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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.

Defendant.

Case No. 13-cv-00133 WHO

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

Judge: The Hon. William H. Orrick
Trial Date: September 23, 2013
Time: 8:30 a.m.
Pretrial Conf.: September 9, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. BAZAARVOICE'S ACQUISITION OF POWERREVIEWS VIOLATED SECTION 7.

1. Section 7 of the Clayton Act prohibits mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18.

2. Congress intended Section 7 to be "a prophylactic measure, intended 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil . . . .'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (quoting *United States v. E.I. du Pont de Nemours & Co*, 353 U.S. 586, 597 (1957)). "Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967); *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.32 (1962).

3. "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition.'" *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). "Congress used the words '*may be* substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *Brown Shoe*, 370 U.S. at 323.

4. To prevail in a Section 7 case, the government must demonstrate by a preponderance of evidence that there is a "reasonable probability of anticompetitive effect" arising from the challenged transaction. *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984). This standard, however, only requires the government to prove a *reasonable* probability. The government need not show "even a high probability" that the proposed transaction will substantially lessen competition. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (Posner, J.). Any "doubts are to be resolved against the transaction." *Id*. at 906. (citing *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362-63 (1963); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 555–58 (1973)).

5. A transaction violates Section 7 if it has the "potential for creating, enhancing, or facilitating the exercise of market power—the ability of one or more firms to raise prices above

competitive levels *for a significant period of* time." *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 393 (1956)).

6. "Section 7 does not require proof that a merger *or other acquisition ha*s caused higher prices in the affected market. All that is necessary is that the merger creates an appreciable danger of such co*nsequences in* the future." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1118 (N.D.Cal .2001) (same); *cf. United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966) ("[W]hen the Government brings an action under § 7 it must, according to the language of the statute, prove no more than that there has been a merger between two corporations engaged in commerce and that the effect of the merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country." (emphasis omitted)); IV Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 914e, at 93 (3d ed. 2009) ("The statute does not require sure proof of price increases of a given magnitude; rather, it requires only reasonable evidence showing that the effect of a merger 'may be' substantially to 'lessen competition.'").

7. Even when a merger has been consummated, the government does not need to prove there have been anticompetitive price increases in the market in order to prevail. As the Supreme Court has recognized, "[i]f a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504-05 & n.13 (1974); *see Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 432, 434-35 (5th Cir. 2008).

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II. PRR PLATFORMS USED BY U.S. RETAILERS AND MANUFACTURERS ARE A RELEVANT ANTITRUST MARKET.

A. *The Purpose of Defining Markets is to Determine Whether a Transaction Will Create or Enhance a Defendant's Ability to Exercise Market Power.*

8. Under Section 7, courts define the relevant product and geographic markets in which the merging parties compete in order to assess a transaction's likely competitive effects. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000).

9. Under the antitrust laws, relevant markets are defined to aid the court in determining whether a defendant has the ability to exercise market power. *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987) ("[M]arket definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether market power exists.") (quoting Lawrence A. Sullivan, *Handbook of the Law of Antitrust* 41 (1977)). "Market power exists whenever prices can be raised above the competitive market levels." *Drinkwine v. Federated Publ'n, Inc.*, 780 F.2d 735, 739 n.3 (9th Cir. 1985) (citing *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 27 n.46 (1984)).[1]

10. Market definition is a question of fact. *Oahu Gas Servs., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 363 (9th Cir. 1988); *see Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001) (Sotomayor, J.) ("market definition is a deeply fact-intensive inquiry"); *see also Brown Shoe*, 370 U.S. at 336 ("Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one."). "[T]he reality of the marketplace must serve as the lodestar." *Hartz Mountain Corp.*, 810 F.2d at 805; *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (stating that proper antitrust markets must be defined through "a factual inquiry into the 'commercial realities' faced by consumers" (quoting *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)).

1. PRR Platforms are a Relevant Antitrust Product Market.

11. A relevant product market is composed of a group of products that are "reason[ably] interchangeable" considering "price, use, and [product] qualities." *E.I. du Pont*

[1] Courts have generally adopted the same standard for defining a relevant market in cases brought under the Clayton Act and cases brought under the Sherman Act. *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 292 n.2 (9th Cir. 1979); 4 Areeda & Hovenkamp ¶ 929a, at 159.

(1956), 351 U.S. at 404.

12. "When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents." *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011)*; see FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1045 (D.C. Cir. 2008) (opinion of Tatel J.) (placing emphasis on how merging firms viewed market in their contemporaneous documents); *see also FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 41-42 (D.D.C. 2009)*; Swedish Match*, 131 F. Supp. 2d at 169; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 49 (D.D.C. 1998); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1076 (D.D.C. 1997). Business documents carry significant weight because courts "assume that economic actors usually have accurate perceptions of economic realities." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986).

13. "The determination of what constitutes the relevant product market hinges . . . on a determination of those products to which consumers will turn, given reasonable variations in price." *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001); *see also Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953) (Markets "must be drawn narrowly to exclude any other product to which, within a reasonable variation in price, only a limited number of buyers will turn.").

14. To determine the contours of the relevant product market, courts "often" apply the hypothetical monopolist test from the government's Horizontal Merger Guidelines. *H & R Block*, 833 F. Supp. 2d. at 51-52 & n.10; *see also Olin*, 986 F.2d at 1301-03; U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) § 4.1.1 ("Merger Guidelines").[2]

15. The hypothetical monopolist test asks whether a profit-maximizing monopolist that was the only present and future seller of a group of products likely would impose a small but significant and nontransitory price increase ("SSNIP") on at least one product sold by the merging firms. The profitability of such a price increase turns on the extent to which higher

[2] The Merger Guidelines are not binding on this Court, but are considered "persuasive authority" in merger cases. *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 432 n.11 (5th Cir. 2008).

prices "would drive consumers to an alternative product" or to forego purchases. *Whole Foods*, 548 F.3d at 1038 (opinion of Brown, J.); *CCC Holdings*, 605 F. Supp. 2d at 38 n.12; *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1111-12 (N.D. Cal. 2004); *Swedish Match*, 131 F. Supp. 2d at 160; *Staples*, 970 F. Supp. at 1076 n.8; *Merger Guidelines* § 4.1.1. If not enough consumers would turn to an alternative product or forego purchase to render the price increase unprofitable, the group of products under consideration is a relevant product market. *H&R Block*, 833 F. 2d at 51.

16. "The touchstone of market definition is whether a hypothetical monopolist could raise prices." *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 198 (1st Cir. 1996). Thus, only products that prevent a hypothetical monopolist from significantly increasing price should be included in the relevant market. *See United States v. Microsoft Corp.*, 253 F.3d 34, 51-54 (D.C. Cir. 2001) (affirming exclusion of "middleware" and other products from the relevant market for Intel-compatible PC operating systems as, *inter alia*, either too costly or not sufficiently similar to constrain defendant's prices).

17. Application of the hypothetical monopolist test is consistent with the other evidence in this case, which indicates that PRR platforms are a relevant product market.

18. Other social commerce products are not in the relevant product market because they are complements to PRR platforms, not substitutes. *See U.S. Horticultural Supply v. Scotts Co.*, 367 Fed. App'x. 305, 310 (3d Cir. 2010) ("This demonstrates that these products are complements, rather than substitutes, so a distinct market exists for each."); *accord Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374, 383 (3d Cir. 2005).

2. The United States is a Relevant Geographic Market.

19. The geographic market represents the area "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Phila. Nat'l Bank*, 374 U.S. at 357. The geographic market must "'correspond to the commercial realities' of the industry." *Brown Shoe*, 370 U.S. at 336.

20. "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Id.*

21. Courts have emphasized that the relevant geographic market need not be defined with "scientific precision," *Conn. Nat'l Bank*, 418 U.S. at 669, or "by metes and bounds as a surveyor would lay off a plot of ground." *Pabst Brewing*, 384 U.S. at 549.

22. The relevant geographic market is not always defined by the location of suppliers. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 445-46 (4th Cir. 2011). Where a particular group of customers may be identified and targeted for the exercise of market power, customer locations should be the focus of the geographic market inquiry. *See United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1267 n.12 (N.D. Ill. 1989) (recognizing that price discrimination makes it possible to exercise market power over certain customers with fewer alternatives and not others with more potential alternatives), *aff'd*, 898 F.2d 1278 (7th Cir. 1990); IIB Philip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 534d, at 270 (3d ed. 2009) ("[T]he seller who can segregate a substantial group of buyers and charge them monopoly prices for a significant period has market power over the group of buyers who pay these prices"); Merger Guidelines § 4.2.2 (discussing "geographic markets based on the locations of targeted customers").

23. The hypothetical monopolist test also applies to the definition of the relevant geographic market and requires that the hypothetical monopolist can impose a SSNIP in that region. *See* Merger Guidelines § 4.2.

24. The United States is a relevant geographic market in this case because PRR platforms are sold through individually negotiated transactions, and a hypothetical monopolist of PRR platforms would likely impose a SSNIP on many customers in the United States. Merger Guidelines § 4.2.2. Because PRR platforms cannot be re-sold, a U.S. customer cannot defeat a price increase by purchasing a PRR platform from another customer.

25. When the geographic market is defined based on customer locations, "[c]ompetitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market." Merger Guidelines § 4.2.2.

26. Defining the relevant geographic market as the United States does not exclude foreign suppliers that have demonstrated an interest in or ability to serve customers in the United States. *See Kolon*, 637 F.3d at 446 (holding that it was improper for the district court to conclude that a relevant geographic market could not be properly defined as the United States as a matter of law if the product was also produced in the Netherlands and Korea); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 184 (3d Cir. 2005) (defining market for "the sale of prefabricated artificial teeth in the United States" to include foreign suppliers participating in the U.S. market); Merger Guidelines § 4.2.2; *cf. Pabst Brewing*, 384 U.S. at 551-52 (holding that the geographic market for beer sales in Wisconsin, even though much of the beer sold in Wisconsin was brewed in other states). Even if the geographic market is limited to the United States, foreign suppliers can still be participants in the United States market and assigned a U.S. market share. *See* Merger Guidelines § 4.2.2 ("sales made to those customers [in the region] are counted, regardless of the location of the supplier making those sales"); *id.* § 5.1 ("All firms that currently earn revenues in the relevant market are considered market participants."); *id.* § 5.2 (calculating market shares).

III. THE ACQUISITION SUBSTANTIALLY INCREASES CONCENTRATION IN THE HIGHLY CONCENTRATED MARKET FOR PRR PLATFORMS IN THE UNITED STATES AND IS PRESUMPTIVELY UNLAWFUL.

27. The government establishes a "presumption" that an acquisition "will substantially lessen competition" by showing that it "would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[] in a significant increase in the concentration of firms in that market.'" *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2000) (quoting *Phila. Nat'l Bank*, 374 U.S. at 363; *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990)). Once market share statistics have "made out a *prima facie* case of a violation of § 7," it is "incumbent upon [the defendant] to show that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975); *Heinz*, 246 F.3d at 715; *see also Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993). Nevertheless, "the ultimate burden of persuasion remains with the [plaintiff] at all times." *Heinz*, 246 F.3d at 715.

28. Market shares should capture the competitive significance of the firms competing in the relevant market. *Kaiser Alum. & Chem. Corp. v. FTC*, 652 F.2d 1324, 1341 (7th Cir. 1981) ("The market concentration statistics, however, must be relevant to the focus of competition. The statistics must be an accurate measure of future ability to compete in a relevant market."); *see* Gregory J. Werden, *Assigning Market Shares*, 70 Antitrust L.J. 67 (2002). A "reliable, reasonable, close approximation of relevant market share data is sufficient." *H & R Block*, 833 F. Supp. 2d at 72; *cf.* Merger Guidelines § 5.2 ("The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The Agencies also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.").

29. Courts typically measure market concentration by the so-called "Herfindahl-Hirschmann Index (HHI)." *Heinz*, 246 F.3d at 716; *see also Chi. Bridge*, 534 F.3d at 431 (using HHI as a factor in assessing market concentration); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 n.12 (11th Cir. 1991) (noting that the most prominent method of measuring market concentration is the HHI). "The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market." *Heinz* 246 F.3d at 716 n.9. "Sufficiently large HHI figures establish the [government's] prima facie case that a merger is anti-competitive." *Id.* at 716.

30. A post-merger market is "highly concentrated" when the HHI is 2500 or greater and an increase in HHI of 200 or more points is "presumed to be likely to enhance market power." Merger Guidelines § 5.3; *H & R Block*, 833 F. Supp. 2d at 71-72 (quoting Merger Guidelines § 5.3); *see United States v. Cont'l Can Co.*, 378 U.S. 441, 461 (1964) (merger increasing acquiring firm's market share from 21.9% to 25% and "reduc[ing] from five to four the most significant competitors who might have threatened its dominant position" was presumptively anticompetitive); *Phila. Nat'l Bank*, 374 U.S. at 363 (30% market share is sufficient to trigger the presumption). Bazaarvoice's acquisition of PowerReviews exceeds both thresholds, and is therefore, presumptively unlawful.

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IV. THE ACQUISITION WILL SUBSTANTIALLY LESSEN COMPETITION BY ELIMINATING SIGNIFICANT COMPETITION BETWEEN BAZAARVOICE AND POWERREVIEWS.

31. The government also can establish a *prima facie* case by presenting evidence that the transaction is likely to lead to a substantial lessening of competition in the relevant market. *See Chi. Bridge*, 534 F.3d at 433 (holding that, even without reliance on market concentration statistics, the government also established its prima facie case through other evidence, including the defendant's internal documents); *Whole Foods*, 548 F.3d. at 1036 (the burden shifting framework based on the *Philadelphia National Bank* presumption "does not exhaust the possible ways to prove a § 7 violation on the merits . . . .") (opinion of Brown, J.).

32. "The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition." *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1083 (N.D. Ill. 2012) (quoting Merger Guidelines § 6). This type of anticompetitive effect is frequently called a "unilateral effect" because it does not depend on post-merger coordination with other firms. *H & R Block*, 833 F. Supp. 2d at 81-89; Merger Guidelines § 6.

33. Accordingly, whether a transaction eliminates "significant head-to-head competition" between merging firms is "an important consideration" in evaluating anticompetitive effects. *Staples*, 970 F. Supp. at 1083 ("The merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the superstore market. Thus, the merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market, a factor which is certainly an important consideration when analyzing possible anti-competitive effects."); *see also Swedish Match*, 131 F. Supp. 2d 169 ("[T]he weight of the evidence demonstrates that a unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors").

34. The merging firms' ordinary course of business documents are particularly informative when evaluating the significance of direct competition between two firms. *See Polypore Int'l., Inc. v. FTC*, 686 F.3d 1208, 1212 (11th Cir. 2012); *H & R Block*, 833 F. Supp. 2d

at 81-82. In any antitrust case, "the most persuasive testimony" is not what the witnesses "say in court, but what they do in the market." *Oracle*, 331 F. at 1167.

35. Moreover, "evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." *Brown Shoe*, 370 U.S. at 229 n.48; *see also* IV Areeda & Hovenkamp, Antitrust Law ¶ 964a ("[E]vidence of anticompetitive intent cannot be disregarded, as it is clearly pertinent to the basic issue in any horizontal merger case."). Evidence that a merger was done for an anticompetitive reason is highly probative. *See, e.g.*, *Univ. Health*, 938 F.2d at 1220 n. 27 (relying on evidence showing that "appellees, *by their own admissions*, intend[ed] to eliminate competition through the proposed acquisition"); *Cardinal Health*, 12 F. Supp. 2d at 63-64 (relying on statements of senior executives that merger would curb downward pricing pressure to block proposed transaction).

36. Transactions that eliminate significant head-to-head competition are likely to result in anticompetitive effects. *See, e.g.*, *Heinz*, 246 F.3d at 716-17; *OSF*, 852 F. Supp. 2d at 1083; *Staples*, 970 F. Supp. at 1083; *Swedish Match*, 131 F. Supp. 2d at 169. The elimination of head-to-head competition is particularly likely to lead to anticompetitive effects if the products of the merging firms are close substitutes for a significant number of consumers. *See FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 47-48 (D.D.C. 2002); *Swedish Match*, 131 F. Supp. 2d at 169.

37. "A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger." Merger Guidelines § 6.2.

38. "Anticompetitive unilateral effects in these settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs. These effects also tend to be greater, the more profitable were the pre-merger winning

bids. All of these factors are likely to be small if there are many equally placed bidders." *Id.*

39. Moreover, a firm's ability to target particular customers for price increases is also relevant to unilateral effects analysis. "[W]hen the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers." *Id.* "When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away." Merger Guidelines § 3; *cf. Eastman Kodak*, 504 U.S. at 475 ("[I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.").

40. Significant unilateral effects are likely in this case because (1) Bazaarvoice's and PowerReviews' PRR platforms are close substitutes for many customers; (2) other PRR platforms are distant alternatives to the Bazaarvoice and PowerReviews platforms; and (3) other PRR platform providers are inhibited from quickly repositioning to make their respective platforms close substitutes for the platforms offered by Bazaarvoice and PowerReviews. *See Staples*, 970 F. Supp. at 1082-83; *cf.* IV Areeda & Hovenkamp, Antitrust Law ¶ 914a.

41. By eliminating the significant head-to-head competition between Bazaarvoice and PowerReviews, the acquisition is likely to lessen competition substantially. *See OSF*, 852 F. Supp. 2d at 1083; *H & R Block*, 833 F. Supp. 2d at 89; *Swedish Match*, 131 F. Supp. 2d at 169; *Staples*, 970 F. Supp. at 1083; *cf. Movie 1 & 2 v. United Artists Commc'ns, Inc.*, 909 F.2d 1245, 1255 (9th Cir. 1990) (The elimination of a firm's only serious competitive threat through an acquisition is "evidence of anti-competitive conduct.").

42. In *United States v. Oracle*, the district court concluded that the government failed to demonstrate a likelihood of anticompetitive effects and suggested that proof of unilateral effects requires "that the merging parties would enjoy a post-merger monopoly or dominant position, at least in a 'localized competition space.'" 331 F. Supp. 2d at 1119. To the extent that is the proper inquiry, this requirement would be satisfied here because Bazaarvoice and

PowerReviews were each other's only significant rival. *See, e.g.*, GX-1180 (merger would create "complete dominance in the domestic market"); GX-610 (merger would create a "monopoly in the market"); GX-255 (pre-merger the firms were in a "duopoly"); GX-254 (same); GX-636 (Bazaarvoice and PowerReviews in "a two-horse race"); GX-518 (PowerReviews "the only competitor" Bazaarvoice had); GX-813; GX-315 ("[PowerReviews] the only competitor we [Bazaarvoice] have"); GX-883 ("our only real current competitor"); GX-320 ("Literally, no other competitors"); GX-540 ("[I]ts us or PowerReviews"); GX-416 ("[O]ur only real competitor"); *cf. Oracle*, 331 F. Supp. 2d at 1139 (finding "there is not one single services industry vertical in which SAP is not 'competitive' with Oracle and PeopleSoft.").

43. No other court, however, has adopted *Oracle*'s formulation of the standard for proving unilateral effects. *See H&R Block*, 833 F. Supp. 2d at 84-85 & nn.35-36, 89 (finding likely unilateral effects from the merger and "declin[ing] the defendants' invitation, in reliance on *Oracle*, to impose a market share threshold for proving a unilateral effects claim" because such a standard is inconsistent with other cases and "applied economics") (citations and internal quotation marks omitted). The reason is because, "[w]hile a dominant position is necessary for monopolization, the concern of merger law is impermissible price increases, something which can be achieved on far lower market shares." IV Areeda & Hovenkamp Antitrust Law ¶ 914a, at 84 (rejecting the *Oracle* standard).

44. The *Oracle* standard is also problematic as applied to the facts of this case because it is not clear how the opinion's concept of a "localized competition space" would apply in a case where the merged firm has the ability to target particular customers for a price increase. The Supreme Court has noted that the search for market power requires close examination of "the economic reality of the market at issue," including the possibility of "price discriminat[ion]." *Eastman Kodak*, 504 U.S. at 467, 475; *cf. id.* at 475 ("More importantly, if a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.").

45. The likelihood of unilateral effects that arise from eliminating direct competition among primary competitors is not undermined by the existence of other PRR platform suppliers,

as courts have found unilateral effects even when another alternative will be available in the market following the acquisition. *See OSF*, 852 F. Supp. 2d at 1083 ("[T]he continued existence of one competitor following the merger, even a strong competitor, does not necessarily reduce the probability that the proposed merger would substantially lessen competition in the future"); *H & R Block*, 833 F. Supp. 2d at 72 (finding the largest remaining competitor would have held a market share in excess of 60%, more than double the combined share of the defendants); *Swedish Match*, 131 F. Supp. 3d at 168 (finding the largest remaining competitor would have held a 33% market share).

46. Moreover, the likely anticompetitive effects following a merger do not need to be borne by all customers in order for a transaction to violate Section 7. *See H & R Block*, 833 F. Supp. 2d at 81-89; *Swedish Match*, 131 F. Supp. 2d at 169; *cf. Staples*, 970 F. Supp. at 1082-83. This is particularly true in markets with individually negotiated prices, where each customer receives a separate price determination. *Cf. Eastman Kodak*, 504 U.S. at 467 (holding the search for market power requires close examination of "the economic reality of the market at issue").

47. A merger also can substantially lessen competition by "diminish[ing] innovation." Merger Guidelines § 1. This acquisition is likely to lessen competition substantially by eliminating competition between Bazaarvoice and PowerReviews to develop new features and products. *Cf. FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986) (Bork, J.) (enjoining merger between firms in direct competition and noting that the firms competed at several stages, including "research and development").

V. BAZAARVOICE CANNOT REBUT THE GOVERNMENT'S PRIMA FACIE CASE.

A. *Bazaarvoice Cannot Demonstrate That Entry or Expansion by Other Firms Will Counteract the Competitive Effects Arising From the Transaction.*

48. Once the government has raised a presumption of liability, "it is [the defendant's] burden to rebut a *prima facie* case of illegality." *Olin*, 986 F.2d at 1305.

49. For entry or expansion to rebut the United States' *prima facie* case, it "must be 'timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.'" *H & R Block*, 833 F. Supp. 2d at 73 (quoting Merger

Guidelines § 9). "Determining whether there is ease of entry hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market." *CCC Holdings*, 605 F. Supp. 2d at 47 (quoting *Cardinal Health*, 12 F. Supp. 2d at 55).

50. To carry its burden, the defendant must do more than identify other firms that are competing in the relevant market and might possibly expand. *See H & R Block,* 833 F. Supp. 2d at 73-77. Moreover, "[t]he mere existence of potential entrants does not by itself rebut the anti-competitive nature of an acquisition." *Chi. Bridge*, 534 F.3d at 436.

51. "In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect." Merger Guidelines § 9.1. "Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them. This requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to entry." *Id.*

52. "Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exists." Merger Guidelines § 9.2.

53. The defendant can rebut the presumption by proving that other firms are likely to compete in the market and achieve significant commercial success. *See United States v. Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990) (holding that effective post-merger entry by a competitor had substantially diminished the defendant's market share in the alleged product market, demonstrating the absence of monopoly power); *CCC Holdings*, 605 F. Supp. 2d at 48-49. However, to rebut the presumption, entry or expansion must be of such magnitude that it will "fill the competitive void" created by the acquisition. *Swedish Match*, 131 F. Supp. 2d at 169; *see also H & R Block*, 833 F. Supp. at 73-77 (finding entry not to be timely likely or sufficient even though defendants identified eighteen companies offering various products in the relevant product market because these firms were unlikely to expand to replace the competition that would have been eliminated by the acquisition).

54. Expansion by existing firms is not sufficient in scope, unless it allows the firm to compete "on the same playing field" as the merged entity, *Chi. Bridge*, 534 F.3d at 430, and "affect[s] pricing." *CCC Holdings*, 605 F. Supp. 2d at 59; *Cardinal Health*, 12 F. Supp. 2d at 58. Without substantial growth in share, competitors are too small to be a meaningful constraint on prices. *See CCC Holdings*, 605 F. Supp. 2d at 58 (size of competitors compared to merging firms is a key factor in expansion analysis).

55. Admissions by a defendant regarding the presence of barriers to entry in its market are given substantial weight. *See CCC Holdings*, 605 F. Supp. 2d at 49-50.

56. The absence of significant entry in the market also indicates that there are high barriers to entry. *See Cardinal Health*, 12 F. Supp. at 56 ("The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future.").

57. Network effects can create a significant barrier to entry. Network effects are created when "the utility that a user derives from consumption of the good increases with the number of other agents consuming the good." *Microsoft*, 253 F.3d at 49 (quoting Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985)). Where network effects are present, incumbent firms have a substantial advantage over entrants and fringe competitors if they already have a significant established base of customers. New entrants starting from scratch face the proverbial "chicken-and-egg problem" when attempting to expand. *Microsoft*, 253 F.3d at 55-56.

58. "Where the network effect is sufficiently strong, it can function as a barrier to entry into a market." *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1138 (N.D. Cal. 2010)). Network effects are a substantial barrier to entry when they significantly undermine an entrant's ability to attract customers away from incumbent suppliers. *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 19-22 (D.D.C. 1999) (describing the "applications barrier to entry" created by network effects in the market for Intel-compatible PC operating systems).

59. Reputation for expertise and success and relationships with customers can be "considerable" barriers to entry. *CCC Holdings*, 605 F. Supp. 2d at 54-56; *see also H & R Block*, 833 F. Supp. 2d at 75 ("Building a reputation that a significant number of consumers will

trust requires time and money."); *Cardinal Health*, 12 F. Supp. 2d at 57 (recognizing "strength of reputation" as barriers that prevent smaller fringe firms from expanding to challenge the merging parties); *Chi. Bridge*, 534 F.3d at 437-38 (general reputation is not a barrier to entry but a reputation for expertise and success can be a barrier to entry). However, mere "goodwill achieved through effective service" is not typically an entry barrier. *Syufy*, 903 F.2d at 669 (quoting *United States v. Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984)).

60. High switching costs insulate incumbent suppliers from competition and impede expansion by fringe players and may serve as a barrier to entry. *See CCC Holdings*, 605 F. Supp. 2d at 49; *cf. Eastman Kodak*, 504 U.S. at 476 (high switching costs may cause locked-in consumers to tolerate price increases rather than switch suppliers); *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1031-32 (W.D. Wis. 2000) (consumer unwillingness to switch from established manufacturers made entry unlikely).

61. Because of network effects, high switching costs, and Bazaarvoice's reputation for expertise serving large clients, any entry or expansion will not be timely, likely, and sufficient to rebut the presumption of illegality.

B. *Bazaarvoice's Evidence of Efficiencies From the Acquisition Does not Rebut the Presumption of Illegality.*

62. "High market concentration levels require 'proof of extraordinary efficiencies'" to rebut the presumption of likely anticompetitive effect, and "courts 'generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.'" *H & R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz*, 246 F.3d at 720).

63. Efficiencies are "cognizable" only when they are "merger-specific," "have been verified," and "do not arise from anticompetitive reductions in output or service." *Id.* at 89 (quoting Merger Guidelines § 10). "In other words, a 'cognizable' efficiency claim must represent a type of cost saving that could not be achieved without the merger and the estimate of the predicted saving must be reasonably verifiable by an independent party." *Id.* They also must be "passed through to consumers." *Id.* at 92 n.44 (citing *Staples*, 970 F. Supp. at 1090).

64. "[V]ague and unreliable" efficiency claims cannot rebut a showing of anticompetitive effects. *Oracle*, 331 F. Supp. 2d at 1175.

65. Because Bazaarvoice's claimed efficiencies are not verifiable and merger-specific – and are not likely to be passed through to consumers – they cannot counteract the merger's likely anticompetitive effects.

C. *Post-Acquisition Pricing Evidence Does not Rebut the Government's Prima Facie Case.*

66. "[P]ost-merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit." *Gen. Dynamics*, 415 U.S. at 505 n.13.

67. The converse, however, is not true. *Id.* The probative value of post-acquisition evidence offered by a defendant has been "found to be extremely limited." *Id.* at 504-05. "The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *Id.*

68. The probative value of post-acquisition pricing evidence offered by a defendant in a Section 7 case "is deemed limited not just when evidence is actually subject to manipulation, but rather is deemed of limited value whenever such evidence *could arguably* be subject to manipulation." *Chi. Bridge*, 534 F.3d at 432, 434-35 (emphasis in original); *cf. Hosp. Corp. of Am.*, 807 F.2d at 1384 ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."); *Whole Foods*, 548 F.3d at 1047 (opinion of Tatel, J.).

69. Because the Department of Justice informed Bazaarvoice that it was investigating the company's acquisition of PowerReviews just two days after the transaction closed, the merged firm could have altered its pricing behavior to create an "appearance of competitiveness." *Chi. Bridge*, 534 F.3d at 435. Thus, any evidence that it has not yet raised prices on customers is entitled to little weight and does not rebut the government's prima facie case.

D. *Bazaarvoice's Other Defenses do not Rebut the Government's Prima Facie Case.*

70. To the extent Bazaarvoice's public interest defense is different than its efficiencies defense or its arguments that the merger is not anticompetitive, it is insufficient as a matter of law. "[A] merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *Phila. Nat'l Bank*, 374 U.S. at 371; *cf. Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690, 695 (1978) (citation omitted) (rejecting public safety defense to liability under Section 1 of the Sherman Act, 15 U.S.C. § 1, because "the inquiry is confined to a consideration of impact on competitive conditions" and explaining that "the statutory policy precludes inquiry into the question whether competition is good or bad."). Moreover, anticompetitive effects in one market cannot be justified by procompetitive consequences in another. *Phila. Nat'l Bank*, 374 U.S. at 370.

71. PowerReviews' alleged financial weakness also does not rebut the presumption of illegality. "[F]inancial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger." *Warner Commc'ns*, 742 F.2d at 1164-65 (quoting *Kaiser*, 652 F.2d at 1339. "The acquisition of a financially weak company hands over the company's customers to the acquiring company, thereby deterring competition by preventing others from securing those customers." *Id.* "Also, a 'weak company' defense would expand the failing company doctrine, a defense which has strict limits." *Id* . "[A] company's stated intention to leave the market or its financial weakness does not in itself justify a merger." *Id*. at 1165.

VI. THE REMEDY MUST RESTORE THE COMPETITIVE STATUS QUO TO BEFORE THE ACQUISITION.

72. This Court has the authority "to prevent and restrain" violations of Section 7 of the Clayton Act. 15 U.S.C. § 25.

73. Any proposed remedy must "eliminate the effects of the acquisition offensive to the statute," *E.I. du Pont (1957)*, 353 U.S. at 607, and the acquisition's anticompetitive tendencies. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 325-26 (1961).

74. "Affirmative equitable remedies may be granted to eliminate the harmful *residual* effects of past violations on the competitive system." *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 236 (9th Cir. 1976).

75. Trial courts are "clothed with large discretion" to fit antitrust decrees to "the special needs of the individual case." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (internal quotations omitted).

76. "Divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." *Ford Motor*, 405 U.S. at 573. Even if consummation prevents a full return to the status quo, that fact does not "preven[t] [courts] from mitigating the merger's alleged harm to competition." *Whole Foods*, 548 F.3d at 1034 (Brown, J).

77. Once the government establishes that a merger violates Section 7, "all doubts as to the remedy are to be resolved in its favor." *E.I. du Pont (1961)*, 366 U.S. at 334.

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