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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 UNITED STATES OF AMERICA,

14 *Plaintiff,*

15 v.

16 BAZAARVOICE, INC.

17 *Defendant.*

Case No. 13-cv-00133 WHO

18 **PLAINTIFF’S TRIAL BRIEF AND**
19 **MOTION IN LIMINE**

Judge: Hon. William H. Orrick
Trial Date: September 23, 2013
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Pretrial Conf.: September 9, 2013

20 **PUBLIC VERSION**

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1 On June 12, 2012, Bazaarvoice, Inc. acquired PowerReviews, Inc. for \$168.2 million.
2 Two days later, after learning of the consummated deal, the Department of Justice notified
3 Bazaarvoice that it had opened an investigation into whether the transaction violated Section 7 of
4 the Clayton Act, 15 U.S.C. § 18. After completing its investigation, the United States brought
5 this action to unwind the merger and restore the vigorous competition that it extinguished.

6 I. INTRODUCTION

7 Before the transaction, Bazaarvoice and PowerReviews were the two leading providers of
8 product ratings and reviews (“PRR”) platforms in the United States, a market that was
9 “essentially a duopoly.” GX-255 (at -698). Bazaarvoice was the market leader and
10 PowerReviews was its most prominent rival, “the #2 company in a two-horse race.” GX-636 (at
11 -834); *see also* GX-617 (at -195); GX-254 (at 3); *cf.* GX-540 (at -252) (“[I]t is us or
12 PowerReviews and in the game of big clients, we win.”). Many of the largest retailers and
13 manufacturers in the United States use PRR platforms provided by Bazaarvoice and
14 PowerReviews to collect product ratings and reviews submitted by consumers and display them
15 on their websites. The widespread use of PRR platforms provides consumers with a rich source
16 of detailed product information and advice that they can use to make better-informed purchasing
17 decisions.

18 Bazaarvoice and PowerReviews zealously competed against each other to retain and win
19 clients. The pre-merger rivalry between the two firms benefitted consumers, retailers, and
20 manufacturers, resulting in lower prices and significant product innovations. Bazaarvoice,
21 however, was frustrated by the “distraction” of competing with an increasingly aggressive
22 PowerReviews, GX-716 (at -965), which it confronted in approximately 80% of its sales
23 opportunities, GX-326 (at -200). Bazaarvoice had enjoyed a long reign at the top of the market,
24 but the lower-priced alternative provided by PowerReviews often forced it to offer significant
25 price concessions. *See, e.g.*, GX-1119 (Godfrey Dep. 46:23-47:19).

26 As Bazaarvoice admitted before the acquisition, it sought to acquire PowerReviews in
27 order to eliminate its “only real competitor,” GX-416 (at -683), and ease “price erosion,” GX-316
28 (at -431), caused by the fierce competition between the two firms. GX-883 (at -752); *see also*

1 GX-315 (at -211); GX-907 (at -036); GX-221 (at -528). After “taking out” its “only
2 competitor,” GX-518 (at -475), Bazaarvoice expected to face a barren competitive landscape in
3 which it would have “[l]iterally no other competitors,” GX-320 (at -028); *see also* GX-521 (at -
4 088). Accordingly, Bazaarvoice’s current CEO expected the acquisition to provide Bazaarvoice
5 with a “dramatic increase [in] overall market share,” and leave it with “no meaningful direct
6 competitor.” GX-321 (at -245); *see also* GX-1175.

7 Bazaarvoice executives knew that they would be able to raise prices for many customers
8 after acquiring PowerReviews. They planned to charge PowerReviews clients higher prices after
9 the acquisition “via migration to the Bazaarvoice platform [at] higher price points.” GX-332 (at
10 6). They also believed the deal would alleviate the competitive discounting necessary to
11 “achieve competitive steals,” GX-332 (at -292), and protect their company’s business from
12 “direct competition and premature price erosion.” GX-925 (at 7). These themes resonated
13 with Bazaarvoice’s board of directors. The day before the transaction was publicly announced,
14 one of Bazaarvoice’s directors told a colleague, “This is a good long term acquisition as it
15 eliminates the largest competitor for BV on the retail side and basically gives it complete control
16 of most of the top 500 retailers.” GX-948 (at -448).

17 As Bazaarvoice executives predicted, acquiring PowerReviews cemented Bazaarvoice’s
18 dominant position by eliminating its “biggest competitor.” GX-418 (at -912). As a result of the
19 transaction, the gap separating Bazaarvoice from the remaining universe of “scarce/low-quality
20 alternatives” has become even larger. GX-316 (at -431). Nearly 300 of the top 500 Internet
21 retailers in North America are now Bazaarvoice customers. All other commercial providers
22 *combined* serve fewer than 20 of these retailers.

23 Section 7 of the Clayton Act prohibits all mergers “where in any line of commerce . . . in
24 any section of the country, the effect of such acquisition *may be* substantially to lessen
25 competition, or tend to create a monopoly.” 15 U.S.C. § 18 (emphasis added). From
26 Bazaarvoice’s and PowerReviews’ extensive pre-merger admissions, the testimony and expert
27 analyses in this case, and well-established case law, it is clear that Bazaarvoice’s acquisition of
28 PowerReviews violated the statute. Both firms saw the transaction as an opportunity to eliminate

1 “‘knife-fighting’ over competitive deals” between the companies that led to “margin erosion.”
2 GX-519 (at -751); *see also* GX-90 (Luedtke Dep. 289:10-15, 18-24). “Margin erosion,”
3 however, was simply another way to say that competition between the two companies resulted in
4 lower prices. This is precisely the kind of competition the antitrust laws seek to preserve.

5 Recognizing the probative nature of its pre-merger admissions, Bazaarvoice now is
6 poised to tell a different story at trial. But in a Section 7 case, self-serving statements made by
7 executives following an antitrust challenge carry little weight. The most persuasive evidence is
8 how those executives and their companies acted in the market. And in this case that evidence
9 leaves no doubt that Bazaarvoice and PowerReviews were each other’s most significant
10 competitors by a wide margin.

11 **II. STATEMENT OF FACTS**

12 Consumer-generated product ratings and reviews are an established part of the online
13 shopping experience. *See* GX-89 (Hurt Dep. 273:6-10); GX 1126 (at -860); GX 1086 (at -155).
14 Approximately 70% of the top 100 online retailers feature product ratings and reviews on their
15 websites. When shopping online, consumers read product ratings and reviews written by other
16 consumers, and that information helps them make more informed decisions. *See* Plaintiff’s
17 Proposed Findings of Fact (“PFOF”) ¶¶ 68-71. For retailers and manufacturers (or “brands”),
18 ratings and reviews can increase website traffic, improve sales, and reduce product returns.
19 PFOF ¶¶ 62.

20 PRR platforms combine specialized software and services¹ to enable retailers and
21 manufacturers to collect and display product ratings and reviews on their websites. *See* PFOF ¶¶
22 34-47 (describing PRR platform features). Retailers and manufacturers either (1) license a PRR
23 platform from a commercial supplier; or (2) build a PRR platform “in house” with internal
24

25 ¹ For example, sophisticated providers of PRR platforms offer moderation services to their
26 customers. Moderation refers to the process through which a PRR platform provider screens
27 product ratings and reviews before they are displayed on a retailer’s or manufacturer’s website.
28 After a consumer submits a review, the PRR platform provider applies software algorithms to
scan the submission for inappropriate or fraudulent content (i.e., reviews that are written by a
product’s manufacturer). After the automated scan, a human moderator manually examines each
submission before it is ultimately displayed on the customer’s website. *See* PFOF ¶ 39.

1 resources. Commercial PRR platforms are delivered to the client over the Internet through the
2 software-as-a-service, or SaaS, model. Under the SaaS model, clients pay recurring subscription
3 fees to maintain access to software and services.² For larger enterprise clients,³ suppliers
4 independently negotiate the commercial terms of each licensing agreement. GX-81 (Collins
5 Dep. 76:17-77:16); GX-90 (Luedtke Dep. 91:24-92:8). The sales process usually lasts several
6 months, while suppliers tailor their proposals to fit a customer's specific needs. *See* GX-92
7 (Osborne Dep. 103:16-22) (a typical sales cycle lasts between 90 and 150 days).

8 Before the merger, Bazaarvoice and PowerReviews were by far the top two commercial
9 providers of PRR platforms in the United States. *See* GX-271 (at -741) (“The market can largely
10 be considered a duopoly, with the market being split between Bazaarvoice and PowerReviews.”);
11 GX-646 (at -242-43); GX-952 (at -258); GX-604 (at -401). Bazaarvoice now has more than 800
12 enterprise PRR platform clients in the United States, including approximately 350 former
13 PowerReviews enterprise clients. GX-1064. In contrast, Pluck, Bazaarvoice's closest remaining
14 competitor, has only [REDACTED] enterprise clients. *Id.*

15 **A. Bazaarvoice Acquired PowerReviews To Eliminate Price Competition from its**
16 **Primary Rival.**

17 PowerReviews was Bazaarvoice's “fiercest competitor,” GX-417 (at -036), and remained
18 a persistent “thorn in [Bazaarvoice's] side,” GX-424 (at -543), until the acquisition closed. *See,*
19 *e.g.,* GX-1105 (at -047). During negotiations, customers routinely used PowerReviews as “a
20 price-pressure lever,” GX-1104 (at -164), to obtain more favorable pricing from Bazaarvoice.
21 *See also* GX-660 (at -910). As a result, Bazaarvoice's pre-merger business documents are full of
22 examples in which Bazaarvoice offered substantial price discounts when facing competition
23 from PowerReviews. *See* GX-424 (at -543) (“There is no doubt that PowerReviews brings our
24

25 ² Unlike some other software licensing arrangements, clients do not typically receive a perpetual
26 license to a PRR platform.

27 ³ Before the transaction, PowerReviews sold both an enterprise product for large retailers and
28 manufacturers, and a much more limited product, called PowerReviews Express, which targeted
smaller clients. *See* GX-90 (Luedtke Dep. 36:24-37:6, 10-15; 198:6-19). These two products
served different segments of the market. GX-90 (Luedtke Dep. 53:12-23).

1 pricing down.”); GX-293 (at -120); GX-802 (at -695). The benefits of price competition
2 between Bazaarvoice and PowerReviews accrued to retailers and manufacturers in the form of
3 lower prices. *See e.g.*, GX-228; *see generally* PFOF ¶¶ 136-47.

4 Avoiding price competition was a driving factor behind Bazaarvoice’s pursuit of
5 PowerReviews. *See* GX-522 (at -035) (“How much longer does it take us to win deals because
6 they are out there and how much does the price competition impair our long-term value as a
7 company?”); GX-422 (at -469); GX-250 (at -322). PowerReviews licensed its PRR platform at a
8 substantially lower price than Bazaarvoice’s platform, GX-293 (at -120), and its “scorched earth
9 approach to pricing” was a constant source of irritation for Bazaarvoice, GX-208 (at -475). At
10 one point, Bazaarvoice’s Vice President of Retail Sales concluded that competitive pressure from
11 PowerReviews resulted in average price concessions of more than 70% in competitive sales
12 opportunities. GX-553 (at 2). He recommended that Bazaarvoice acquire PowerReviews to
13 “remov[e] a parasite competitor” from the market. GX-554 (at -093).

14 **B. The Acquisition Terminated the Ongoing Feature Competition Between**
15 **Bazaarvoice and PowerReviews.**

16 Bazaarvoice and PowerReviews also jockeyed back and forth to develop new PRR
17 platform features and functionality. *See* PFOF at ¶¶ 169-187. Both firms saw the merger as a
18 way to avoid costly “feature driven one-upmanship,” GX-324 (at -921), or “leapfrogging” in
19 order to maintain “competitive parity,” GX-90 (Luedtke Dep. 324:10-12, 15-25). To the
20 detriment of retailers and manufacturers, the acquisition has extinguished the “need for feature
21 wars in core ratings and reviews products.” GX-254 (at 1).

22 For example, PowerReviews launched a feature that enabled its product reviews to be
23 indexed by Google and other search engines, which improved clients’ rankings across a broad
24 range of search results. GX-90 (Luedtke Dep. 134:12-18; 135:11-16; 141:9-13; 142:2-7, 10-14).
25 Bazaarvoice followed suit, copying the PowerReviews approach with similar technology. GX-
26 941 (at -408) (“We took their idea . . . the SEO [search engine optimization] value alone is
27 actually about the same between us and PR now.”); GX-90 (Luedtke Dep. 143:25-144:13; 154:7-
28 9, 12-13) (PowerReviews considered the Bazaarvoice technology a “competitive response” to its

1 functionality). As they grappled for a competitive edge, the two firms “constantly traded places
2 in terms of who leads and who fast follows.” GX-240 (at -396). The resulting innovations
3 benefitted both companies’ clients.

4 Another example of this innovation battle was the new approach to “syndication” that
5 PowerReviews introduced during the summer of 2011. *See* GX-241 (at -878, -898); GX-90
6 (Luedtke Dep. 207:12-13, 16-25; 209:8-12; 246:1-6). Syndication is a PRR platform feature that
7 allows manufacturers to display their ratings and reviews on retail partners’ websites. GX-85
8 (Defossé Dep. 152:21-153:7). For example, Sony collects and displays reviews for Sony
9 televisions on its website. Syndication allows those reviews to appear on the corresponding
10 product pages for Sony televisions on Walmart’s website. As more retailers license a
11 commercial supplier’s PRR platform, the platform becomes more attractive to manufacturers
12 because there are more retail sites available for syndication. Similarly, as more manufacturers
13 license a PRR platform, it becomes more attractive to retailers by offering ratings and reviews
14 from a larger number of manufacturers.

15 Before the merger, Bazaarvoice had a large syndication network that connected its
16 manufacturing clients and retail clients. GX-85 (Defossé Dep. 153:8-154:5). The Bazaarvoice
17 network locked in many large clients and presented a significant impediment to PowerReviews’
18 expansion plans. GX-90 (Luedtke Dep. 211:9-12, 22); *see also* GX-1107 (at -109); GX-244 (at -
19 979). Retailers hesitated to leave the Bazaarvoice platform if it required them to forego
20 syndication relationships with their manufacturing partners. Likewise, manufacturers were
21 reluctant to leave the Bazaarvoice platform without assurances that they could maintain
22 syndication relationships with their retail partners on the Bazaarvoice platform. PowerReviews
23 had its own syndication network, but it did not have as many manufacturing clients as
24 Bazaarvoice. GX-90 (Luedtke Dep. 57:1-12).

25 To overcome Bazaarvoice’s network advantage and attract manufacturing clients to its
26 platform, PowerReviews devised an innovative solution that allowed Bazaarvoice’s
27 manufacturing clients to syndicate their reviews to PowerReviews’ retail clients. GX-242.
28 Until this point, the PowerReviews syndication network (like the Bazaarvoice network) was

1 limited to its own customers. *See* GX-90 (Luedtke Dep. 205:20-206:6). Several of
2 Bazaarvoice’s manufacturing clients, including HP and Sony, signed up for the new
3 PowerReviews offering, which allowed them to syndicate reviews they collected using the
4 Bazaarvoice platform to retail partners that used the PowerReviews platform. GX-1109 (at -
5 110).

6 Bazaarvoice considered the PowerReviews campaign “a direct frontal attack from [its]
7 biggest competitor.” GX-418 (at -912). It feared “[l]osing control of the network” would
8 diminish a substantial competitive advantage. GX-30 (at -673). PowerReviews was uniquely
9 positioned to mount an attack on the Bazaarvoice network. Unlike all other commercial PRR
10 platform providers, PowerReviews had an established base of large retail clients, which created
11 the foundation for a network that could rival Bazaarvoice’s syndication network. For example,
12 PowerReviews leveraged relationships with Staples and Drugstore.com to capture syndication
13 agreements with Bazaarvoice’s manufacturing clients. GX-541 (at -266).

14 Bazaarvoice responded with an aggressive counterattack, which it called “Project
15 Menlogeddon,” GX-34, after PowerReviews’ largest venture capital investor, Menlo Ventures,
16 GX-1084 (at -022); *see also* GX-334 (at -684) (describing Project Menlogeddon as “a special
17 project to defeat [Bazaarvoice’s] only meaningful competitor”). Bazaarvoice sought to fend off
18 the PowerReviews assault by “building moats” around its most significant clients and by enticing
19 large PowerReviews clients to its platform. GX-33 (at -350). As part of its plan to “[t]ake it to
20 PowerReviews,” GX-40 (at -033), Bazaarvoice created pricing guidelines to steal “marquee”
21 PowerReviews clients “at all costs,” GX-39 (at -939, -941). Project Menlogeddon was a
22 significant undertaking at all levels of the Bazaarvoice corporate hierarchy, and the executive
23 team received regular reports on the progress of the campaign. *See, e.g.*, GX-35.

24 Additionally, after initially refusing to syndicate reviews outside of its own network, GX-
25 911 (at -660), Bazaarvoice developed new technology to syndicate reviews from its
26 manufacturers to PowerReviews’ retail customers. *See* GX-30; GX-31; GX-1111.
27 PowerReviews executives feared this change in strategy was an attempt by Bazaarvoice to adopt
28 “an open syndication model” that mirrored the PowerReviews approach. GX-90 (Luedtke Dep.

1 225:8-18); *see also* GX-243 (at -928). Both companies viewed cross-platform syndication
2 relationships as an opportunity to establish a beachhead within their principal competitor’s
3 customer base. *See, e.g.*, GX-1108 (at -536); GX-1112 (at -638).

4 The threat from PowerReviews was unique. Bazaarvoice never instituted another
5 initiative targeting any other competitor that reached the scale or significance of Project
6 Menlogeddon. GX-92 (Osborne Dep. 266:22-267:10; 267:25-268:16; 268:24-269:17); GX-81
7 (Collins Dep. 159:13-21); GX-492 (Pacitti Dep. 152:10-18; 154:6-155:18). And now that it has
8 acquired PowerReviews, Bazaarvoice no longer needs to “waste” time fending off competition
9 from its former rival. GX-1119 (Godfrey Dep. 90:19-91:1; 117:25-118:3).

10 III. ARGUMENT

11 By acquiring PowerReviews, Bazaarvoice eliminated its most significant competitor. It
12 is positioned to raise or maintain prices for customers in the United States above the level that
13 would have prevailed absent the merger. It also has less incentive to develop new features for its
14 products. This is precisely the type of acquisition Section 7 was designed to prevent.

15 Section 7 is “a prophylactic measure.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429
16 U.S. 477, 485 (1977). Because the statute condemns any merger that “may” substantially lessen
17 competition, 15 U.S.C. § 18, Section 7 analysis is based upon “probabilities, not certainties.”
18 *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). The government, therefore, does
19 not bear the burden of proving a merger has actually resulted in higher prices. *Hosp. Corp. of*
20 *Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986); IV Phillip E. Areeda & Herbert Hovenkamp,
21 *Antitrust Law* ¶ 914e, at 93 (3d ed. 2009) (“The statute does not require sure proof of price
22 increases of a given magnitude; rather, it requires only reasonable evidence showing that the
23 effect of a merger ‘may be’ substantially to ‘lessen competition.’”). An acquisition is unlawful
24 when it has a “reasonable probability of anticompetitive effect.” *FTC v. Warner Commc’ns,*
25 *Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984). Even in the case of a consummated merger, the
26 government must only demonstrate that a transaction has created “an appreciable danger” of
27 higher prices in the affected market. *Hosp. Corp.*, 807 F.2d at 1389.

1 One way of analyzing a merger between two competitors is through a burden-shifting
2 approach. *See United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004).
3 Under this approach, the government first establishes that a transaction is presumptively
4 unlawful by showing it would significantly increase market concentration and create a firm with
5 a large market share. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). To rebut this
6 presumption, the defendant “must produce evidence that ‘show[s] that the market-share statistics
7 [give] an inaccurate account of the [merger’s] probable effects on competition’ in the relevant
8 market.” *Id.* (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975)). “If
9 the defendant successfully rebuts the presumption, the burden of producing additional evidence
10 of anticompetitive effect shifts to the government, and merges with the ultimate burden of
11 persuasion, which remains with the government at all times.” *Id.* (citation and internal quotation
12 marks omitted).

13 This burden-shifting framework, however, “does not exhaust the possible ways to prove a
14 § 7 violation on the merits.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir.
15 2008) (Brown, J.) (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964)).
16 Alternatively, the government may prove that there is a reasonable probability of anticompetitive
17 effect because a transaction eliminates significant head-to-head competition between the merging
18 parties. *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1083 (N.D. Ill. 2012); *see also*
19 *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 81-89 (D.D.C. 2011); *FTC v. Swedish*
20 *Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082-
21 83 (D.D.C. 1997).

22 Both modes of analysis confirm that Bazaarvoice’s acquisition of PowerReviews violated
23 Section 7. The acquisition of PowerReviews substantially increased Bazaarvoice’s market share
24 to 55%, triggering a presumption of illegality. *United States v. Phila. Nat’l Bank*, 374 U.S. 321,
25 364 (1963) (acquisitions in concentrated markets resulting in a firm with at least 30% market
26 share are presumptively unlawful). In light of the history of vigorous competition between the
27 two firms, Bazaarvoice cannot rebut this presumption. Moreover, the other evidence in this case,
28 most notably Bazaarvoice’s pre-merger admissions, establishes that the merger has eliminated

1 competition from Bazaarvoice’s most significant rival. As a result, Bazaarvoice now can charge
2 many retailers and manufacturers in the United States higher prices.

3 **A. PRR Platforms Used by U.S. Retailers And Manufacturers Are a Relevant Antitrust**
4 **Market.**

5 The fundamental inquiry in a merger case is whether the merger may create or facilitate
6 the exercise of market power. “Market power exists whenever prices can be raised above the
7 competitive market levels.” *Drinkwine v. Federated Publ’ns, Inc.*, 780 F.2d 735, 739 n.3 (9th
8 Cir. 1985) (citing *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 27 n.46 (1984)). In determining
9 whether a merger may create or facilitate the exercise of market power, courts routinely define
10 the relevant product and geographic markets in which the merging firms compete. *See Kaiser*
11 *Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1329 (7th Cir. 1981). But market definition is
12 not an end unto itself. It is merely a tool to determine whether market power exists. *Gen. Indus.*
13 *Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987) (quoting Lawrence A.
14 Sullivan, *Handbook of the Law of Antitrust* 41 (1977) (“[M]arket definition is not a jurisdictional
15 prerequisite, or an issue having its own significance under the statute; it is merely an aid for
16 determining whether market power exists.”)).

17 In this case, there is overwhelming evidence that Bazaarvoice and PowerReviews
18 compete in the United States market for PRR platforms. Bazaarvoice’s efforts to expand that
19 market beyond PRR platforms and beyond the United States cannot be squared with commercial
20 realities or with its pre-merger view of the marketplace. Moreover, setting aside disputes over
21 the precise boundaries of the relevant market, the evidence of Bazaarvoice’s likely post-merger
22 market power is compelling. In short, there is no question that Bazaarvoice’s acquisition of
23 PowerReviews has likely enhanced Bazaarvoice’s ability to exercise market power.

24 **1. PRR Platforms Are a Relevant Product Market.**

25 A group of products form a relevant product market if they are “reasonably
26 interchangeable[le] for the purposes for which they are produced—price, use, and qualities
27 considered.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). When
28 defining a relevant market, a court must consider both the functional uses of the products under

1 consideration *and* whether customers substitute between the products in response to changes in
2 price. *Brown Shoe*, 370 U.S. at 325. Ultimately, “[t]he determination of what constitutes the
3 relevant product market hinges . . . on a determination of those products to which consumers will
4 turn, given reasonable variations in price.” *Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone, Inc.*,
5 275 F.3d 762, 767 (9th Cir. 2001); *see Olin Corp. v. FTC*, 986 F.2d 1295, 1298 (9th Cir.
6 1993).⁴

7 In this case there is substantial evidence that PRR platforms are a relevant product
8 market. In the ordinary course of business, Bazaarvoice and PowerReviews executives
9 recognized that PRR platforms are a distinct product market. *See* PFOF ¶¶ 98-104. Before the
10 merger, for example, a Bazaarvoice executive recognized that the number of PRR platform
11 alternatives available to enterprise customers is limited: “My take is that there really isn’t a
12 market for them to understand (as it relates R&R), it is us or PowerReviews and in the game of
13 big clients: we win.” GX-540 (at -252). PowerReviews executives similarly considered the PRR
14 platform market a “duopoly.” PFOF ¶¶ 102-03. This evidence is highly probative because
15 “[w]hen determining the relevant product market, courts often pay close attention to the
16 defendants’ ordinary course of business documents.” *United States v. H&R Block, Inc.*, 833 F.
17 Supp. 2d at 52; *see also Staples*, 970 F. Supp. at 1076; *FTC v. CCC Holdings, Inc.*, 605 F. Supp.
18 2d 26, 41-42 (D.D.C. 2009); *Swedish Match*, 131 F. Supp. 2d at 162, 169; *Whole Foods*, 548
19 F.3d at 1045 (Tatel, J., concurring).

20 Most significantly, Bazaarvoice’s and PowerReviews’ business documents show that the
21 two firms intensely competed to license their PRR platforms to retailers and manufacturers.
22 Both firms routinely offered substantial discounts when competing against each other. *See, e.g.*,
23 GX-422 (at -469) (■■■■ discount); GX-497 (discount in excess of ■■■■); GX-1096 (■■■■
24 discount); GX-1116 (at -652) (“BV offered to undercut PR by ■■■■”). These examples of price
25
26

27 ⁴ Courts have adopted the same standards for defining a relevant product market in cases brought
28 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); *IV Areeda & Hovenkamp* ¶ 929a, at 159.

1 competition show where purchasers of PRR platforms would turn in response to changes in the
2 price, which is the core consideration in defining a relevant market.

3 There is no evidence that either firm discounted its PRR platform prices in response to
4 competition from products other than PRR platforms. Nonetheless, in defending itself in this
5 action, Bazaarvoice asserts “[r]atings and reviews are but one of many tools that brands and
6 retailers can use to engage with their customers as part of an overall social commerce strategy to
7 increase awareness of their products.” GX-1085 (at -697). Bazaarvoice argues that the relevant
8 product market in this case includes a host of other social commerce products, including
9 “Facebook, Twitter, question and answer, and community forums, and many others.” *Id.* This
10 argument is devoid of support in Bazaarvoice’s ordinary course of business documents and
11 should be rejected as an argument that was crafted specifically for this litigation.

12 **a. PRR Platforms Are Not Reasonably Interchangeable With Other Social Commerce**
13 **Products.**

14 If other social commerce tools were in the same relevant antitrust market as PRR
15 platforms, these tools would have exerted some pricing discipline on Bazaarvoice and
16 PowerReviews prior to the merger. But there is no evidence that the social commerce tools
17 identified by Bazaarvoice have ever affected its pricing. Moreover, there is no evidence that
18 customers have ever substituted between PRR platforms and other social commerce tools in
19 response to variations in price. *Cf.* GX-90 (Luedtke Dep. 310:25-311:10); GX-82 (Barton Dep.
20 173:17-174:15). To the contrary, numerous customers have testified that in response to an
21 increase in price they would not drop their PRR platform, even to switch to another social
22 commerce product. *See e.g.*, GX-114 (Build.com Dep. 78:24-79:14); GX-130 (Dick’s Sporting
23 Goods Dep. 42:7-13, 42:16-43:5, 11-16); GX-109 (Blinds.com Dep. 64:21-25, 65:3-12); GX-193
24 (Walgreens Dep. 84:14-17, 20-21, 85:4-14); GX-124 (Chico’s Dep. 46:10-13, 46:15, 47:15-18).
25 This evidence demonstrates that these other social commerce tools are not in the relevant market.
26 *See Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953) (markets “must
27 be drawn narrowly to exclude any other product to which, within reasonable variations in price,
28 only a limited number of buyers will turn”).

1 It is not surprising that PRR platforms and other social commerce tools are not
2 reasonably interchangeable. Only PRR platforms can be used by retailers and manufacturers to
3 collect and display online product ratings and reviews on their respective websites. Product
4 ratings and reviews offer a uniquely structured set of information near the point of purchase,
5 which consumers have come to expect and rely upon when making purchasing decisions. *See*
6 PFOF ¶¶ 60-72. Retailers and manufacturers use other social commerce tools, which include
7 Facebook, Twitter, Q&A, and community forums, for fundamentally different purposes. These
8 tools collect and display other types of user-generated content that are often unrelated to
9 influencing consumer decisions at the point of sale. Consistent with Bazaarvoice's pre-merger
10 view of the market, ample customer testimony refutes the notion that PRR platforms are
11 reasonably interchangeable with any other social commerce tool. *See, e.g.*, GX-98 (American
12 Eagle Dep. 30:6-8, 13; 30:22-23, 31:1); GX-124 (Chico's Dep. 43:20-21, 43:23; 47:19-21); GX-
13 130 (Dick's Sporting Goods Dep. 41:8-13, 41:16-22, 41:25); *see* PFOF ¶¶ 73-97.

14 Indeed, before the merger, Bazaarvoice claimed that the same social commerce products
15 it now identifies as competitive products were complementary to PRR platforms. *See generally*
16 GX-837 (at -084) (forums/communities); GX-1118 (at -772) (social listening tools); GX-837 (at
17 -077) (social media marketing systems); *cf.* GX-81 (Collins Dep. 134:8-13) (Q&A is
18 complementary to PRR platforms); GX-74 (██████████ Dep. 26:3-19, 26:22-24, 27:3-28:13, 28:16-
19 19) (same); PFOF ¶¶ 73-97. Because other social commerce tools are *complements* to PRR
20 platforms, not *substitutes* for them, and they do not impact the price of PRR platforms, they are
21 properly excluded from the relevant product market. *See U.S. Horticultural Supply v. Scotts Co.*,
22 367 Fed. App'x 305, 310 (3d Cir. 2010) ("This demonstrates that these products are
23 complements, rather than substitutes, so a distinct market exists for each.").

24 As one of Bazaarvoice's own directors has admitted, Bazaarvoice's PRR platform does
25 not compete with all other social commerce products, GX-492 (Pacitti Dep. 82:10-15).
26 Moreover, Bazaarvoice's CEO sits on the board of directors for another social commerce firm,
27 and he acknowledges that it does not compete with Bazaarvoice. GX-81 (Collins Dep. 22:10-11;
28 22:13-17); *see* GX-301. Accordingly, including all social commerce products in the relevant

1 product market, as suggested by Bazaarvoice, would provide a highly misleading view of the
2 competitive effects arising from the transaction.

3 In another attempt to distance itself from the pre-merger admissions of its executives,
4 Bazaarvoice has also pointed to the specter of Facebook and Google looming on the horizon of
5 the market as a competitive constraint. Numerous Bazaarvoice and PowerReviews executives,
6 however, have admitted Facebook does not compete directly with Bazaarvoice's PRR platform
7 today. GX-655 (at -916) ("Are you competitive with Facebook? . . . Absolutely not."); GX-89
8 (Hurt Dep. 175:18-176:1, 176:5-6); GX-84 (Comée Dep. 92:4-8); GX-88 (Hossain Dep. 96:4-5,
9 8-15); *cf.* GX-507 (at -412) (Bazaarvoice co-founder informing a Facebook employee that
10 Bazaarvoice acquired PowerReviews, its "primary competitor"). Similarly, outside of the
11 context of this litigation, Bazaarvoice recognized that its PRR platform does not directly compete
12 with other products touching the sphere of social commerce, including those offered by Google.
13 GX-1133 (at -569) ("Google is not directly competing with us . . . They are not offering anything
14 that can replace our solution for our clients."); GX-425 (at -927) ("We enjoy a partnership with
15 Google; they are not competitive to our business model, we are actually very different and
16 complementary."); *see generally* PFOF ¶¶ 78-85. Indeed, Bazaarvoice's SEC filings continue to
17 acknowledge that both Facebook and Google have not entered *any* market in which Bazaarvoice
18 competes. GX-970 (at 8); *see also* GX-511 (at -570) ("Google's move here does not make them
19 a direct competitor of ours or put them on the path to becoming one at this point."); GX-928 (at -
20 928) ("With regard to Google and Facebook we see ourselves as more a partner than a potential
21 competitor."). Thus, the company's current claims regarding competition from Facebook and
22 Google are illusory.

23 **b. Economic Analysis Confirms PRR Platforms Are a Relevant Market.**

24 To determine the proper scope of the relevant product market, courts "often" apply the
25 "hypothetical monopolist test," which is described in the government's Horizontal Merger
26 Guidelines. *H&R Block*, 833 F. Supp. 2d. at 51-52 & n.10; *see generally* U.S. Dep't of Justice &
27
28

1 Fed. Trade Comm’n Horizontal Merger Guidelines (2010) § 4.1.1 (Merger Guidelines).⁵ The
2 hypothetical monopolist test asks whether a profit-maximizing monopolist that was the only
3 present and future seller of a group of products likely would impose a “small but significant
4 [and] nontransitory” price increase (“SSNIP”) on at least one product sold by the merging firms.⁶
5 If such a price increase “would drive [enough] consumers to an alternative product” to render the
6 price increase unprofitable, the group of products under consideration is too small to form a
7 relevant product market. *Whole Foods*, 548 F.3d at 1038 (Brown, J.); Merger Guidelines § 4.1.1.
8 The hypothetical monopolist test is consistent with Ninth Circuit precedent. *See Theme*
9 *Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008); *Lucas Automotive*,
10 275 F.3d at 767; *Olin Corp. v. FTC*, 986 F.2d 1295, 1299, 1303 (9th Cir. 1993).

11 The government’s expert, Dr. Carl Shapiro, has performed several different analyses to
12 determine whether a hypothetical monopolist would raise the price of PRR platforms. He
13 examined head-to-head competition between PRR platform suppliers and found evidence of
14 substantial discounting activity—far in excess of five percent—when PRR platform providers
15 engaged in direct competition. He concluded the impact of price competition provides
16 compelling evidence of where customers would likely turn in response to small, but significant
17 variations in price. In the absence of the discount offered by the winning supplier, the customer
18 would likely have turned to the losing bidder at a higher price. He then looked for instances in
19 which other products may have forced similar discounts by PRR platform providers, but could
20 find no such evidence. He determined that the lack of pricing discipline posed by other products
21 supported the conclusion that PRR platforms are a relevant product market. This evidence is
22 consistent with Dr. Shapiro’s observation that customers receive substantial benefits from PRR
23 platforms, suggesting that they would be unlikely to stop using a PRR platform in response to a
24 price increase.

25 _____
26 ⁵ The Merger Guidelines are not binding on this Court, but are frequently considered “persuasive
27 authority” in merger cases. *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431 n.11 (5th
28 Cir. 2008).

⁶ The SSNIP is usually 5%. *See, e.g., Olin Corp. v. FTC*, 986 F.2d 1295, 1299 (9th Cir. 1993);
Merger Guidelines § 4.1.2.

1 Dr. Shapiro also sought to determine whether it would be profitable for a hypothetical
2 monopolist to impose a price increase on PRR platforms by conducting a “recapture” analysis.
3 Recapture analysis seeks to determine the percentage of sales that would be retained by a
4 hypothetical monopolist if it were to raise prices. If the additional sales from a price increase
5 will outweigh the expected losses, the price increase will be profitable. And if a small, but
6 significant price increase by a hypothetical monopolist would be profitable, the group of
7 products under consideration is a relevant product market. Dr. Shapiro determined that PRR
8 platforms would form a relevant product market if a hypothetical PRR platform monopolist
9 would retain at least 17 percent of all sales following a five percent price increase. He then
10 calculated an estimated recapture rate of 57 percent, which far exceeds the 17 percent threshold
11 for such a price increase to be profitable. Considering all of these factors, Dr. Shapiro concluded
12 that PRR platforms are a relevant market.

13 **2. *The United States is a Relevant Geographic Market.***

14 In determining the relevant geographic market, a court must identify the geographic area
15 “where, within the area of competitive overlap, the effect of the merger on competition will be
16 direct and immediate.” *Phila. Nat’l Bank*, 374 U.S. 321, 357 (1963). This is necessarily a
17 practical, fact-intensive inquiry that requires close scrutiny of the realities of the marketplace.
18 *Cf. Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 467 (1992). In this case,
19 the United States is the area where the effect of the merger will be “direct and immediate.”
20 *Phila. Nat’l Bank*, 374 U.S. at 357.

21 Before the merger, Bazaarvoice and PowerReviews competed directly for many U.S.
22 customers, often leading to substantial discounts. Both Bazaarvoice and PowerReviews have
23 acknowledged that large U.S. retailers prefer native speakers who are familiar with U.S. English
24 to screen product reviews for profane or inappropriate content. GX-248 (at -595); GX-89 (Hurt
25 Dep. 264:11-17, 20-24). Moreover, a supplier needs a local presence to efficiently deliver sales
26 support and implementation services. GX-840 (at -943) (“[W]e found in serving large Fortune
27 500 clients that it’s very important to serve them from a local presence. People want to deal with
28 each other from that local presence”); *cf.* GX-73 (Reevoo Dep. 21:25-22:5, 22:8-18; 39:16-

1 40:4). In addition, to offer a syndication network in the U.S., suppliers must have access to
2 ratings and reviews written by U.S. consumers. Ratings and reviews collected in other countries
3 are not typically syndicated into the United States because there are substantial product
4 differences between countries (different SKUs), as well as language and cultural differences,
5 which significantly diminish the value of foreign reviews to U.S. consumers. GX-1097 (at -
6 925); GX-73 (██████████ Dep. 26:10-13, 26:16-27:25); GX-87 (Godfrey CID Dep. 84:9-20).

7 All of these factors make the competitive landscape for PRR platforms in the United
8 States distinct from the state of competition in other countries. This is significant, because prices
9 for PRR platforms are typically set through individual negotiations between a supplier and a
10 customer. PFOF ¶¶ 48-58. Suppliers can easily identify customers with a U.S. presence and,
11 even for multinational customers, typically price and sell platforms specifically for their U.S.-
12 facing website. PFOF ¶ 117. In addition, because PRR platforms are provided under a SaaS
13 model, it is not possible to re-sell a PRR platform. *Id.* Thus, if all suppliers increased prices for
14 PRR platforms sold to customers with a U.S. presence (i.e., a U.S.-facing website), customers
15 could not avoid the price increase by re-purchasing a PRR platform from another customer.

16 Because PRR platform suppliers can target U.S. customers for a price increase without
17 raising prices abroad, the geographic market is appropriately defined based on the location of
18 those customers. Merger Guidelines § 4.2.2 (discussing “geographic markets based on the
19 locations of targeted customers”). Dr. Shapiro will testify that the United States is the effective
20 area of competition in this case. Based on his analysis, he has concluded that a hypothetical
21 monopolist controlling all PRR platform sales to customers with U.S.-facing websites would
22 increase price to them significantly. *See* Merger Guidelines §§ 4.2, 4.2.2 (applying the
23 hypothetical monopolist test to the geographic market).

24 Bazaarvoice claims that limiting the geographic market to the United States improperly
25 excludes foreign suppliers. This is not the case. When the geographic market is defined based
26 on customer locations, “[c]ompetitors in the market are firms that sell to customers in the
27 specified region. Some suppliers that sell into the relevant market may be located outside the
28 boundaries of the geographic market.” Merger Guidelines § 4.2.2. Accordingly, foreign

1 suppliers that have demonstrated an interest in or ability to serve customers with a U.S. presence
2 are participants in the U.S. market. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 184
3 (3d Cir. 2005) (market for “the sale of prefabricated artificial teeth in the United States” defined
4 to include foreign suppliers participating in the U.S. market);

5 The critical issue is not *whether* the Court should account for sales from foreign suppliers
6 in the United States—it should—but *how* to assess their competitive significance. Foreign
7 suppliers have a negligible U.S. presence, and their lack of success in the U.S. market provides
8 no support for Bazaarvoice’s argument that foreign suppliers will act as a true competitive check
9 on its behavior. Bazaarvoice’s real argument—and this is the critical issue with respect to
10 geographic market definition—is that sales to overseas customers should also count in
11 determining market shares. But the fact that a firm may have sales for PRR platforms in another
12 country says nothing about its ability to serve the unique requirements of the U.S. market. The
13 competitive significance of foreign suppliers, therefore, should be assessed in light of their U.S.
14 market shares.

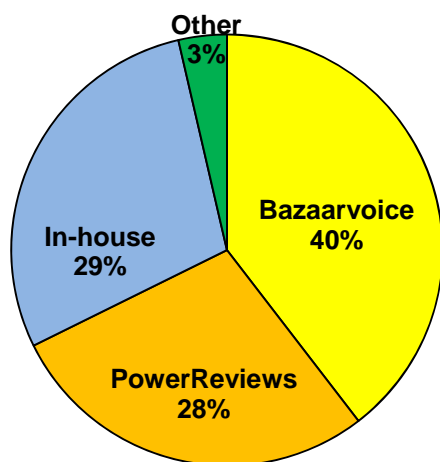
15 **B. Bazaarvoice’s Acquisition of PowerReviews is Presumptively Unlawful.**

16 If a transaction results in a firm with a significant market share and substantially
17 increases concentration within the relevant market, it is presumptively unlawful. *Phila. Nat’l*
18 *Bank*, 374 U.S. at 363. A “reliable, reasonable, close approximation of relevant market share
19 data is sufficient” to trigger the presumption. *H&R Block*, 833 F. Supp. 2d at 72; *see also*
20 *Merger Guidelines* § 5.2. Courts have adopted a flexible approach, assigning shares in the
21 manner that best reflects each competitor’s future competitive significance. *See generally Kaiser*
22 *Aluminum*, 652 F.2d at 1341; Gregory J. Werden, *Assigning Market Shares*, 70 *Antitrust L.J.* 67
23 (2002). Market shares reflecting each competitor’s future significance in the PRR platform
24 market in the United States can reasonably be based on the Internet Retailer 500 (“IR 500”)
25 index. *See PFOF* ¶¶ 188-197. The IR 500 is an annual trade publication that identifies the 500
26 largest Internet retailers in North America, according to online revenue. The list includes online
27 retailers and manufacturers that sell products online directly to consumers through U.S. websites.

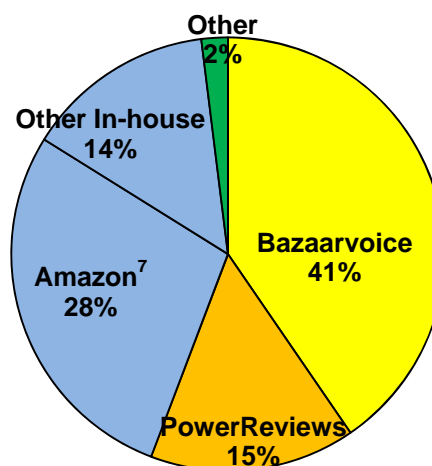
1 Market shares derived from the IR 500 are consistent with the way in which Bazaarvoice,
 2 PowerReviews, and other industry observers evaluated competition in the market for PRR
 3 platforms prior to the transaction. *See* GX-1126 (at -861); GX-82 (Barton Dep. 53:4-8, 11-54:12).
 4 Indeed, Bazaarvoice and PowerReviews frequently looked to the IR 500 data as an indicator of
 5 success. *See* PFOF ¶¶ 188-91; *cf. H&R Block*, 833 F. Supp. 2d at 72 (market share data was
 6 reliable, in part, because the defendants relied on it in the ordinary course of business). When
 7 explaining its market to public investors, Bazaarvoice has repeatedly discussed its IR 500 market
 8 share. *E.g.*, GX-425 (at -919). Bazaarvoice executives also emphasized the expected impact of
 9 the acquisition on the company’s IR 500 market share as a justification for pursuing the
 10 transaction. GX-1175 (at -904) (“Combined, we would be approaching the 50% share point of
 11 the IR 500. There is no other US competitor with more than 10 clients and 104 do not have any
 12 solution or are using an in-house solution.”); *see also* GX-925 (at -941); GX-948.

13 As a result of the merger, Bazaarvoice’s market share is substantial. Approximately 68%
 14 of IR 500 firms with ratings and reviews on their websites are Bazaarvoice customers. GX-
 15 1062. When weighted by customer revenues—placing greater emphasis on a supplier’s ability to
 16 serve larger customers—Bazaarvoice’s share is approximately 55%.⁷ GX-1063.

17 **PRR Market Shares by Customer Count**
 18 *For IR 500 Customers, 2012 (GX-1135)*



17 **PRR Market Shares by Customer Revenue**
 18 *For IR 500 Customers, 2012 (GX-1136)*



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 27 ⁷ Including Amazon.com, the aggregate market share for in-house solutions when weighted by
 28 customer revenues is 42%. GX-1063. Amazon.com, however, is unique. It accounts for a
 substantial share of all ecommerce and has full-time employees dedicated to the development
 and maintenance of its internal PRR platform. GX-70 (Ahmed Dep. 101:11-18, 20).

1 Moreover, the merger substantially increased market concentration. Courts commonly
2 measure market concentration using the Herfindhal-Hirschman Index (“HHI”) of market
3 concentration. *Heinz*, 246 F.3d at 716. “The HHI is calculated by totaling the squares of the
4 market shares of every firm in the relevant market.” *Id.* at 716 n.9. Under the Merger
5 Guidelines, a market is considered highly concentrated if its HHI exceeds 2500, and mergers that
6 involve an increase in HHI of more than 200 points are presumed to be likely to enhance market
7 power. Merger Guidelines § 5.3. Based on customer revenues, the pre-merger HHI was 2674,
8 and it increased by 1240 points to 3915 after the merger. GX-1063 (HHI calculations). Based
9 on customer count, the pre-merger HHI was 2365, and it increased 2226 points to 4590 after the
10 merger. GX1062 (HHI calculations). By either measure, these figures are significantly above
11 the Merger Guidelines’ thresholds for presuming that the transaction is likely to substantially
12 reduce competition. Merger Guidelines §5.3.

13 Because the merger significantly increased market concentration in a highly concentrated
14 market, it is presumptively anticompetitive. *Cf. Phila. Nat’l Bank*, 374 U.S. at 364 (30% market
15 share is sufficient to trigger the presumption).

16 **C. The Acquisition is Likely to Substantially Lessen Competition by Eliminating Head-**
17 **to-Head Competition Between Bazaarvoice and PowerReviews.**

18 Bazaarvoice recognized that, by acquiring PowerReviews, it was eliminating its principal
19 competitor in the United States. As one of Bazaarvoice’s co-founders, Brant Barton, testified,
20 “by acquiring PowerReviews we . . . acquir[ed] the company that we most often competed with
21 in the U.S. for ratings and reviews.” GX-82 (Barton Dep. 202:10-203:16). Bazaarvoice’s
22 former CEO and other co-founder, Brett Hurt, also acknowledged that PowerReviews was
23 Bazaarvoice’s “biggest competitor for ratings and reviews” in the United States prior to the
24 merger, for both retailers, GX-89 (Hurt Dep. 126:22-127:1; 151:10-16), and manufacturers, GX-
25 89 (Hurt Dep. 372:18-373:5); *cf.* GX-81 (Collins Dep. 143:18-21, 143:24-144:3); GX-492
26 (Pacitti Dep. 151:8-13).

27 By eliminating competition from its most significant rival, Bazaarvoice acquired the
28 ability to charge many retailers and manufacturers higher prices. Even without relying on

1 market concentration statistics, this evidence alone is sufficient to establish a violation of Section
2 7. *See Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 433 (5th Cir. 2008) (“Even without
3 the HHI . . . [t]he Government also provided ample other evidence to establish its strong *prima*
4 *facie* case, such as customer testimony, history of the market, and [the merging parties’] internal
5 documents.”). As recognized by courts and the Merger Guidelines, “[t]he elimination of
6 competition between two firms that results from their merger may alone constitute a substantial
7 lessening of competition.” Merger Guidelines § 6; *OSF Healthcare*, 852 F. Supp. 2d at 1083; *cf.*
8 *Swedish Match*, 131 F. Supp. 2d at 169 (“[T]he weight of the evidence demonstrates that a
9 unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate
10 one of Swedish Match’s primary direct competitors.”).

11 When evaluating the significance of direct competition between two firms, courts
12 consider the merging firms’ ordinary course of business documents to be particularly relevant.
13 *See Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208, 1212 (11th Cir. 2012); *H&R Block*, 833 F. Supp.
14 2d at 81-82. Both firms recognized that they were each other’s only significant competitors, and
15 the gap between PowerReviews and the remaining PRR alternatives in the market was
16 substantial. PowerReviews was an omnipresent threat to Bazaarvoice. At one point,
17 Bazaarvoice executives estimated that PowerReviews was present in around 80% of all sales
18 opportunities. GX-326 (at -200); GX-37 (at -950); *cf.* GX-492 (Pacitti Dep. 156:6-10)
19 (PowerReviews caused Bazaarvoice to offer discounts more frequently than any other
20 competitor).

21 The gap separating PowerReviews from the field of remaining competitors is apparent
22 from Bazaarvoice’s own sales records. In the ordinary course of business, Bazaarvoice
23 maintains a sales opportunity database, in which its salespersons record information related to
24 potential sales opportunities, GX-80 (Bolian Dep. 65:1-23), including the presence of
25 competitors. GX-80 (Bolian Dep. 67:18-68:3; 73:17-23). PowerReviews appears in
26 approximately 75% of PRR platform sales opportunities in which a competitor is identified.
27 GX-1044 (summarizing frequency of competitors in PRR sales opportunities); *cf.* GX-1046.
28 Other alternatives appear much less frequently. In-house solutions are present in only 18% of

1 sales opportunities in which an alternative is identified. GX-1044. No other commercial
2 supplier appears in more than 3% of opportunities where an alternative is identified. *Id.*

3 A similar picture of the competitive landscape emerges from Bazaarvoice's How the Deal
4 was Done ("HTDWD") e-mails. GX-92 (Osborne Dep. 270:10-16). Bazaarvoice salespersons
5 circulate these e-mails after each new deal is signed. GX-92 (Osborne Dep. 272:13-17, 272:20).
6 These e-mails often reference the competitors Bazaarvoice encountered in a particular sales
7 opportunity. PowerReviews is identified in approximately 80% of HTDWD e-mails that name a
8 competitor. GX-1047; GX-1048. In-house solutions, on the other hand, appear in only 12% of
9 HTDWD e-mails that identify a competitor. GX-1047; GX-1048. All other commercial
10 providers combined appear in only 9% of HTDWD e-mails that identify a competitive
11 alternative. GX-1047; GX-1048.

12 Based on its experience competing with PowerReviews, Bazaarvoice expected that the
13 acquisition would stem the "margin erosion" caused by competition from PowerReviews and
14 allow it to raise prices. In fact, Bazaarvoice executives extolled the anticompetitive virtues of
15 the acquisition when urging the company's board of directors to approve the deal. Evidence
16 regarding a defendant's anticompetitive rationale for pursuing a merger is significant because it
17 illuminates the transaction's likely competitive effects. *Brown Shoe*, 370 U.S. at 329 n.48
18 ("[E]vidence indicating the purpose of the merging parties, where available, is an aid in
19 predicting the probable future conduct of the parties and thus the probable effects of the
20 merger."); *see also* IVA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 964a, at 18
21 (3d ed. 2009) ("[E]vidence of anticompetitive intent cannot be disregarded, as it is clearly
22 pertinent to the basic issue in any horizontal merger case."). Accordingly, Bazaarvoice's candid
23 pre-merger admissions regarding its anticompetitive rationale for the transaction are highly
24 probative evidence bearing on the ultimate issue in this case.

25 During merger discussions, Bazaarvoice and PowerReviews executives discussed the
26 benefits of eliminating competitive discounting, GX-90 (Luedtke Dep. 306:12-18), and they
27 anticipated the transaction would lead to higher prices, GX-90 (Luedtke Dep. 286:14-22, 287:1).
28 Both firms viewed the transaction as an opportunity for "revenue acceleration," GX-253 (at -

1 188), and expected “[p]ricing accretion due to [the] combination,” GX-522 (at -035); *see also*
2 GX-90 (Luedtke Dep. 305:18-20, 305:23-306:3). In the midst of merger negotiations with
3 Bazaarvoice, a PowerReviews board member pointedly urged the firm’s executive team to “push
4 hard on BV flips with very aggressive pricing,” to “remind [Bazaarvoice] why this deal makes
5 sense.” GX-617 (at -195). This theme persisted long after the acquisition closed, when a draft
6 roadshow presentation prepared for Bazaarvoice’s follow-on public offering touted that the
7 transaction created an “[o]ppportunity to increase revenue from existing PowerReviews clients via
8 migration to the Bazaarvoice platform.” GX-1129 (at -382).

9 As Bazaarvoice executives understood before the transaction, anticompetitive effects can
10 arise solely from the elimination of competition between two close competitors. A transaction is
11 likely to have anticompetitive effects if it will allow the acquiring firm to raise prices without
12 regard to reactions by other competitors. *See Swedish Match*, 131 F. Supp. 2 at 169; Carl
13 Shapiro, *Mergers with Differentiated Products*, 10 Antitrust 23, 23 (Spring 1996) (“Unilateral
14 effects” refers to “the tendency of a horizontal merger to lead to higher prices simply by virtue of
15 the fact that the merger will eliminate the direct competition between the two merging firms,
16 even if all other firms in the market continue to compete independently.”). Because the effects
17 of such a transaction arise solely from a change in the merged firm’s incentives, without regard
18 to coordination with rivals, they are often called “unilateral effects.” Significant unilateral
19 effects are likely in this case because: (1) Bazaarvoice’s and PowerReviews’ PRR platforms are
20 close substitutes; (2) other PRR platforms are distant alternatives to the Bazaarvoice and
21 PowerReviews platforms; and (3) other PRR platform providers cannot quickly reposition to
22 make their respective platforms closer substitutes for the platforms offered by Bazaarvoice and
23 PowerReviews. *Cf. IV Areeda & Hovenkamp* ¶ 914a, at 76.

24 The analysis of unilateral effects must account for the commercial realities of the relevant
25 market in which the merging parties compete. In this market, suppliers do not charge uniform
26 prices. Enterprise PRR platforms are licensed through individually negotiated transactions, and
27 each customer receives a unique price. *See GX-81* (Collins Dep. 77:12-16); *GX-90* (Luedtke
28 Dep. 91:24-92:8). As a result, different customers commonly receive different prices when

1 purchasing the same product. *See* GX-81 (Collins Dep. 77:24-78:4); GX-90 (Luedtke Dep.
2 129:10-13, 129:23-130:4). When a product cannot be re-sold, as is the case with PRR platforms,
3 PFOF ¶ 117, a supplier’s ability to charge different customers different prices is called price
4 discrimination. *IV Areeda & Hovenkamp* ¶927e, at 155; *see also* Jonathan B. Baker,
5 *Competitive Price Discrimination: The Exercise of Market Power Without Anticompetitive*
6 *Effects (Comment on Klein and Wiley)*, 70 *Antitrust L.J.* 643, 646 (2003).

7 The Supreme Court has recognized that a supplier’s “ab[ility] to price discriminate” is an
8 important factor courts should consider when scrutinizing a firm’s conduct under the antitrust
9 laws. *Eastman Kodak*, 504 U.S. at 475. Bazaarvoice’s ability to price discriminate has profound
10 implications for this case. Because it can engage in price discrimination, Bazaarvoice will be
11 able to raise prices for particular customers without imposing a uniform, across-the-board price
12 increase. In many sales opportunities, PowerReviews was Bazaarvoice’s only significant
13 competitor. *See* PFOF ¶¶ 123-47. Because Bazaarvoice no longer faces competition from
14 PowerReviews, it can charge higher prices to clients that would have considered Bazaarvoice
15 and PowerReviews their top two alternatives.

16 In markets with individually negotiated prices, an anticompetitive merger will not
17 necessarily result in an across-the-board price increase. After a merger between two
18 competitors, if the post-merger supplier can identify the customers that consider the two firms’
19 products to be close substitutes, it can charge those customers higher prices. This behavior may
20 be profitable even if the supplier cannot identify these customers with absolute precision. If
21 significant price increases to targeted customers are reasonably likely to occur as a result of a
22 transaction, the transaction is likely to result in harm to competition.⁸

23 Dr. Shapiro will testify that Bazaarvoice’s ability to engage in price discrimination is
24 important to the analysis of competitive effects in this case for two reasons. First, existing
25

26 ⁸ Even in the absence of price discrimination, Section 7 does not require competitive harm
27 arising from a transaction to be borne equally by all purchasers. A violation of Section 7 may
28 occur even when the competitive impact of the transaction will fall primarily on customers that
placed the greatest value on the merging firms’ products. *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.

1 Bazaarvoice and PowerReviews customers are likely to pay higher prices than they would have
2 otherwise paid absent the merger. As a group, they have revealed a preference for using a
3 commercial supplier over an in-house platform. As Dr. Shapiro will testify, Bazaarvoice does
4 not need to precisely identify the most vulnerable customers in order to profitably raise its prices.
5 By licensing a product from Bazaarvoice or PowerReviews, these customers have revealed
6 enough information to allow Bazaarvoice to target them for price increases. Before the merger,
7 many of these customers benefitted from price competition between Bazaarvoice and
8 PowerReviews. *See supra* § II.A. With the competitive threat offered by PowerReviews
9 removed from the market, this group of retailers and manufacturers will likely face higher prices
10 upon renewal of their current contracts. Dr. Shapiro’s conclusions are consistent with
11 Bazaarvoice’s pre-merger plan to migrate PowerReviews customers to the Bazaarvoice platform
12 at higher prices. GX-332 (at -291).

13 Second, as Dr. Shapiro will testify, Bazaarvoice will use information obtained through
14 the bargaining process to charge many new clients higher prices than they would have otherwise
15 paid. A Bazaarvoice salesperson learns a great deal of information about a prospective client
16 throughout the sales process. GX-203 (at -104-05); GX-92 (Osborne Dep. 118:25-119:13;
17 120:24-122:4, 122:7-126:7); *cf.* GX-90 (Luedtke Dep 86:2-22; 86:24-87:1, 87:4-5; 87:7-88:1,
18 89:4-22) (PowerReviews collected similar information). Bazaarvoice uses this information to
19 develop a unique pricing proposal for each client. *See* GX-92 (Osborne Dep. 147:1-5); *cf.* GX-
20 90 (Luedtke Dep 91:24-92:8) (PowerReviews developed pricing proposals in a similar fashion);
21 *see generally* PFOF ¶¶ 48-59. In many cases, a Bazaarvoice salesperson is able to determine
22 whether a particular customer is considering another PRR platform,⁹ including an in-house
23 solution. *See, e.g.,* GX-627 (at -997) (“This is currently not a competitive situation with other
24 vendors. The only competition here is the possibility of them building ratings and reviews in
25 house.”); GX-279; GX-807 (at -791). As a customer reveals information regarding its

26 _____
27 ⁹ *See e.g.,* GX-730 (at -051) (“You are competing with Power Reviews and we need the Stories
28 module free of charge to stay with Bazaarvoice.”); GX-494 (Godfrey 30(b)(6) Dep. 69:5-9,
69:11-12) (“I would say in most sales cycles, we know who the competitor is.”); GX-200 (at -
156); GX-56 (at -815); GX-90 (Luedtke Dep. 95:13-21, 96:6-14).

1 preferences and the suitability of alternative options, Bazaarvoice will adjust its proposal
2 accordingly. *See, e.g.*, GX-649 (at -136) (“[REDACTED] is the most they are willing to pay and
3 [REDACTED] more than what PR has offered them.”). With the threat offered by PowerReviews
4 removed from the market, the next-best alternative to Bazaarvoice for many retailers and
5 manufacturers is gone. Consequently, Bazaarvoice will be able to charge those retailers and
6 manufacturers higher prices.

7 Additionally, Dr. Shapiro will testify that the merger is likely to substantially lessen
8 competition by eliminating the competition between Bazaarvoice and PowerReviews to develop
9 new PRR features and functionalities. Prior to the merger, Bazaarvoice was engaged in an
10 intense “feature war” with PowerReviews that led to the development of many new services,
11 including search engine optimization and syndication. *See supra* § II.B. With PowerReviews
12 gone, and the remaining competitors far behind PowerReviews in terms of functionality and
13 research and development resources, Bazaarvoice will have less incentive to develop new
14 features in the future than it did before the acquisition. Thus, the acquisition also violates
15 Section 7 for likely reducing innovation competition. *See FTC v. PPG Indus., Inc.*, 798 F.2d
16 1500, 1505 (D.C. Cir. 1986) (enjoining merger between direct competitors and noting that the
17 firms competed at several stages, including “research and development”).

18 **D. Bazaarvoice Cannot Rebut the Government’s Strong *Prima Facie* Case.**

19 Other sources of PRR platforms, including in-house solutions, have not substantially
20 constrained Bazaarvoice in the past and are unlikely to do so in the future. Before the
21 transaction, Bazaarvoice believed that the transaction would eliminate the company’s only
22 significant rival in the United States. Considering past competition between Bazaarvoice and the
23 other alternatives, the firm’s expectations were well-grounded.

24 It is also unlikely that a new firm will enter the market to constrain an anticompetitive
25 price increase by Bazaarvoice. There are significant barriers to entry in the PRR platform market
26 in the United States, including network effects from syndication, high switching costs, and
27 Bazaarvoice’s established reputation for expertise and success. Before the acquisition,
28 Bazaarvoice admitted that “[s]ignificant barriers to entry” protected its competitive position and

1 that it “would be very difficult for a new company to enter [its] market organically or through
2 M&A.” GX-650 (at -306). In light of its pre-merger statements, Bazaarvoice’s recent claim that
3 there are no meaningful barriers to entry in the PRR platform market is not credible. *Cf. CCC*
4 *Holdings*, 605 F. Supp. 2d at 49-50 (giving substantial weight to pre-merger admissions by a
5 defendant regarding the presence of barriers to entry in its market).

6 A defendant may rebut the government’s *prima facie* case by showing that entry or
7 expansion by other firms will be timely, likely, *and* sufficient to counteract the competitive
8 effects from the transaction. *See H&R Block*, 833 F. Supp. 2d at 73 (citing Merger Guidelines §
9 9). However, “[t]he mere existence of potential entrants does not by itself rebut the anti-
10 competitive nature of an acquisition.” *Chi. Bridge*, 534 F.3d at 436. The defendant bears the
11 burden of demonstrating entry or expansion will “fill the competitive void” created by the
12 acquisition. *Swedish Match*, 131 F. Supp. 2d at 169; *see also Olin Corp.*, 986 F.2d at 1305
13 (defendant bears the burden of rebutting the presumption of illegality). Bazaarvoice cannot meet
14 its burden in this case.

15 **1. *Expansion by Existing Competitors Will Not Fill the Competitive Void Created by the***
16 ***Acquisition.***

17 To demonstrate that expansion by other competitors will counteract the likely harm from
18 a transaction, a defendant must do more than merely identify other firms that compete in the
19 relevant market. *See H&R Block*, 833 F. Supp. 2d at 73-77. The prospect of expansion can only
20 save an otherwise anticompetitive transaction from condemnation if the defendant can show that
21 the other firms are likely to compete in the market *and* achieve commercial success. *CCC*
22 *Holdings*, 605 F. Supp. 2d at 48-49; *cf. United States v. Syfy Enters.*, 903 F.2d 659, 665-66 (9th
23 Cir. 1990) (holding that effective post-merger entry by a competitor had substantially diminished
24 the defendant’s market share, demonstrating the absence of monopoly power). In *H&R Block*,
25 for example, the defendants identified eighteen other companies competing in the relevant
26 product market. 833 F. Supp. 2d at 73-74. The court, however, concluded that these firms were
27 unlikely to expand to replace the competition that would have been eliminated by the acquisition.
28 *H&R Block*, 833 F. Supp. at 73-77.

1 Particularly in light of the entry barriers in the PRR platform market, *infra* § III.D.2, there
 2 is no reason to believe that expansion by existing firms will counteract the transaction’s likely
 3 anticompetitive effects. *See Chi. Bridge*, 534 F.3d at 430 (to be sufficient, entry or expansion
 4 must allow the firm to compete “on the same playing field” as the merged entity). Other
 5 commercial suppliers of PRR platforms will not constrain Bazaarvoice the same way that
 6 PowerReviews did before the transaction. Compared to PowerReviews, other providers have
 7 struggled to achieve meaningful competitive significance. Table 1 below illustrates the gap that
 8 separates PowerReviews and Bazaarvoice from the most significant remaining commercial
 9 suppliers for enterprise customers in the market today.

Company	U.S. Clients
Bazaarvoice	463
PowerReviews	1205
<i>Enterprise</i>	354
<i>Express</i>	851
Bazaarvoice (post-merger)	1668
Gigya	█
Pluck	█
Lithium	█
Rating-System	█
Reevo	█
Practical Data	█

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18 **Table 1: Enterprise PRR Clients of Commercial Suppliers**¹⁰

19 These fringe competitors are not well-positioned to mount an effective assault on
 20 Bazaarvoice in the near future. PFOF ¶¶ 221-38. Pluck, which Bazaarvoice’s CEO has
 21 identified as the company’s closest remaining competitor, GX-81 (Collins Dep. 221:7-17), has
 22 obtained only █ PRR platform clients in the United States during the past seven years, GX-62
 23 (Pluck Dep. 169:25-170:5). Meanwhile, Reevo, which Bazaarvoice claims is a “formidable”
 24 new entrant in the U.S. market, Joint Case Management Statement (ECF No. 81 at 5:14-16), has
 25 obtained only █ U.S.-based customers since hiring its first U.S. employee in September 2012.
 26 GX-73 (Reevo Dep. 41:7-10, 13). Rating-System and Practical Data, on the other hand, offer
 27

28 ¹⁰ GX-1064; GX-65 (Practical Data Dep. 43:4-7).

1 platforms with limited functionality, similar to that offered by PowerReviews Express, *see supra*
2 n.3, and they target a different segment of the market than the Bazaarvoice and PowerReviews
3 enterprise platforms. Neither firm has ever constrained Bazaarvoice in any meaningful way. *See*
4 PFOF ¶¶ 237-38. Bazaarvoice’s direct competition is so limited that the company’s SEC filings
5 continue to identify Viewpoints, a firm that has left the market altogether, GX-75 (Moog Dep.
6 68:5-17, 20), as a noteworthy direct competitor. *See* GX-970 (at 8).

7 Future competition from fringe players that have experienced little commercial success
8 will not compensate for the removal of PowerReviews from the market. Outside of the context
9 of this litigation, Bazaarvoice did not consider any of these firms to be a serious threat. *See*
10 PFOF ¶¶ 221-38. Bazaarvoice’s indifference toward these firms was entirely justified. In
11 Bazaarvoice’s sales database, commercial suppliers other than PowerReviews were identified in
12 less than 15% of the PRR platform sales opportunities in which a salesperson identified a
13 competitor—*combined*. GX-1044.

14 Importantly, the gap between Bazaarvoice and its next closest competitor has become
15 even greater as a result of the transaction. Bazaarvoice is now the only PRR platform supplier in
16 the U.S. market with a syndication network. Before the merger, PowerReviews also offered its
17 own syndication network in the United States. Without an operational syndication offering,
18 Bazaarvoice’s remaining commercial rivals are at a significant competitive disadvantage. *See*
19 *infra* § III.D.2.a.

20 **2. *Bazaarvoice is Insulated from Meaningful Competition by Substantial Barriers to***
21 ***Entry.***

22 Before the transaction, Bazaarvoice believed “[s]ignificant barriers to entry” protected its
23 competitive position, and thought it “would be very difficult to enter [its] market organically or
24 through M&A.” GX-650 (at -306). Courts in other merger cases have given substantial weight
25 to admissions by a defendant regarding the presence of barriers to entry in its market. *See CCC*
26 *Holdings*, 605 F. Supp. 2d at 49-50. Bazaarvoice’s own views of barriers to entry in the PRR
27 platform market confirm that entry will not counteract the likely harm from the transaction.
28

1 **a. Bazaarvoice’s Syndication Network is a Barrier to Entry.**

2 Network effects occur when “the utility that a user derives from consumption of the good
3 increases with the number of other agents consuming the good.” *United States v. Microsoft*
4 *Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (quoting Michael L. Katz & Carl Shapiro, *Network*
5 *Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985)). Where
6 network effects are present, incumbent firms with a significant customer base have a substantial
7 advantage over new entrants and fringe competitors. New entrants starting from scratch, as well
8 as fringe players, face the proverbial “chicken-and-egg problem” when attempting to gain new
9 customers. *Microsoft*, 253 F.3d at 55-56; *cf.* GX-425 (at -926) (“[A]ny company entering the
10 market would have to start from the beginning by securing all of the retail clients...but we
11 already have many of the biggest and we continue to win new, high profile logos.”). Network
12 effects are a substantial barrier to entry and expansion when they protect an incumbent supplier’s
13 customer base. *See DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1138 (N.D. Cal.
14 2010) (“Where the network effect is sufficiently strong, it can function as a barrier to entry into a
15 market.”); *cf. United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 19-22 (D.D.C. 1999)
16 (describing the “applications barrier to entry” created by network effects in the market for Intel-
17 compatible PC operating systems).

18 Bazaarvoice’s syndication network creates network effects. As more retailers license
19 Bazaarvoice’s platform, the number of outlets for review syndication increases and the platform
20 becomes more attractive to manufacturers. Similarly, as more manufacturers license
21 Bazaarvoice’s platform, the number of sources of product reviews increases, and the platform
22 becomes more attractive to retailers. GX-425 (at -923).

23 Bazaarvoice recognizes the importance of its syndication network as a barrier to entry.
24 Before the transaction, one of Bazaarvoice’s co-founders wrote: “Connecting the retailers and
25 the brands creates the largest barrier to entry to [Bazaarvoice’s] business—the network effect
26 that is so rare for any business.” GX-406 (at -202); *see also* GX-840 (at -942) (“[I]t’s really
27 important for our investors to realize that we are in a network effect business, that the more
28 retailers we win, the more it’s going to attract the brands, and the more brands we get live, the

1 more it's going to attract the retailers."'). Facing Bazaarvoice's syndication network, new
2 entrants or smaller fringe competitors are at a substantial disadvantage because they cannot offer
3 clients an attractive number of syndication outlets (retailers) or sources of product reviews
4 (manufacturers). *See* GX-944.

5 Before the transaction, PowerReviews also acknowledged that Bazaarvoice's syndication
6 network was a substantial impediment to winning business, GX-90 (Luedtke Dep. 211:9-12, 22);
7 GX-1034, sometimes even referring to Bazaarvoice's exploitation of its network as
8 "monopolistic behavior," GX-244 (at -979); GX-1115 (at -550). PowerReviews devoted
9 substantial resources to "puncture the network effect" through the pursuit of "BV flips." GX-
10 281 (at -896). Compared to other providers, PowerReviews was uniquely positioned to
11 overcome the Bazaarvoice network advantage because PowerReviews had a significant customer
12 base from which to launch its own syndication network. While PowerReviews had some success
13 against the syndication barrier, it ultimately conceded that the network effect was "stronger than
14 anticipated." GX-245 (at -433); GX-90 (Luedtke Dep. 246:11-247:2).

15 Bazaarvoice's decision before the merger to develop technology to syndicate reviews
16 from its manufacturing clients to PowerReviews retailers does not diminish the significance of
17 the syndication barrier to entry.¹¹ PowerReviews was uniquely positioned to trigger this
18 response. PowerReviews had a substantial base of retail clients that were attractive to existing
19 Bazaarvoice manufacturing clients. PowerReviews offered those manufacturers an opportunity
20 to syndicate their reviews to PowerReviews retail clients without switching to the PowerReviews
21 PRR platform. If Bazaarvoice had not responded to PowerReviews, these clients would have
22 been at risk. No remaining competitor poses a similar threat.

23 The addition of the PowerReviews customers to the Bazaarvoice network has
24 significantly bolstered the syndication barrier to entry. Shortly before the transaction closed, a
25

26 ¹¹ This service was never operational before the merger because Bazaarvoice and PowerReviews
27 had no incentive to cooperate with each other in order to implement the service. *See, e.g.*, GX-
28 1091 (at -978); GX-711 (at -922-23). Today, Bazaarvoice syndicates content from its
manufacturing clients to only two non-Bazaarvoice retailers—Sears and Target—
GX-699; GX-1090.

1 member of the PowerReviews board of directors described the dilemma that faces Bazaarvoice's
2 remaining competitors today, writing, "[P]ost this combination, there is a network effect between
3 the brands and the retailers that will be nearly impossible for someone to break." GX-746 (at -
4 897). During roadshows for its follow-on public offering in July 2012, Bazaarvoice executives
5 boasted that the company's "scale and network effects create [a] sustainable competitive
6 advantage." GX-770 (at -232). Similarly, before appreciating their company's potential
7 exposure to antitrust liability, Bazaarvoice employees drafted an internal communication that
8 candidly justified the substantial purchase price for the transaction by referencing how it would
9 increase the syndication barrier to entry. GX-1092 (at -709) ("Why did we pay so much? We
10 believe that scale, reach and network economics is our competitive advantage – and a significant
11 barrier to entry."). The syndication barrier to entry is even stronger today than it was in the years
12 preceding the transaction, during which all other commercial suppliers in the market—except
13 PowerReviews—struggled to expand their respective PRR customer bases.

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 **b. Switching Costs and Reputation are Barriers to Entry.**

22 High switching costs will prevent other competitors from expanding to take the
23 competitive position occupied by PowerReviews prior to the merger. Just before the
24 PowerReviews acquisition closed, Brett Hurt wrote to the Bazaarvoice board of directors, "We
25 own the network for global retail, especially with the acquisition of PowerReviews We all
26 know how difficult it is to get retailers to switch" GX-1094 (at -312). Switching costs in
27 the PRR platform market include the time and resources necessary to evaluate other vendors, as
28 well as the technical work required to switch platforms. If a customer that uses syndication

1 services wants to switch platforms, it may also need to forego its network connections for
2 content syndication.

3 As courts have recognized, high switching costs insulate incumbent suppliers from
4 competition and impede expansion by fringe players. *CCC Holdings*, 605 F. Supp. 2d at 49; *cf.*
5 *Eastman Kodak*, 504 U.S. at 476 (high switching costs may cause locked-in consumers to
6 tolerate price increases rather than switch suppliers); GX-62 [REDACTED]

7 [REDACTED] The switching costs in the PRR platform market protect a supplier's installed customer
8 base. Before the merger, even Bazaarvoice executives lamented that "[PowerReviews was]
9 REALLY hard to unseat because of switching costs," GX-223 (at -634), and they acknowledged
10 Bazaarvoice had been unsuccessful in taking clients like REI and Staples away from
11 PowerReviews because "switching costs are high," GX-1093 (at -864).

12 Because of switching costs, fringe suppliers will encounter substantial difficulties
13 displacing Bazaarvoice from its installed customer base. Accordingly, it will be difficult for a
14 fringe player to rapidly expand to fill the competitive void in the marketplace created by the
15 transaction. Bazaarvoice executives acknowledged the impact of switching costs in evaluating
16 the transaction, concluding the acquisition of PowerReviews would "further increase[] the
17 switching costs, and therefore deepen[] [its] protective moat, for brands and retailers alike." GX-
18 925 (at -943).

19 Moreover, reputational barriers will also inhibit the expansion of fringe players and entry
20 by new firms. Where customers require a record of proven expertise in a particular market for a
21 supplier to merit consideration, courts have acknowledged that reputational concerns are a
22 considerable barrier to entry. *See CCC Holdings*, 605 F. Supp. 2d at 54-55; *Chi. Bridge*, 534
23 F.3d at 437-38; *cf. Syfy*, 903 F.2d at 669 (suggesting that mere "good will achieved through
24 effective service" is not itself a barrier to entry).

25 In the PRR platform market, many large customers will only consider suppliers that have
26 demonstrated the ability to service large enterprise customers. Because a disruption in the
27 provision of a PRR platform to a customer's website could lead to a substantial loss of business,
28 a supplier's proven ability to serve large customers is critical. *See generally* PFOF ¶¶ 212-14.

1 The potential losses associated with business disruption create additional risk when selecting an
2 unproven vendor. The remaining fringe suppliers lack the same type of customer base and
3 proven record of providing PRR platforms to enterprise customers that PowerReviews had prior
4 to the merger. New entrants also face this hurdle because they are unproven. *See H&R Block*,
5 833 F. Supp. 2d at 75 (“Building a reputation that a significant number of consumers will trust
6 requires time and money.”).

7 **c. Recent Entrants in the PRR Platform Market Have Not Experienced Commercial**
8 **Success.**

9 Within the past few years, there have been two notable (and unsuccessful) attempts to
10 enter the PRR platform in the United States. *See* PFOF ¶¶ 218-26. One entrant, Viewpoints, has
11 exited the market entirely. GX-75 (Moog Dep. 67:23-24; 68:3-17, 20). The other, [REDACTED]

12 [REDACTED]
13 [REDACTED] The experience of these two firms confirms that there are high
14 barriers to entry in the U.S. market for PRR platforms. *See, e.g., FTC v. Cardinal Health, Inc.*,
15 12 F. Supp. 34 at 56 (D.D.C. 1998) (“The history of entry into the relevant market is a central
16 factor in assessing the likelihood of entry in the future.”).

17 **d. The Defensive Value That Bazaarvoice Attached to the Acquisition Confirms the**
18 **Existence of Entry Barriers.**

19 In the months leading up to the transaction, Bazaarvoice executives became increasingly
20 concerned that a firm in an adjacent space would enter the market by acquiring PowerReviews.
21 *See* GX-512 (at -070). One way to overcome the “chicken-and-egg” problem in order to enter a
22 market where network effects are present is to acquire an incumbent firm with an established
23 customer base. Other than Bazaarvoice, PowerReviews was the only company with a substantial
24 base of PRR platform customers. Accordingly, the prospect of other firms entering “the ratings
25 and reviews business” by acquiring PowerReviews was a significant concern that weighed on
26 Bazaarvoice executives. GX-82 (Barton Dep. 187:23-188:20); *see also* GX-89 (Hurt Dep.
27 430:3-13); GX-1181 (at -158); GX-324 (at -922).

1 The mere existence of this concern illuminates the existence of entry barriers, which
2 Bazaarvoice has attempted to obscure with its post-merger defenses. If entry barriers in the PRR
3 platform market were low, the company's acquisition of PowerReviews would not impede entry
4 by another firm in any meaningful way. To the contrary, however, Bazaarvoice believed it was
5 so critical to prevent PowerReviews from being acquired by another firm that it paid in excess of
6 \$160 million for a company with annual revenues that barely exceeded \$10 million.

7 **3. *In-house Solutions Will Not Prevent Anticompetitive Price Increases by Bazaarvoice.***

8 The mere fact that PRR platforms are also developed in-house cannot alleviate concerns
9 regarding the likely anticompetitive effects of the transaction. A substantial number of retailers
10 and manufacturers do not consider the prospect of building an in-house PRR platform a
11 reasonable alternative. *See generally* GX-781. There are significant costs associated with
12 building an in-house platform, including both the cost of development and the opportunity costs
13 associated with foregoing other projects. *See* GX-678 (at -130-34); GX-168 (Onlineshoes.com
14 Dep. 21:7-22:6); GX-124 (Chico's Dep. 43:25-44:10); PFOF ¶¶ 240, 245. By electing to build
15 an in-house platform, a retailer or manufacturer sacrifices the new features that are developed by
16 commercial suppliers over time, unless it is willing to commit resources to ongoing product
17 development. *See, e.g.,* GX-678 (at -128); GX-77 (██████████ Dep. 53:11-13, 53:16-24);
18 PFOF ¶¶ 240, 246. Maintenance and other related services are also costly to provide on an
19 ongoing basis, deterring many customers from adopting an in-house platform. GX-90 (Luedtke
20 Dep. 81:22-82:21); PFOF ¶¶ 242-43.

21 In-house solutions did not significantly constrain Bazaarvoice's pricing before the
22 merger. Many Bazaarvoice and PowerReviews customers never even seriously considered the
23 option of building an in-house PRR platform. *See, e.g.,* GX-105 (Belk Dep. 30:24-31:2); GX-76
24 (Waltzinger Dep. 21:19-22:6, 22:10-20, 22:23-23:7); GX-130 (Dick's Sporting Goods Dep.
25 50:10-14). In Bazaarvoice's sales database, in-house solutions appear in only 17% of sales
26 opportunities in which Bazaarvoice recorded the presence of a competitor. GX-1044. This data
27 demonstrates that Bazaarvoice's platform is significantly differentiated from most in-house
28

1 installations and confirms that the mere presence of in-house solutions in the market will not
2 deter post-merger price increases by Bazaarvoice.

3 According to Dr. Shapiro's analysis, approximately 28% of IR 500 firms with ratings and
4 reviews use an in-house platform. When weighted by customer revenues, excluding
5 Amazon.com, in-house solutions account for a 14% share of IR 500 firms with ratings and
6 reviews. GX-1063; *supra* p. 19 n.7. In-house platforms, however, are not a single product.
7 Because each in-house solution has been developed independently by an individual firm, in-
8 house solutions have widely varying capabilities. Accordingly, the aggregate market share
9 attributed to in-house solutions does not reflect the relative attractiveness of building an in-house
10 solution for *all* customers.

11 While in-house solutions are sufficient to serve the needs of *some* customers, in-house
12 solutions will not mitigate the overall anticompetitive impact of the transaction. As courts have
13 recognized in other cases, a merger may cause harm to competition even when another
14 alternative will be available in the market following the acquisition. *See OSF Healthcare*, 852 F.
15 Supp. 2d at 1083 (N.D. Ill. 2012) ("However, the continued existence of one competitor
16 following the merger, even a strong competitor, does not necessarily reduce the probability that
17 the proposed merger would substantially lessen competition in the future."); *H&R Block*, 833 F.
18 Supp. 2d at 72 (largest remaining competitor would have held a market share in excess of 60%,
19 more than double the combined share of the defendants); *Swedish Match*, 131 F. Supp. 3d at 166
20 (largest remaining competitor would have held a 33% market share). In this case, customers
21 with an existing preference for commercial platforms are particularly vulnerable to price
22 increases. For these customers, in-house solutions are a distant alternative and will not constrain
23 a price increase by Bazaarvoice.

24 **E. Bazaarvoice Cannot Prove Merger-Specific Efficiencies Will Counteract the**
25 **Transaction's Likely Anticompetitive Effects.**

26 Courts have "rarely, if ever" held that efficiency claims can overcome the effect of an
27 otherwise anticompetitive transaction. *CCC Holdings*, 605 F. Supp. 2d at 72. When a merger
28 results in a highly concentrated market and there are significant entry barriers, a defendant must

1 prove “extraordinary” verifiable and merger-specific efficiencies to escape liability. *CCC*
2 *Holdings*, 605 F. Supp. 2d at 72. Efficiencies are “cognizable” only when they are “merger-
3 specific,” “have been verified,” and “do not arise from anticompetitive reductions in output or
4 service.” *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10). “In other words,
5 a ‘cognizable’ efficiency claim must represent a type of cost saving that could not be achieved
6 without the merger and the estimate of the predicted saving must be reasonably verifiable by an
7 independent party.” *Id.*; see also *Oracle*, 331 F. Supp. 2d at 1175 (“vague and unreliable”
8 efficiency claims cannot rebut a showing of anticompetitive effects). Cognizable efficiencies
9 also must be “passed through to consumers.” *H&R Block*, 833 F. Supp. 2d at 92 n.44 (citing
10 *Staples*, 970 F. Supp. at 1090). Bazaarvoice cannot prove such efficiencies here.

11 Bazaarvoice has not produced any verifiable evidence demonstrating its claimed
12 efficiencies are cognizable. It has not identified any PowerReviews technology that it was not
13 working to replicate before the transaction. See GX-87 (Godfrey CID Dep. 51:14-53:9)
14 (Bazaarvoice was working to improve its product matching technology and was developing a
15 universal product catalog before the merger); GX-1110 (at -508) (“We will leapfrog their current
16 capabilities with work on product matching”); GX-925 (at -988) (“Bazaarvoice will eclipse
17 their catalog matching capability . . . later this year.”). It has also failed to demonstrate that the
18 merger was necessary to improve the quality of its data analytics offerings. GX-83 (Collins
19 30(b)(6) Dep. 46:13-47:8) (without the merger, Bazaarvoice and PowerReviews could have
20 shared their data to improve their respective data analytics offerings). Finally, it has failed to
21 demonstrate that the merger was necessary to allow the two firms’ customers to syndicate
22 reviews to one another. GX-30 (work to allow for syndication between Bazaarvoice and
23 PowerReviews customers was under way before the merger).

24 Moreover, Bazaarvoice has made no discernible attempt to quantify the magnitude of any
25 purported efficiencies arising from the transaction. The transaction, however, closed more than
26 one year ago. If legitimate efficiencies have been achieved, their value should be readily
27 ascertainable. But Bazaarvoice has not produced any concrete evidence of any efficiency gains
28 from the transaction. Bazaarvoice’s efficiency claims, therefore, cannot salvage the transaction.

1 **F. Bazaarvoice's Other Defenses Are Deficient.**

2 **1. *Post-Acquisition Pricing Evidence Does Not Demonstrate That Other Competitors***
3 ***Have Emerged to Fill the Competitive Void Created by the Acquisition.***

4 The Department of Justice informed Bazaarvoice that it was investigating the company's
5 acquisition of PowerReviews just two days after the transaction closed. GX-1189. Bazaarvoice
6 executives have known that the company's pricing behavior would be subject to antitrust
7 scrutiny for the duration of the Department of Justice investigation and this litigation. Any post-
8 acquisition pricing evidence offered by Bazaarvoice to show the transaction has not caused
9 competitive harm, therefore, has little probative value. As the Supreme Court recognized almost
10 forty years ago, "If a demonstration that no anticompetitive effects had occurred at the time of
11 trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could
12 stave off such actions merely by refraining from aggressive or anticompetitive behavior when
13 such a suit was threatened or pending." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 at
14 504 (1974). Accordingly, even in the case of a consummated merger, the government must only
15 demonstrate that the transaction has created "an appreciable danger" of higher prices in the
16 affected market. *Hospital Corp.*, 807 F.2d at 1389.

17 Post-merger evidence proffered by a defendant in a Section 7 case has little value, even if
18 there is no evidence the defendant has actually manipulated its behavior to avoid liability.
19 Where post-acquisition evidence "*could arguably* be subject to manipulation" by the party
20 offering it as evidence, courts have held that post-acquisition evidence has limited probative
21 value. *Chi. Bridge*, 534 F.3d at 435 (emphasis in original); *see also Hosp. Corp.*, 807 F.2d at
22 1384 ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is
23 entitled to little or no weight."); *Whole Foods*, 548 F.3d at 1047 (Tatel, J., concurring). In
24 declining to attach significant weight to post-acquisition evidence, courts have not required that
25 the government actually demonstrate a defendant has deliberately altered its behavior to escape
26 liability.

27 In any event, Bazaarvoice's own economic expert concedes that there have been
28 widespread price increases since the consummation of the transaction. While Bazaarvoice seeks

1 to rationalize each of its post-merger price increases, claiming all price increases were associated
2 with the purchase of new products or services, there is reason to doubt that this is true. *See* GX-
3 131 (Dillard’s Dep. 46:13-47:15); GX-337. Even if it were accurate, the most likely explanation
4 is that Bazaarvoice created an “appearance of competitiveness” that will likely disappear once
5 this lawsuit has been resolved. *Chi. Bridge*, 534 F.3d at 435.

6 **2. *Testimony from Customers in Response to Vague Questions About Whether They Feel***
7 ***They Have Been “Harmed By” or Are “Concerned About” the Merger are Entitled to***
8 ***Little if Any Weight.***

9 During discovery Bazaarvoice took a series of telephonic and live depositions from a
10 selected group of companies that use PRR platforms. The majority of these depositions were
11 noticed under Fed. R. Civ. P. 30(b)(6). Bazaarvoice’s examinations were abbreviated, averaging
12 less than an hour each (with the shortest lasting just 9 minutes). This testimony must be viewed
13 in the proper context.

14 In addition to the evidentiary issues noted below, Bazaarvoice did not appear to use an
15 unbiased, systematic method to select these deponents. Rather, it selected several PRR users that
16 for a variety of idiosyncratic reasons selected a fringe competitor, developed an in-house solution
17 or determined they did not need a PRR platform. The presence of these other alternatives in the
18 market, however, is not surprising. It is also not harmful to the government’s case.

19 In order to win a Section 7 case, the government does not need to prove a merger will
20 create a monopoly. In *H&R Block*, for example, the court held that the defendants’ proposed
21 acquisition violated Section 7, even though their combined post-merger market share would have
22 been less than thirty percent. 833 F. Supp. 2d at 44, 72. In that case, more than sixty percent of
23 consumers, representing roughly 25 million Americans, purchased a product in the relevant
24 market from one of the eighteen other competitors in the market—not one of the merging parties.
25 *Id.* at 44, 73. Even if all 25 million consumers offered the same type of testimony in that case
26 that Bazaarvoice seeks to introduce here, it would not have altered the outcome.

27 In this case, the mere fact that fringe competitors and in-house solutions serve some
28 customers cannot shield the transaction from liability. The transaction’s competitive impact
must be evaluated in the context of the broader market. Accordingly, when assessing the market

1 and the competitive significance of the remaining competitive alternatives, the court should place
 2 greater weight on more systematic data in the Bazaarvoice sales opportunity database, HTDWD
 3 emails, and Bazaarvoice's and PowerReviews' contemporaneous business documents. *See supra*
 4 §§ III.A & III.C

5 The customer testimony offered by Bazaarvoice is also fraught with evidentiary issues.
 6 During these depositions Bazaarvoice routinely asked the company representative whether his or
 7 her company had been "harmed" by the merger. For example,

8 Q. Do you believe that the merger of Bazaarvoice and Power Reviews
 has harmed your company?

9 MR. LEPORE: Objection, foundation, form.

10 THE WITNESS: I don't really think of it in those terms. I don't know.
 Harmed? I don't know, I mean -- I mean, I -- probably not, but, I
 11 mean, I don't know -- like, has it harmed our company? I don't --
 after the merger, I mean, nothing changed. Nothing -- it wasn't,
 12 you know -- because, like I said, I didn't know that they had
 merged until I was looking for a solution, another solution, and I
 was like: Oh, Power Reviews; and then: Oh, it's Bazaarvoice
 13 now. I mean, no. No. I -- we've managed to move forward, I
 guess.

14 GX-99 (Astral Brands Dep. 72:25-73:11). Bazaarvoice also asked customer representatives a
 15 similar question about whether they were "concerned" about the merger. For example,

16 Q. Have you given any thought to the acquisition of PowerReviews
 by Bazaarvoice?

17 A. I have not.

18 Q. Would it be fair to say that you're not concerned about the merger?

19 MS. BRODY: Objection. Leading.

A. It would be fair to say that I'm not concerned about the merger.

20 GX- 95 (Abe's of Maine Dep. 23: 11-18).

21 Setting aside the fact that Section 7 is a prophylactic statute and post-acquisition
 22 evidence regarding "harm" has little probative value (especially in light of the ongoing
 23 investigation and litigation), this sort of testimony is entitled to little—if any—weight. This
 24 testimony, which was gathered through a haphazard flurry of depositions during a three-month
 25 time period,¹² suffers from serious evidentiary shortcomings. First, the questions were vague and
 26 ambiguous. Bazaarvoice's counsel provided no explanation or context as to what he or she

27 _____
 28 ¹² Between March 28, 2013 and June 28, 2013, Bazaarvoice conducted more than 90 third-party
 depositions, averaging more than one deposition per day for most of fact discovery.

1 meant by “harmed” or “concerned.” Second, the questions, asked by a Bazaarvoice lawyer of a
2 witness noticed by Bazaarvoice, were often improperly leading. Fed. R. Evid. 611(c). Third, the
3 questions called for improper lay opinion. A lay witness’s opinion is only admissible if it is
4 “rationally based on the witness’s perception,” Fed. R. Evid. 701, and “not speculative,” *United*
5 *States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007). Bazaarvoice did not establish a proper
6 basis for such opinions. Fourth, the questions lacked proper foundation. For example,
7 Bazaarvoice failed to elicit testimony that these witnesses had actually given any thought to the
8 implications of the merger, let alone conducted the sort of “serious analysis” courts have
9 required from customer witnesses in other Section 7 cases. *Oracle*, 331 F. Supp. 2d at 1131.

10 This is not surprising. It may be rational for customers to remain uninformed about the
11 facts that will determine a merger’s likely competitive impact because it is costly gather all of the
12 necessary information to form a reasoned opinion. See Ken Heyer, *Predicting the Competitive*
13 *Effects of Mergers by Listening to Customers*, 74 Antitrust L.J. 87, 103-04 (2007). For example,
14 many PRR platform users Bazaarvoice deposed were in the midst of a multi-year contract at the
15 time of their deposition. See, e.g., GX-103 (B&H Photo Dep. 42:20-43:7). It would make little
16 sense for these customers to invest the resources necessary to fully vet the field of remaining
17 alternatives before the expiration of their current contracts.¹³

18 Rational ignorance, however, does not cure the inherent deficiencies in this type of
19 testimony. Pure speculation that is entirely unsubstantiated is, by definition, not helpful in
20 “determining a fact in issue.” Fed. R. Evid. 701. This testimony has no probative value.
21 Unsubstantiated customer testimony should carry no weight, particularly when it is contradicted
22 by an overwhelming amount of contravening evidence, as it is in this case. See *United States v.*
23 *Ivaco, Inc.*, 704 F. Supp. 1409, 1428 (W.D. Mich. 1989) (customer opinions that are not
24 supported by the other evidence in a Section 7 case are insufficient to offset the potential for
25 anticompetitive effects).

26
27 ¹³ At most, the responses that Bazaarvoice will highlight could stand for the proposition that the
28 PRR users do not *yet* believe that they have been harmed by the merger, or are not *yet* concerned
by the merger.

1 Customer testimony, depending on how it is gathered and how it is being used, can
2 sometimes provide useful information to a finder of fact in an antitrust case. But for the reasons
3 set forth above, the testimony from customers regarding whether they were concerned by the
4 merger or think that it has harmed them should be given no weight in this case. It is a sideshow
5 that is intended to distract the court's attention from the real issue in this case—whether
6 Bazaarvoice's acquisition of PowerReviews is reasonably likely to have an anticompetitive
7 effect.

8 **3. *Bazaarvoice's Public Interest Defense is Insufficient as a Matter of Law.***

9 Bazaarvoice has argued that the merger should be allowed because it is in the public
10 interest. But “a merger the effect of which ‘may be substantially to lessen competition’ is not
11 saved because, on some ultimate reckoning of social or economic debits and credits, it may be
12 deemed beneficial.” *Phila. Nat'l Bank*, 374 U.S. at 371. Moreover, “anticompetitive effects in
13 one market [cannot] be justified by procompetitive consequences in another.” *Id.* at 370. To the
14 extent that Bazaarvoice's defense is anything other than the lack of harm in the relevant market
15 (which fails on the facts), it is insufficient as a matter of law.

16 **IV. MOTION IN LIMINE TO EXCLUDE TESTIMONY FROM MR. GOLDBERG**

17 This Court should exclude the testimony of Defendant's industry expert Jason Goldberg
18 under Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26. Mr. Goldberg is a
19 digital media consultant who currently works at Razorfish, a Bazaarvoice business partner. He
20 submitted an expert report, a rebuttal expert report, and sat for a deposition.¹⁴ His reports are
21 largely a recitation of selected business experiences taken from memory, punctuated with his
22 own summaries of deposition testimony from this case. From this he offers a series of sweeping
23 and improper opinions. His testimony should be excluded or significantly limited for four
24 reasons: (1) he is not qualified; (2) he did not supply materials supporting his testimony, which
25 has precluded the United States from fully testing his conclusions; (3) his opinions are not
26 reliable; and (4) his opinions are not relevant.

27 _____
28 ¹⁴ Mr. Goldberg's expert report (“Report”), rebuttal report, and the transcript of his deposition
are attached.

1 **A. Mr. Goldberg is Not Qualified to Offer the Opinions Contained in his Reports.**

2 To offer expert testimony, a witness must qualify as an expert “by knowledge, skill,
3 experience, training, or education.” Fed. R. Evid. 702; *see also Pecover v. Elec. Arts Inc.*, 2010
4 WL 8742757, at *3 (N.D. Cal. Dec. 21, 2010). Expert opinion testimony offered by a witness
5 who does not qualify as an expert, or which is outside his area of expertise, is inadmissible. Fed.
6 R. Evid. 702; *Ralston v. Mortgage Investors Group, Inc.*, 2011 WL 6002640 (N.D. Cal. Nov. 30,
7 2011); *Pecover*, 2010 WL 8742757, at *6; *Walsh v. City of Richland*, 2005 WL 6201455, at *2
8 (E.D. Wash. Feb. 24, 2005).

9 Most of the opinions Mr. Goldberg offers are well outside any area of expertise he may
10 have. Mr. Goldberg’s educational background is murky. His resume states that he completed
11 three years toward a degree in “Computer and Information Systems” at University of California-
12 Irvine. Yet at his deposition, he mentioned two other areas of focus, Social Ecology and
13 Physical Science. Goldberg Dep. 90:15-91:19. His website (<http://www.retailgeek.com>), which
14 he uses to promote himself, touts a “formal education” in “cognitive psychology” (which at his
15 deposition, he acknowledged amounts to two courses he audited for no credit at University of
16 California-San Diego and a course he took online). *Id.* at 189:5-192:13.

17 As to PRR platforms, the subject of this case, Mr. Goldberg has scant experience. He
18 appears to draw on his three years of digital media work experience at Razorfish¹⁵ and his
19 previous employer CrossView as his primary qualification.¹⁶ Indeed, Mr. Goldberg has only
20 been involved in recommending a particular PRR platform twice (██████████
21 ██████████). *See* Goldberg Dep. 235:4-12, 236:23-238:5. Thus, he is not qualified to offer expert
22 testimony on the procurement of PRR platforms. *See Ralston*, 2011 WL 6002640, at *6
23 (expert’s 30 years of experience training and consulting mortgage brokers provided a sufficient
24

25 ¹⁵ Mr. Goldberg’s Report states that he is “VP of E-Commerce Strategy,” a title that suggests
26 some relevance to the products at issue here. Report at 1. But, the title he uses on his resume is
27 “Vice President Strategy, Content and Commerce Practice.” He explained that the “e-
commerce” label he used in his report is “de-emphasize[d]” at Razorfish. Goldberg Dep. 92:8-
93:7, 97:24-100:24.

28 ¹⁶ Prior to joining CrossView in 2010, Mr. Goldberg spent the prior 15 years focused on “in-
store” experiences. Goldberg Dep. 146:13-148:2.

1 basis for his testimony about “general practices of mortgage brokers” but not about a specific
2 type of loan with which he had very little experience).

3 Mr. Goldberg’s opinions are not limited to PRR or e-commerce. While Mr. Goldberg has
4 no education, training, or experience in economics and concedes that he is not an expert in
5 antitrust economics (or economics generally), Goldberg Dep. 155:20-25, he offers an array of
6 opinions regarding economic matters. These include opinions on price and/or quality effects,
7 availability of alternatives, entry barriers, competitive conditions, product substitution, including
8 substitution to self-supply, Report at 38, innovation effects, *id.* at 6, market shares, *id.* at 70, and
9 an improper opinion on the ultimate issue in this case, *id.* at 6 (“... I do not expect a reduction in
10 innovation or an increase in price as a result of Bazaarvoice’s acquisition of PowerReviews.”).
11 While an industrial organization economist *may* be qualified to offer opinions on such topics,
12 Mr. Goldberg is not so qualified. Accordingly, this testimony is inadmissible. *Berlyn, Inc. v.*
13 *Gazette Newspapers, Inc.*, 214 F. Supp. 2d 530, 536 (D. Md. 2002) (“general business
14 experience unrelated to antitrust economics does not render a witness qualified to offer an
15 opinion on complicated antitrust issues”); *see also Va. Vermiculite, Ltd. v. W.R. Grace & Co.-*
16 *Conn. & The Historic Green Springs, Inc.*, 98 F. Supp. 2d 729, 733 (W.D. Va. 2000) (“[M]arket
17 analyses for antitrust markets generally require some expertise in the field of industrial
18 organization.”).

19 **B. The Court Should Exclude Mr. Goldberg’s Testimony For Failure to Disclose**
20 **Materials.**

21 Mr. Goldberg’s reports rely heavily on work performed for Razorfish and CrossView
22 clients. The Court should exclude Mr. Goldberg’s testimony relating to current and former
23 clients. Mr. Goldberg claims to have drafted these sections of his reports from memory, without
24 reviewing any Razorfish or CrossView documents. Goldberg Dep. 220:17-221:7. Thus, he was
25 unable to fact-check his reports, *id.* at 222:4-223:3, 378:4-19, even though some of the events
26 described happened three years ago and Mr. Goldberg admits he has a “less [than] perfect
27 memory.” *Id.* at 236:5-11. In his deposition, Mr. Goldberg admitted that there were numerous
28 relevant documents that he drafted, edited, commented upon, reviewed, and had access to (but

1 which were not provided to the United States) during the time he was preparing his reports. *Id.*
2 at 118:3-125:11, 126:23-128:6. He also acknowledged that there are numerous highly relevant
3 facts in his head that he left out of his reports because he was concerned about client sensitivity.
4 *Id.* at 210:14-211:3. Indeed, the facts included in his reports are nothing more than “anecdotes
5 that came to mind” at the time, *id.* at 139:21-140:4, that he believed were not sensitive (though
6 Mr. Goldberg now admits that he has done an “imperfect job” distinguishing sensitive facts from
7 non-sensitive facts, *id.* at 208:6-21).

8 Bazaarvoice and Mr. Goldberg failed to provide the materials supporting the client
9 interactions Mr. Goldberg relied upon. This violates Rule of Civil Procedure 26 and warrants
10 exclusion of his testimony. *See* ECF No. 85. Having not received the materials from Mr.
11 Goldberg or Bazaarvoice, the United States subpoenaed Razorfish and CrossView. Bazaarvoice
12 moved to quash the subpoenas, *id.*, but Magistrate Judge Beeler did not do so and ordered
13 discovery, ECF No. 95. Bazaarvoice produced only a small number of Razorfish documents that
14 do not provide meaningful support for Mr. Goldberg’s assertions and cannot possibly constitute
15 the client materials he accessed during the time he prepared his reports. Because the United
16 States has not had, and will not have at trial, the materials necessary to effectively test the
17 reliability and limits of Mr. Goldberg’s recollection of his client interactions, testimony on those
18 subjects should be excluded.

19 **C. Mr. Goldberg’s Expert Opinions Are Not Reliable.**

20 The opinions of Mr. Goldberg that rest on his client anecdotes are not reliable and are
21 inadmissible. “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district
22 court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the
23 expert.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 157 (1999) (quoting *General Elec.*
24 *v. Joiner*, 522 U.S. 136, 146 (1997)). Here, there can be no doubt that Mr. Goldberg’s client
25 stories are just that—*ipse dixit* of Mr. Goldberg—his own assertions supported by nothing. Mr.
26 Goldberg took advantage of this in his reports by presenting his client anecdotes in a misleading
27 fashion. For example, his Report states: “As part of a site optimization project, I recommended
28 that [REDACTED] consider migrating its ratings and reviews from Bazaarvoice to Gigya.”

1 Report at 56. Not only did [REDACTED] not consider migrating to Gigya, Goldberg Dep.
2 369:4-19, but in his deposition Mr. Goldberg admitted that the passage in his Report referred to a
3 single conversation at an industry trade show and was not based on a rigorous analysis. *Id.* at
4 368:20-375:5.

5 Moreover, Mr. Goldberg's opinions are unreliable and inadmissible because he failed to
6 apply any methodology whatsoever in reaching his opinions. An expert's opinion must have "a
7 reliable basis in the knowledge and experience of his discipline." *Daubert v. Merrell Dow*
8 *Pharms., Inc.*, 509 U.S. 579, 592 (1993); *see also United States v. Redlightning*, 624 F.3d 1090,
9 1111 (9th Cir. 2010). The focus of this analysis is on "the soundness of [the expert's]
10 methodology." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (on
11 remand). In assessing that methodology, a critical issue is whether an expert's method "can be
12 (and has been) tested." *Daubert*, 509 U.S. at 593; *see also Cooper v. Brown*, 510 F.3d 870, 880
13 (9th Cir. 2007). "The proponent [of expert testimony] has the burden of establishing . . . that the
14 opinions offered are reliable." *Walker v. Contra Costa Cnty.*, 2006 WL 3371438, at *1 (N.D.
15 Cal. Nov. 21, 2006) (citing *Bourjaily v. United States*, 483 U.S. 171, 172 (1987)); *see also*
16 *Daubert*, 509 U.S. at 593 n.10. "[T]he party proffering the evidence must explain the expert's
17 methodology and demonstrate in some objectively verifiable way that the expert has both chosen
18 a reliable scientific method and followed it faithfully." *Daubert*, 43 F.3d at 1319 n.11.

19 In determining reliability, the court considers whether the "analysis 'undergirding the
20 expert's testimony falls within the range of accepted standards governing how [experts in the
21 relevant field] conduct their research and reach their conclusions.'" *Pecover*, 2010 WL 8742757,
22 at *4 (quoting *Daubert*, 43 F.3d at 1317). For expertise gained through industry experience, as is
23 the case with Mr. Goldberg, the expert "must establish how his experience provides a basis for
24 and leads to the conclusions that he reaches." *Ralston*, 2011 WL 6002640, at *4. That
25 experience must provide a knowledge base that goes beyond "subjective belief or unsupported
26 speculation." *Samuels v. Holland Am. Line-USA Inc.*, 656 F.3d 948, 952 (9th Cir. 2011) (citing
27 *Daubert*, 509 U.S. at 590); *Perez v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 3116355, at *5-*7
28 (N.D. Cal. July 31, 2012) (testimony not replicable, and therefore not reliable and excluded,

1 because expert could not identify methodology for selecting studies and data relied upon, other
2 than his own experience).

3 Mr. Goldberg’s opinions all suffer from the same flaw—they are based on subjective
4 belief and cannot be replicated. When asked about the methodology he used to reach an opinion
5 regarding the impact of the transaction on the availability of PRR platform providers, Mr.
6 Goldberg “struggle[d] to specifically say.” Goldberg Dep. 252:23-253:18. Mr. Goldberg was
7 also unable to provide responsive answers when asked if his methodology was prone to errors
8 and what he had done to control for errors. *Id.* at 276:10-278:17. He admitted that his
9 methodology could not be replicated by someone else because “there’s no other human being
10 that has the exact same knowledge and flaws that I have and, therefore—could apply those in
11 exactly the same way to reach the exact same conclusion.” *Id.* at 253:19-254:8. Eventually, Mr.
12 Goldberg “[came] up with a label” for his methodology: “brilliant insight.” *Id.* at 275:13-19.
13 Mr. Goldberg’s inability to explain his methodology, or explain how his experience provides a
14 basis for his conclusions, is fatal to his testimony. *See Claar v. Burlington N. R.R. Co.*, 29 F.3d
15 499, 502 (9th Cir. 1994).

16 Though Mr. Goldberg offers various opinions regarding the relative competitiveness of
17 PRR platform vendors in his reports, *see, e.g.*, Report at 51, in his deposition, Mr. Goldberg
18 admitted that he did not compare them using a “set of objective criteria,” Goldberg Dep. at 86:3-
19 25, and that he did not consider (or even know, *see, e.g., id.* at 75:7-12) the number of clients
20 each PRR platform provider had. *Id.* at 88:6-17. For example, in his deposition, Mr. Goldberg
21 could point to no analysis he had performed in offering an opinion regarding the relative
22 strengths of PowerReviews and Reevoo. *Id.* at 292:12-295:4. Even in the rare instance where
23 Mr. Goldberg refers to actual analysis he performed, he declined to actually provide his analysis
24 because it was contained only within his “mental scratch pad.” *Id.* at 280:8-285:2.

25 Mr. Goldberg performed no research that would allow him to extrapolate from his own
26 experiences. He based the opinions outlined in his reports on his relatively limited personal
27 experiences and made no attempt to conduct a systematic analysis of the use of PRR even by all
28 Razorfish clients, all Publicis (Razorfish’s parent) clients, or all CrossView (Mr. Goldberg’s

1 former employer) clients. *Id.* at 132:18-133:2, 142:3-7. In fact, in preparing his reports, Mr.
2 Goldberg “did not do what [he] would consider to be a systematic study” of the social commerce
3 industry. *Id.* at 200:7-15. These flaws render his testimony inadmissible. *See Walker*, 2006 WL
4 3371438, at *1-*2 (expert fire chief’s testimony about “standard” practices regarding a task he
5 had performed over 100 times was not reliable and inadmissible because he had done no
6 research regarding what others do at his or other fire stations); *Pecover*, 2010 WL 8742757, at *7
7 (testimony excluded because expert provided no methodology for showing that the anecdotal
8 quotations were “representative of all or even most critics’ opinions.”).

9 **D. Mr. Goldberg’s Testimony Is Not Relevant.**

10 Expert testimony under Rule 702 must be relevant. *Daubert*, 509 U.S. at 589;
11 *Redlightning*, 624 F.3d at 1111. An expert’s opinion is relevant if it will “help the trier of fact to
12 understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702; *see also Daubert*,
13 509 U.S. at 591 (identifying the “helpfulness” requirement); *Primiano v. Cook*, 598 F.3d 558,
14 564 (9th Cir. 2010); *United States v. W.R. Grace*, 504 F.3d 745, 759 (9th Cir. 2007). Expert
15 testimony, therefore, that does not “address an issue beyond the common knowledge of the
16 average layman” is considered irrelevant and inadmissible. *United States v. Vallejo*, 237 F.3d
17 1008, 1019 (9th Cir. 2001); *see also Pecover*, 2010 WL 8742757, at *6. In making this
18 determination, courts consider whether the trier of fact can “receive appreciable help” from the
19 expert’s testimony. *United States v. Rahm*, 993 F.2d 1405, 1417 (9th Cir. 1993) (citation
20 omitted). Even if expertise is required to perform a rigorous analysis of a subject, expert
21 testimony may not be required when the subject is a matter of common sense. *Pecover*, 2010
22 WL 8742757, at *6.

23 Courts exclude expert opinions that provide nothing more than a “chronological picture”
24 or narrative of the facts of the case. *Johns v. Bayer Corp.*, 2013 WL 1498965, at *28 (S.D. Cal.
25 Apr. 10, 2013). Triers of fact do not need the help of an expert to review the evidence and
26 develop background knowledge of the facts surrounding the case. *Id.*

27 Mr. Goldberg’s reports do not aid the factfinder in understanding the evidence or
28 determining a fact in issue. In his Report, Mr. Goldberg explained his assignment in this matter:

1 “. . . I was asked to provide my opinions on a range of topics including whether the merger will
2 have a detrimental effect on my clients because of the reduction in vendor choice for the
3 provision of ratings and reviews services.” Report at 4. Importantly, his Report does not
4 describe any methodology that might be used to extrapolate beyond Mr. Goldberg’s own
5 relatively few relevant clients, nor does Mr. Goldberg assert, much less explain, that his clients
6 are representative of the marketplace more generally.

7 Moreover, Mr. Goldberg devotes much of his reports to a “chronological picture” of the
8 development and growth of ratings and reviews, as well as other social commerce tools. *E.g.*,
9 Report at 39-46. The sources Mr. Goldberg cites to support this chronology consist largely of
10 deposition transcripts, news articles, and third-party market research studies. *Id.* “None of this
11 evidence or testimony requires the providence of an expert.” *Johns*, 2013 WL 1498965, at *28.
12 Thus, his testimony is so limited, that it is not relevant.

13 * * * * *

14 For the reasons set forth above, the Court should exclude Mr. Goldberg’s testimony
15 because he is not qualified by knowledge, skill, training, education, or experience to offer any
16 expert opinion in this case. In the event the Court should not exclude Mr. Goldberg’s testimony
17 in its entirety, it should exclude as unreliable and/or irrelevant any testimony or opinions
18 regarding: the impact of the merger on price, quality, innovation, or consumer choice;
19 competition generally; whether products are substitutes; product market definition; market
20 shares; the relative strength of PRR platform providers; entry barriers; deposition summaries;
21 industry chronologies or trends; and all client anecdotes.

22 **V. CONCLUSION**

23 Because of its acquisition of PowerReviews, Bazaarvoice has the power to significantly
24 raise price to many customers, and does not need to compete as vigorously in developing new
25 features for its PRR platform. The Court should, therefore, enter judgment for the United States
26 and order a remedy that will restore the competition the acquisition eliminated.

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Respectfully submitted by:

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