relevant product and geographic market definitions are correct, the government has failed prove undue concentration in the market it defines.

41. Courts have long recognized that in a dynamic market, historical market shares are not meaningful predictors of future competitive harm. *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (quoting *Brown Shoe*, 370 U.S. at 321-22 & n.38). In this Court, even alleging a 35 percent combined market share has been found insufficient to establish a presumption of anticompetitive effects in a differentiated product market. *See Oracle*, 331 F. Supp. 2d at 1123.

42. In this case, even assuming the relevant market is as the government claims, the government has provided no reliable evidence of market share. It therefore cannot sustain its burden of proof. *See United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 49 (D.D.C. 2011) (*citing Baker Hughes*, 908 F.2d at 982).

43. The government's calculation of market shares fails for at least the following reasons. First, as detailed in the Court's Findings of Fact, the government's "universe" (or denominator), the Internet Retailer 500 ("IR500"), is unduly narrow:

- The IR500 ranks the top *retailers by online revenue for physical goods* in the last fiscal year. It does not look, for example, at brands, manufacturers, marketplaces, or ticket sales. Nearly *75%* of Bazaarvoice's revenues and a substantial majority of its customers (34 of its top 50) are not accounted for by the IR500.
- Critically, the IR500 excludes sales of manufactures who choose not to sell directly from their own websites (including such giants as Procter & Gamble, for example). The IR500 is thus inconsistent with the government's relevant product market (PRR platforms used by retailers *and manufacturers*) and has no correlation to the demand for the government's putative product market, "PRR platforms." Some of the companies that spend the most on ratings and reviews do not appear anywhere on the IR500 list.
- Because the IR500 also excludes online revenue from the sale of services and travel, it systematically excludes whole classes of customers that are in the putative relevant market. For example, Expedia, a prominent online travel service, is one of Bazaarvoice's largest clients but is excluded from the IR500. The IR500 also excludes smaller retailers who also use PRR platforms. It even excludes eBay.
- In addition, sites use ratings and reviews to *drive in-store sales*. Thus, any calculation of market power must look beyond online retail sales, and clearly beyond the IR500.
- The IR500 is also not reliable. The sales figures reported are sometimes right, sometimes wrong. They may include sales outside North America – for example, all of Amazon's worldwide sales are included – or not. It is

impossible to calculate product sales on the Internet in the U.S. using the IR500 as a source.

44. Second, the government's use of *customer* revenues as a basis to calculate market shares is improper. The government has cited no authority for using customer revenues to measure share. Its own *Guidelines* specify that shares should be calculated on a basis that reflect the *seller's* competitive significance, such as *sellers'* revenues, unit sales, or capacity. U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 5.2 (2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (hereinafter *"Horizontal Merger Guidelines"* or *"Guidelines"*). *Accord, e.g., General Dynamics Corp.*, 415 U.S. at 501; 2B P. AREEDA ET AL., ANTITRUST LAW ¶ 535 (3d ed. 2007); *see id.* ¶ 535b ("A firm's market significance is usually measured by its sales, which typically match its output, especially over time.").

45. Third, the government's calculations of share, even based on customer revenues, are so replete with errors that it would be unreasonable to rely on them. For example, the government attributes all of Amazon's sales to the U.S. market, even though over $20 billion are outside North America. The government also attributes half of Apple's revenues to Bazaarvoice, even though Bazaarvoice's ratings and reviews product affects zero product sales of Apple.

46. The government's alternate share calculations, based on customer count, are also unreliable. First, the government relies on the IR500 for its universe, which is improper for the reasons just discussed. Second, the government attributes zero or the most trivial sales to rapid entrants such as Amazon (as a third-party supplier), Oracle, IBM, hybris, and Google – thereby vastly understating those firms' competitive significance. Third, the government's customer count also provides zero weight to the potential expansion of rivals such as Reevoo, Pluck, and Gigya. Assigning little or no weight to these significant potential rivals is contrary to the government's own *Guidelines*. *See Horizontal Merger Guidelines* § 5.1. Fourth, calculation of market shares must account for "the full range of selling opportunities reasonably open to competitors," which

includes potential as well as existing customers. *Stewart v. GoGo, Inc.*, No. C-12-5164, 2013 WL 1501484, at *4 (N.D. Cal. Apr. 10, 2013) (Chen, J.); *see also Engelhard*, 970 F. Supp. at 1483, *aff'd*, 126 F.3d 1302 (11th Cir. 1997). The government, however, refuses to count any potential customer as part of its universe.

47. Market share calculations based on unreliable data and analysis predicated on those shares should be rejected. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242-43 (1993) (*citing Matsushita*, 475 U.S. at 594 n.19); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 995-97 (C.D. Cal. 2012).

48. Had the government calculated market shares reliably, it would have concluded that the combined post-merger share of Bazaarvoice and PowerReviews is too low to establish a Clayton Act violation. The government's case fails on this independent ground alone.

D. PLAINTIFF HAS FAILED TO PROVE HARM TO COMPETITION

49. The government, like any antitrust plaintiff, must show that the challenged conduct (here, a merger) harms the competitive process. *Oracle*, 331 F. Supp. 2d at 1123. This means harm to the "market *as a whole*," not to individual market participants. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984), *abrogated on other grounds by Illinois Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (emphasis added); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998). *See generally Syufy*, 903 F.2d at 668 ("It can't be said often enough that the antitrust laws protect competition, *not* competitors.").

50. There are two theories of competitive harm recognized by the courts when considering the marketwide effects of a proposed (or consummated) merger: (a) that the transaction will facilitate "coordinated effects," or (b) that the transaction will facilitate "unilateral effects." *Oracle*, 331 F. Supp. 2d at 1112-23.

51. Plaintiff does not allege a "coordinated effects" theory; instead, the government advances a "unilateral effects" approach alone. Its theory is based upon an allegation that the combination of Bazaarvoice and PowerReviews will facilitate market power in a differentiated products market. *See, e.g.*, *Oracle*, 331 F. Supp. 2d at 1112-13.

52. A theory of harm predicated on unilateral effects from a merger posits that the merged entity will have the ability to increase marketwide prices on its own without regard for competition from other players in the market. *Id*. at 1113; *see also H & R Block, Inc.*, 833 F. Supp. 2d at 81 (upholding merger challenge on coordinated effects theory and addressing unilateral effects in *dicta*). "Differentiated products are imperfect substitutes representing as they do different features or characteristics that appeal variously to different customers." *Oracle*, 331 F. Supp. 2d at 1115.

53. "[F]our factors make up a differentiated products unilateral effects claim. First, the products controlled by the merging firms must be differentiated. Products are differentiated if no 'perfect' substitutes exist for the products controlled by the merging firms. Second, the products controlled by the merging firms must be close substitutes. Products are close substitutes if a substantial number of the customers of one firm would turn to the other in response to a price increase. Third, other products must be sufficiently different from the products controlled by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging firms. Finally, repositioning by the non-merging firms must be unlikely. In other words, a plaintiff must demonstrate that the non-merging firms are unlikely to introduce products sufficiently similar to the products controlled by the merging firms to eliminate any significant market power created by the merger." *Oracle*, 331 F. Supp. 2d at 1117-18 (internal citations omitted); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 68 (D.D.C. 2009) (citing *Oracle*, 331 F. Supp. 2d at 1117-18).

54. Thus, in a unilateral effects case involving differentiated products, the government must show that, after the merger, Bazaarvoice "would enjoy a post-merger monopoly

or dominant position, at least in a 'localized competition' space." *Oracle*, 331 F. Supp. 2d at 1118.

55. The government must demonstrate, not what solutions customers would merely "like or prefer," but what customers could do (or not do) in the event of an anticompetitive price increase. *Oracle*, 331 F. Supp. 2d at 1131. Here, the government at some points contends that it can demonstrate post-merger market power by identifying a group of customers who would absorb a substantial price increase from a hypothetical monopolist through targeted price discrimination. But those types of effects are cognizable only where the evidence shows *objective* criteria, that the defendant can and will use *in advance*, to identify the prospective "victims." *See PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107 (2d Cir. 2002); *In re R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 159 & n.66 (1995); *In re Midcon Corp*. No. 9198, 1989 WL 1126782, at **55-56 (F.T.C. July 18, 1989); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 997-98 (11th Cir. 1993); *Oracle*, 331 F. Supp. 2d at 1173 (rejecting plaintiff's "inarticulable contentions" that "'somehow' Oracle was able to determine what level of discount it could offer to different customers"). It cannot rely on the purchasing preferences of a small number of heterogeneous customers with extremely strong preferences, or customers who preferences have become known (or guessed at) though individual negotiations. *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 228 (2d Cir. 1999); *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1376 (9th Cir. 1989); *Oracle*, 331 F. Supp. 2d at 1131 & 1172-73.

56. There is no evidence to support a price discrimination theory of unilateral effects in this case. The record demonstrates that the ratings and review choices of customers vary completely irrespective of any objective criteria such as size, breadth of product line, or any other objective factor. As the Court's Findings of Fact demonstrate, some choose the robust solutions provided by Bazaarvoice and others. Some prefer inhouse solutions. Some prefer the simpler outside solutions of firms such as Yotpo. Many prefer to forego R&R altogether. There are no criteria under which the characteristics of a customer that would choose *only* Bazaarvoice or

PowerReviews could be identified. The targeted customer theory set forth in the government's complaint therefore fails.

57. Plaintiff's economic expert's report did not rely on the complaint's targeted customer approach. It advanced instead a theory of unilateral effects based on market concentration, arguing that, because of their combined market shares, Bazaarvoice would be able to raise prices because of the loss of bidding competition between it and PowerReviews.

58. Ninth Circuit precedent compels rejection of new theories of anticompetitive harm that were not alleged in the Complaint. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000); *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011); *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). Even if this new theory were considered, however, it would still fail. First, the evidence of "undue concentration" is insufficient as a matter of law as discussed above. Second, even if the evidence of concentration were not lacking, the evidence, prominently including the customer testimony, that customers have numerous choices in bidding situations – including existing major suppliers such as Gigya, Pluck, and Reevoo; smaller firms such as Yotpo; rapid entrants and expanders such as Amazon, Oracle, IBM, hybris, and Google; and inhouse solutions as well.

59. Finally, in his rebuttal report, the government's economic expert appeared to advance yet another theory of harm: that Bazaarvoice might target price increases to renewal customers or legacy PowerReviews customers. That new theory came far too late in the day to be used consistently with Ninth Circuit precedent. But even had it been timely, the numerous alternatives available to customers, as customers themselves have attested and as explained in the Court's Findings of Fact, disprove that theory as well.

60. The government's inability to show any actual or probable competitive harm from the merger provides yet another ground for entering judgment in defendant's favor.

E. PLAINTIFF HAS FAILED TO ACCOUNT PROPERLY FOR THE ROLE OF ENTRY AND EXPANSION IN ASSESSING THE COMPETITIVE EFFECTS OF THE TRANSACTION

61. Even if the government had established, *prima facie*, a case of probable competitive harm, its case would still fail. Bazaarvoice has met its burden of producing evidence that any attempted price increases by the merged firm will cause repositioning and new entry and that there are no meaningful barriers to entry. *See Metro Mobile CTS, Inc. v. NewVector Commc'ns, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989); *Am. Stores Co.*, 872 F.2d at 842-43, *rev'd on other grounds*, 495 U.S. 271 (1990); *Syufy*, 903 F.2d at 664-65; *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 981-83 (2d Cir. 1984). The government has failed to meet its burden of proving that, in light of these factors, competition has been or will be harmed.

62. "To justify a finding that a defendant has the power to control prices, entry barriers must be . . . capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting. Barriers to entry are insignificant when natural market forces will likely cure the problem. In such cases, judicial intervention into the market is unwarranted." *Rebel Oil Co.*, 51 F.3d at 1439 (citing *Syufy*, 903 F.2d at 663).

63. Even substantial concentration does not violate Section 7 if new, existing or adjacent competitors can reposition their products to compete effectively against the merged entity. *Syufy*, 903 F.2d at 664-65 and 669 (holding defendant's 100% share at the time of the merger proved irrelevant, because "this utopia proved to be only a mirage"). The question is not whether entry is easy or likely at pre-merger prices; the issue instead is whether entry would occur post-merger if prices were to rise. *See, e.g.*, *Waste Mgmt.*, 743 F.2d 976, 983-84. The government has not adequately addressed this question; its focus is on the incorrect question whether there would be significant entry at pre-merger price levels. Even so, the evidence indicates significant entry and expansion by rivals post-merger even in the absence of evidence of increased prices.

64. Moreover, "[i]f barriers to entry are insignificant, the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs." *Baker Hughes*, 908 F.2d at 988 (emphasis in original); *see also United States v. Falstaff Brewing Corp.*,

410 U.S. 526, 532-33 (1973); *FTC v. Procter & Gamble, Co.*, 386 U.S. 568, 581 (1967); *Am. Stores*, 872 F.2d at 842; *Ball Mem'l Hosp., Inc. v. Mutual Hosp., Ins.*, 784 F.2d 1325, 1335-36 (7th Cir. 1986); *U.S. v. Gillette Co*., 828 F. Supp. 78, 84-85 (D.D.C. 1993). If entry is not costly and can be accomplished quickly, entry barriers are generally found to be low. *See, e.g.*, *Baker Hughes*, 908 F.2d at 988-89; *Waste Mgmt.*, 743 F.2d at 982; *United States v. Calmar Inc.*, 612 F. Supp. 1298, 1305-07 (D.N.J. 1985).

65. It is important to recognize at the outset that the entry or expansion in issue is that which is sufficient to replace the competitive influence of PowerReviews if prices were ever to rise, not entry on a scale sufficient to replace Bazaarvoice. *See FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 47-48 (D.D.C. 2002) (issue is whether acquisition would result in elimination of a particularly aggressive competitor like the acquired company, and whether existing competitor or new entrant can "effectively *replace [the acquired company] as a viable competitor* in the market" (emphasis added)). That is because it is PowerReviews, not Bazaarvoice, that will no longer be an independent competitive entity. The government concedes this point. *E.g.*, GX0983, at 68 ("[t]o protect customers, entry and expansion would need to replace the competition provided by PowerReviews").

66. A defendant is not required to prove that entry will be "quick and effective" because "[s]uch evidence is rarely available." *Baker Hughes*, 908 F.2d at 987. The issue is whether the *cumulative* effect of all the entrants and expanders will replace the influence of the acquired firm. New competitors need not have high market share to exert a competitive impact. Even new competitors to the market with small shares can be significant, especially in the aggregate. *See Waste Mgmt.*, 743 F.2d at 981-84 (ease of small scale entry negated likelihood of anticompetitive effects); *Gillette*, 828 F. Supp. at 85 & n.11 ("[T]he record demonstrates that there are new entrants into the fountain pen market which are able to check increases in price.").

67. The infrequency of historic large scale entry, relied on by the government here, is not significant. That infrequency may well "only [be attributable to] the existence of competitive, entry-forestalling prices," *Waste Mgmt.*, 743 F.2d at 983, and the government has not

even attempted to prove otherwise. Similarly, while a defendant may present actual examples of firms that are "poised for future expansion," such examples are not required as "a firm that *never* enters a given market can nevertheless exert competitive pressure on that market." *Baker Hughes*, 908 F.2d at 988-89 (emphasis in original).

68. The government advances four factors as barriers to entry. Each fails as a matter of law.

69. The government first maintains that Bazaarvoice's good reputation is an entry barrier. Ninth Circuit case law, however, is clear that "reputation alone does not constitute a sufficient entry barrier in this Circuit." *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997) (citing *Syufy*, 903 F.2d at 669 ("We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition.")); *accord Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997) (quoting *Harcourt*, 108 F.3d at 1154 and *Syufy*, 903 F.2d at 669).

70. Second, the government maintains that customer switching costs are an entry barrier. This argument also fails. PowerReviews itself was a noted failure in getting customers to switch from Bazaarvoice, gaining just three in the past four years. Replacing that competition would plainly not be hard. Moreover, switching costs are indisputably not a barrier to the estimated 50% of all existing customers expected to change their e-commerce platform over the next two years – or for the many, many firms that have not yet adopted ratings and reviews. The testimony of customers in this matter who have switched away from Bazaarvoice or PowerReviews to other providers also indicates switching is a simple and straightforward task, further eliminating any conception that switching costs are a barrier to entry.

71. Third, the government asserts that "syndication" is a barrier. Yet PowerReviews itself had syndication for just a trivial portion of its customers – less than 4% overall and less than 10% for its larger "enterprise" customers. Replacing that competitive significance, again, would be easy. One reason for the low penetration of syndication is that it is

often a significant negative in a website's search rankings. Search engines value and reward *unique* content, but syndicated content (by definition) is not unique. Reliance on syndication therefore lowers a site's search rankings, all things equal, and many ecommerce firms avoid it intentionally for just that reason. Moreover, it is the customers who control their data, not ratings and reviews suppliers like Bazaarvoice. Nothing stands in the way of retailers or brands creating syndication arrangements on their own, with or without an independent ratings and reviews provider.

72. Fourth, the government claims that "scale economies" are a barrier. It is unclear whether this is in addition to or redundant of the syndication argument. But in any event, it is without support. PowerReviews had just $12 million in revenues in its last year and just $29 million throughout its entire seven-year history. Replicating that significance could be achieved with great ease by any of the major ratings and reviews suppliers or rapid entrants. Amazon alone generates vastly more revenues than that every day.

73. There is, in short, nothing that would prevent a combination of the major existing ratings and reviews providers, the many smaller providers, and the numerous and powerful rapid entrants from entering or expanding in a manner that replaces the competitive influence of PowerReviews, and then some, were prices ever to rise. Because of this demonstrated ease of entry and expansion, judgment must be entered for the defendant.

F. PLAINTIFF HAS IMPROPERLY DISCOUNTED INTERNALLY DEVELOPED PRODUCTS IN THE ALLEGED PRODUCT MARKET

74. "Courts have generally recognized that when a customer can replace the services of a wholesaler with an internally-created delivery system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 48 (D.D.C. 1998); *see also California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057, 1067 (N.D. Cal. 2000), *aff'd sub nom., State of Cal. v. Sutter Health*, 217 F.3d 846 (9th Cir. 2000) and *amended*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001); *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 186 (D.D.C. 2001); *Spectrofuge*

Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 278 (5th Cir. 1978); *United States v. ALCOA*, 148 F.2d 416, 424 (2d Cir. 1945); 2B P. AREEDA ET AL., ANTITRUST LAW ¶ 535e, at 281 (3d ed. 2007).

75. In this case, the evidence is indisputable that inhouse solutions are easily available and would prevent any marketwide price increase by incumbent suppliers. Large and small customers alike made clear just how easy it is to develop a robust inhouse solution. One customer, Wayfair, testified that it developed R&R functionality on its own *in less than two months with a single engineer*, allowing it to drop its commercial vendor (PowerReviews). While the government indicates that some customers would prefer not to go inhouse, the preferences of these individual customers say nothing about the effect on the market if prices were to rise.

76. In order to demonstrate that internally developed solutions are not a competitive alternative for the customers allegedly harmed by the merger, the government must identify the characteristics of customers that would render those customers *unable* to switch to an alternative product like an in-house solution and prove that those customers are significant in number. *See Engelhard*, 126 F.3d at 1306; *Pay 'N Pak Stores*, 875 F.2d at 1376; *PepsiCo*, 315 F.3d at 107; *Oracle*, 331 F. Supp. 2d at 1131; *SunGard*, 172 F. Supp. 2d at 189-90. The government has offered no such evidence in this case.

77. The record is clear that any attempt to raise market prices post merger would be quickly defeated by a flight of customers to inhouse R&R solutions. Judgment may be entered for Bazaarvoice on this ground alone.

G. THE SUBSTANTIAL EFFICIENCIES RESULTING FROM THIS TRANSACTION FURTHER IMMUNIZE THE DEFENDANT'S CONDUCT FROM ANY ALLEGED VIOLATIONS OF THE CLAYTON ACT

78. The government's Horizontal Merger Guidelines explain that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." *Horizontal Merger Guidelines* § 10. "The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude

such that the merger is not likely to be anticompetitive in any relevant market." *Id.* Courts must consider the evidence of enhanced efficiency in the context of the competitive effects of the merger. *See FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-55 (8th Cir. 1999).

79. In this case, because the transaction is consummated, the Court need not speculate on prospective efficiencies – instead it may focus on those efficiencies that have already come to pass. Where, as here, the combined firm has already began offering "lower prices, improved quality, enhanced service, or new products," the evidence of procompetitive efficiencies is abundantly clear. *Horizontal Merger Guidelines* § 10.

V. THE BALANCE OF EQUITIES FAVORS FINDING IN FAVOR OF DEFENDANT

80. If this Court finds a violation of Section 7 of the Clayton Act has occurred, this Court must then balance the equities in ordering the government's the requested relief of "order[ing] Bazaarvoice to divest assets, whether possessed originally by PowerReviews, Bazaarvoice, or both, sufficient to create a separate, distinct, and viable competing business." Complaint ¶ 63(b).

81. "The extreme remedy of divestiture" is an extraordinary measure. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 322 (3d Cir. 2007). Divestiture is appropriate only where the government can "meet their burden of demonstrating that the balance of equities tips in [its] favor." *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1123-24 (N.D. Cal. 2011) (internal citation omitted).

82. Where companies have already "combined their sizeable operations and today function as one corporate entity," there is "obvious hardship" if the Court were to order a divestiture, while the benefit to competition of a divestiture would only be speculative. *Id.* at 1124 (quoting *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235-36 (8th Cir. 2010)). Thus, the "remedial equities balance[d] overwhelmingly in favor of denying" the remedy of divestiture. *Id.* (footnote omitted); *see also Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1172-74 (C.D. Cal. 2000).

83. Based on the applicable legal standards and principles, the Court finds that balancing of the equities favors a finding in favor of the defendant and that the order of divestiture requested by the government is inappropriate.

VI. CONCLUSION

84. Based on the Court's foregoing Findings of Fact and the applicable legal standards and principles, this Court finds that the government has not shown by a preponderance of evidence that the acquisition of PowerReviews by Bazaarvoice has lessened or likely will substantially lessen competition in a relevant product and geographic market in violation of Section 7 of the Clayton Act.

85. The court directs the entry of judgment in favor of Bazaarvoice.

IT IS SO ORDERED.

Dated: _____, 2013

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Honorable William H. Orrick
United States District Court Judge