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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11
12 United States of America,)
13 Plaintiff,)
14 v.)
15 Bazaarvoice, Inc.,)
16 Defendant.) Judge: William H. Orrick
17)
18)

19
20 Pursuant to the Court’s Reassignment Order and Order Requiring Submission of Case
21 Management Statement, the parties submit this Joint Case Management Statement.

22 **1. The date the case was filed**

23 January 10, 2013

24 **2. List or description of each party**

25 *Plaintiff: United States – Department of Justice (Antitrust Division)*

26 *Defendant: Bazaarvoice, Inc.*
27
28

1 Bazaarvoice, Inc. provides social commerce solutions that help its clients capture, display
2 & analyze online word of mouth, such as consumer-generated ratings & reviews, questions &
3 answers, stories, recommendations, photographs, videos & other content.

4 **3. Summary of claims, counter-claims, cross-claims, third party claims**

5 In June 2012, Defendant Bazaarvoice acquired PowerReviews, Inc. On January 10,
6 2013, after a seven-month investigation into the transaction, Plaintiff filed a complaint against
7 Bazaarvoice alleging that the acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18,
8 seeking the divestiture of assets sufficient to create a competing business that can replace the
9 competitive significance of PowerReviews in the marketplace.

10 **4. Description of events underlying action**

11 **a. Plaintiff's Position**

12 Bazaarvoice is a provider of product ratings and reviews platforms ("PRR platforms"),
13 which are used by retailers and manufacturers to collect, organize, and display consumer-
14 generated product ratings and reviews online. Consumer-generated ratings and reviews are
15 online feedback from consumers regarding their experiences with products they have purchased.
16 Ratings and reviews are a valuable asset for retailers and manufacturers to feature on their
17 websites because they tend to increase sales, decrease product returns, and provide valuable
18 information regarding consumer sentiment. Consumers find ratings and reviews useful because
19 the experiences of prior consumers may assist them in making an informed purchasing decision.

20 On June 12, 2012, Bazaarvoice acquired its closest competitor, PowerReviews, Inc.
21 ("PowerReviews"). Prior to the acquisition, prospective customers routinely played Bazaarvoice
22 and PowerReviews against each other during negotiations. PowerReviews positioned itself as a
23 low-price alternative to Bazaarvoice and aggressively pursued Bazaarvoice's largest clients. As
24 a result of price competition between Bazaarvoice and PowerReviews, many manufacturers and
25 retailers obtained substantial discounts.

26 Plaintiff contends that Bazaarvoice's acquisition of PowerReviews violates Section 7 of
27 the Clayton Act, which prohibits transactions "where in any line of commerce or in any activity
28 affecting commerce in any section of the country, the effect of such acquisition may be

1 substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. Congress
2 intended Section 7 to be “a prophylactic measure, intended ‘primarily to arrest apprehended
3 consequences of intercorporate relationships before those relationships could work their
4 evil’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (quoting
5 *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957)). Accordingly,
6 Section 7 can be violated, even if the challenged acquisition has not yet caused any
7 anticompetitive effects, as long as such effects are “reasonably probable.” *FTC v. Warner
8 Communications, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984) (“It is well established that a section
9 7 violation is proven upon a showing of reasonable probability of anticompetitive effect.”); *see
10 also Brown Shoe Co. v. United States*, 370 U.S. 294, 332 (1962) (A merger violates Section 7 of
11 the Clayton Act “if there is a reasonable probability that the merger will substantially lessen
12 competition.”). Bazaarvoice’s acquisition of PowerReviews is reasonably likely to result in
13 significant anticompetitive effects because the transaction eliminated Bazaarvoice’s most
14 significant rival and extinguished long-standing price competition between Bazaarvoice and
15 PowerReviews. Without continued competitive pressure from PowerReviews, Bazaarvoice will
16 be able to significantly increase what it charges customers for its PRR platform, harming many
17 retailers and manufacturers.

18 **b. Defendant’s Position**

19 **Overview.** Plaintiff does not (because it cannot) allege that Bazaarvoice’s July 2012
20 acquisition of PowerReviews – a company whose annual revenues were below \$12 million – has
21 actually lessened competition in any relevant market. *United States v. Syufy Enters.*, 903 F.2d
22 659, 665-66 (9th Cir. 1990). Nor has Plaintiff alleged a cognizable product or geographic
23 market, market shares, or meaningful barriers to entry. Since the acquisition seven months ago,
24 there has been substantial competitor repositioning and entry and intense competition on price
25 and innovation. PowerReviews customers have also received tangible benefits from the
26 transaction. In the teeth of continued stiff competition, Plaintiff rests its entire case on dated,
27 superseded documents and predictions that bear no resemblance to marketplace realities. In a
28 consummated merger, however, such speculations cannot overcome what the marketplace

1 already has shown: that customers have many choices to which they can turn in this dynamic,
2 vibrant market sector.

3 **(1) Market Concentration.** To make out a prima facie case that a transaction will harm
4 competition, the plaintiff must allege the market shares of the merging parties and market
5 concentration levels as reflected in the Herfindahl–Hirschmann Index. *United States v. Oracle*
6 *Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004). In this case, Plaintiff has not alleged
7 market shares or market concentrations and is therefore not entitled to any such presumption.

8 **(2) Product market definition.** The relevant product is commonly defined by
9 determining “the reasonable interchangeability of use or the cross-elasticity of demand between
10 the product itself and substitutes for it.” *Id.* at 1119. Plaintiff alleges that the relevant product
11 market is product ratings and reviews platforms (“PRRP”) used by retailers and manufacturers.
12 Compl. ¶ 30. However this seemingly simple one size fits all definition is undercut by
13 allegations that the market is highly differentiated with varying customer demands. PRRP range
14 from simple to multi-featured, “sophisticated commercial platforms.” *Id.* ¶ 18. PRRP can be
15 supplied by third parties or built by customers in-house. *Id.* The customers themselves are as
16 varied as the product range, demanding simple solutions, complex multi-featured solutions, and
17 everything in between. *Id.* ¶¶ 27-29.

18 These allegations mirror prior cases brought by the Department of Justice involving
19 alleged differentiated product markets and customers. In those cases, DOJ failed to show that
20 there were “a substantial number of customers for whom there are no competitive alternatives.”
21 *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 190 (D.D.C. 2001); *Oracle*, 331
22 F. Supp. 2d at 1172 (entering judgment in favor of defendant where plaintiffs “failed to prove
23 that there are a significant number of customers [] who regard Oracle and PeopleSoft as their
24 first and second choices”). Here, Plaintiff dismisses rival suppliers as “not sufficiently close
25 substitutes” and in-house solutions as “impractical and cost-prohibitive” for “many” customers.
26 Compl. ¶¶ 34, 37. However, as in *Oracle* and *Sungard*, Plaintiff does not quantify the portion of
27 the relevant market comprised of customers who cannot use rival or in-house solutions.
28

1 Plaintiff's hypothesized PRRP product market is also unsustainably narrow. For
2 example, it excludes significant solutions that serve the same purposes as ratings and reviews.
3 These solutions include software that allows users to comment, offer testimonials, participate in
4 online forums, or ask questions and receive answers about products. The definition also
5 excludes solutions that integrate Facebook features such as "posts" and "likes" that users share
6 with their friends and can be shown on a website to market products. Finally, the definition
7 excludes providers of ratings and reviews technology used in other industry verticals such as
8 travel, restaurants, and local businesses. Plaintiff has not alleged any facts why these software
9 tools and industry verticals should be excluded from the relevant market.

10 **(3) Geographic market definition.** "[T]he proper geographic market is 'that geographic
11 area to which consumers can practically turn for alternative sources of the product.'" *California*
12 *v. Sutter Health Sys.*, 84 F. Supp. 2d 1057, 1068 (N.D. Cal. 2000). Plaintiff's proposed
13 geographic market is improperly limited to the United States. Plaintiff makes no allegations why
14 U.S. customers could not turn to foreign firms. In fact they have: immediately after the merger,
15 Reevoov, a formidable Bazaarvoice competitor based in the UK, opened a U.S. office and won
16 customers while competing against Bazaarvoice.

17 **(4) No meaningful barriers to entry.** Plaintiff must also show that "new rivals are
18 barred from entering the market and show that existing competitors lack the capacity to expand
19 their output to challenge the [defendant's] high price." *Church & Dwight Co. v. Mayer Labs.,*
20 *Inc.*, 868 F. Supp. 2d 876, 898 (N.D. Cal. 2012). Plaintiff does not allege any of the usual
21 barriers to entry such as intellectual property, access to essential inputs, or sunk costs. *See* ABA
22 SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (7th ed. 2012), at 361-62. To the
23 contrary, the fact that websites choose to develop their own ratings and reviews in-house
24 demonstrates the ease of entry. Moreover, Plaintiff alleges no facts to explain why large firms
25 such as Oracle and IBM could not easily add ratings and reviews to their existing platforms.
26 Similarly, Plaintiff alleges no facts showing why existing PRRP providers could not add features
27 and functionality to their platforms to match what PowerReviews offered. The legal question is
28 whether the market can replicate the competition previously offered by PowerReviews – not

1 Bazaarvoice as it exists today. *Oracle*, 331 F. Supp. 2d at 1117-18 (DOJ failed to show that
2 repositioning by other firms was unlikely). Plaintiff has alleged no facts that would prevent
3 repositioning or new entry to take the place of PowerReviews.

4 Although Plaintiff contends that Bazaarvoice's syndication of ratings and reviews is a
5 "barrier" to entry, Plaintiff ignores that PowerReviews was able to compete with barely any
6 syndication capability. The Complaint alleges no facts as to why syndication capability could
7 not be developed by other existing competitors. Plaintiff also ignores that many customers
8 affirmatively choose not to syndicate their content or receive syndicated content.

9 **(5) No anticompetitive effects.** In the case of a consummated merger such as this one,
10 there can be no antitrust liability where the post-merger evidence demonstrates no actual
11 lessening of competition. *Syufy Enters.*, 903 F.2d at 665 (government's request for divestiture
12 denied because new entrant competed effectively post-merger). Since the merger closed in July
13 2012, *none* of the anticompetitive outcomes envisioned by Plaintiff has come to pass. Plaintiff
14 makes no allegation that prices have in fact gone up or that innovation has slowed following the
15 merger. Bazaarvoice continues to invest to improve its own and legacy-PowerReviews'
16 products. Far from harming competition, marrying Bazaarvoice with PowerReviews has
17 benefitted customers with increased functionality, better sales support, and the promise of a more
18 complete product roadmap.

19 **Conclusion.** Plaintiff's case is based on dated documents that describe past competition
20 between Bazaarvoice and PowerReviews, characterizing the transaction as seeking to
21 "[e]liminate [Bazarvoice's] primary competitor," provide "relief from [] price erosion," and
22 "tak[e] out [Bazaarvoice's] only competitor." Compl. ¶¶ 3, 4, 5. But the forward-looking
23 inferences Plaintiff seeks to draw from these documents are not supported by what has actually
24 taken place since the time of the acquisition. Bazaarvoice intends to show that customers large
25 and small do not believe they are constrained to absorb anticompetitive price increases (or
26 reduced quality) from Bazaarvoice. In this dynamic marketplace that is still in its infancy, the
27 evidence will show that competition continues to flourish, and that the acquisition has only
28 helped, not harmed, customers.

1 **5. Description of relief sought and damages claimed with an explanation as to how**
2 **damages have been (or will be) computed**

3 *Plaintiff* requests that:

- 4 (1) Bazaarvoice's acquisition of PowerReviews be adjudged to violate Section 7 of
5 the Clayton Act, 15 U.S.C. § 18;
- 6 (2) the Court order Bazaarvoice to divest assets, whether possessed originally by
7 PowerReviews, Bazaarvoice, or both, sufficient to create a separate, distinct and
8 viable competing business that can replace PowerReviews' competitive
9 significance in the marketplace;
- 10 (3) the United States be awarded the costs of this action; and
- 11 (4) the United States be awarded any other equitable relief the Court deems just and
12 proper.

13 *Defendant* requests that the Court:

- 14 (1) Deny Plaintiff's contemplated relief;
- 15 (2) Enter judgment in favor of Defendant;
- 16 (3) Award to Defendant its costs incurred to defend this action, including reasonable
17 attorneys' fees;
- 18 (4) Order that such other and further relief for Defendant as the Court deems just and
19 proper.

20 **6. Status of discovery, including any significant discovery management issues, as**
21 **well as any limits or cutoff dates**

22 Fact discovery closed on June 28, 2013.

23 Expert discovery is ongoing. The parties exchanged opening expert reports on June 21,
24 2013. The parties will exchange rebuttal reports on July 12, 2013. Expert discovery is set to
25 close on August 6, 2013.

26 On June 26, 2013, Plaintiff served two subpoenas: the first on the current employer of
27 Defendant's industry expert, Razorfish, and the second on the former employer of Defendant's
28 industry expert, Crossview. Defendant will move before Magistrate Judge Beeler for a
 protective order concerning those subpoenas. Plaintiff will oppose this motion.

1 **7. Procedural history of the case, including any previous motions that were decided**
 2 **or submitted, any ADR proceedings or settlement conferences that have been**
 3 **scheduled or concluded, any appellate proceedings that are pending or**
 4 **concluded, and any previous referral to a magistrate judge**

5 On June 26, 2013, Plaintiff filed a Motion to Modify Case Management Order to Set
 6 Number of Fact Witnesses at Trial. That same day, the parties filed a Stipulation with Proposed
 7 Order Changing the Time for a hearing on that motion. On July 2, 2013, the Court entered the
 8 Stipulation and scheduled a hearing for July 11, 2013. Defendant will file its opposition on July
 9 8, 2013.

10 Pursuant to the Local Rules, the parties have reviewed the ADR Handbook, discussed it
 11 with their counsel, and come to the conclusion that they would not like to proceed with ADR.
 12 The parties participated in an ADR Conference on February 11, 2013.

13 **8. A description of any other deadlines in place before reassignment, including**
 14 **those for dispositive motions, pretrial conferences, and trials**

15 The following dates were entered by Judge Chen on February 19, 2013:

16 Trial Date	September 10, 2013, 8:30 am
17 Final Pre-Trial Conference	August 27, 2013 at 8:30 am
18 Dispositive Motions	Last day to be heard: 6/13/2013 at 1:30pm
19 Non-Expert Discovery Cut-Off	June 28, 2013
20 Expert Identification	Experts to be called in case-in-chief shall be identified by May 31, 2013; Rebuttal experts be identified by June 14, 2013
21 Expert Reports	Opening reports: June 21, 2013 Rebuttal reports: July 12, 2013
22 Expert Discovery cut-off	August 6, 2013
23 Exchange of Trial Materials (deposition 24 designations, trial exhibits)	August 6, 2013

1	Joint Pre-Trial Conference Statement due	August 6, 2013
2	File Motions in Limine	August 6, 2013

3
4 Very soon following the filing of the Complaint, both parties requested that this case be
5 heard on an expedited trial schedule. Judge Chen agreed, and set this case for his earliest
6 possible trial date, September 10, 2013. On July 8, 2013, this Court entered an order setting a
7 trial date of September 10, 2013, and a pre-trial conference for August 26, 2013 at 2 p.m.

8 At the time of the initial case management conference, the parties anticipated that the
9 bench trial will take approximately twenty days, an estimate that was based upon Judge Chen's
10 typical trial day, which runs from 8:30 am to 2:00 pm.

11 **9. Any requested modification of these dates, and the reasons for the request**

12 The parties do not request any modifications to the schedule at this time.

13 **10. Whether the parties will consent to a magistrate judge for trial**

14 The parties have declined to proceed before a Magistrate Judge for all purposes.

15 **11. Whether there exists an immediate need for a case management conference to be
16 scheduled in the action, and why the parties believe such a need exists**

17 The parties have requested an immediate case management conference in order to set a
18 trial date and to re-set pre-trial deadlines.

1 Dated: July 8, 2013

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Attorneys for Defendant Bazaarvoice, Inc.

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8 Dated: July 8, 2013

UNITED STATES OF AMERICA

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Attorneys for Plaintiff
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ATTESTATION

I, Dominique-Chantale Alepin, am the ECF User whose identification and password are being used to file the **JOINT CASE MANAGEMENT STATEMENT PURSUANT TO REASSIGNMENT ORDER**. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that Michael D. Bonanno has concurred in this filing.

Dated: July 8, 2013

WILSON SONSINI GOODRICH & ROSATI
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By: /s/ Dominique-Chantale Alepin
Dominique-Chantale Alepin

Attorneys for Defendant Bazaarvoice, Inc.