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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 REPLY**
MEMORANDUM IN SUPPORT OF
PLAINTIFF’S MOTION FOR ENTRY
OF FINAL JUDGMENT

19 **(REDACTED)**

20 Judge: Hon. William H. Orrick
Hearing Date: April 2, 2014
21 Time: 2 p.m.

TABLE OF CONTENTS

1

2 INTRODUCTION..... 1

3 ARGUMENT..... 1

4 **A. Bazaarvoice Must License Additional Assets To The Divestiture**

5 **Buyer If The Divestiture Sale Will Not Transfer A Large Number**

6 **Of Customers To The Divestiture Buyer. 2**

7 **B. The PFJ Compensates Bazaarvoice For The Cross-Network**

8 **Syndication Services It Is Required To Provide To The Divestiture**

9 **Buyer. 5**

10 **C. The PFJ Does Not Prevent PowerReviews Customers From**

11 **Switching To Bazaarvoice Before The Divestiture Sale. 6**

12 **D. Bazaarvoice Must Release All Current Or Former Employees**

13 **Who Work For The Divestiture Buyer From All Trade-Secret**

14 **Restrictions Related To R&R Technology. 6**

15 **E. To Gain Traction In The Market, The Divestiture Buyer Must Be**

16 **Well Positioned To Solicit Bazaarvoice’s Customers. 7**

17 (1) *Customers Must Be Permitted To Terminate Their Existing*

18 *Agreements With Bazaarvoice At Will For A Limited Time*

19 *Following The Divestiture Sale. 7*

20 (2) *Requiring Bazaarvoice To Provide A List of Customers That*

21 *Signed Agreements Since The Merger Closed Will Compensate*

22 *Those Customers For The Competition Extinguished By The*

23 *Merger..... 9*

24 **F. A Special Master Is Necessary To Ensure Bazaarvoice Complies**

25 **With The Final Judgment. 9**

26

27

28 CONCLUSION 11

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FEDERAL CASES

Int’l Salt Co. v. United States,
332 U.S. 392 (1947)..... 1

Sukumar v. Direct Focus Inc.,
224 Fed. App’x. 556, 560 (9th Cir. 2007) 10

United States v. Coca-Cola Bottling Co. of Los Angeles,
575 F.2d 222 (9th Cir. 1978) 5

United States v. Suquamish Indian Tribe,
901 F.2d 772 (9th Cir. 1990) 10

FEDERAL RULES

Fed. R. Civ. P. 53 9

OTHER AUTHORITIES

Babu Nahata, Krzysztof Ostaszewski & Prasanna Sahoo,
Buffet Pricing, 72 J. Bus. 2, 215 (Apr. 1999) 5

1 **INTRODUCTION**

2 Bazaarvoice has narrowed the remaining issues in dispute in this litigation by accepting
3 many of the remedial measures the United States proposed in its Final Judgment (the “PFJ”).
4 The company has agreed to sell all of the assets it acquired from PowerReviews, and it has
5 agreed to assume additional obligations beyond divestiture to restore competition in the R&R
6 market. Bazaarvoice not only concedes relief beyond divestiture is proper, it has embraced the
7 majority of the provisions in the PFJ and incorporated them into its own remedy proposal.

8 While Bazaarvoice’s proposal adopts much of the relief described in the PFJ, the parties’
9 views still diverge in a few critical areas. Bazaarvoice has objected to certain key provisions
10 proposed by the United States and asked the Court to make several modifications to the PFJ.
11 Where Bazaarvoice’s proposal deviates from the PFJ, however, the company’s position either
12 ignores the Court’s factual findings or improperly dismisses the underlying rationale for a
13 disputed provision.

14 Simply put, Bazaarvoice has failed to articulate any legitimate basis for modifying the
15 terms of the PFJ, and its requested modifications to the PFJ erode the relief that is necessary to
16 fully restore competition. Accordingly, the United States respectfully requests that the Court
17 enter the PFJ without incorporating Bazaarvoice’s proposed changes.¹

18 **ARGUMENT**

19 Bazaarvoice largely concedes the relief proposed by the United States is appropriate to
20 remedy the Section 7 violation found by the Court in this case.² In its opposition filing,
21 Bazaarvoice agreed to:

- 22 (1) sell all of the assets it acquired from PowerReviews;

23 ¹ The United States has attached an Amended PFJ, which incorporates an additional appendix to
24 describe the calculation Bazaarvoice must perform before filing the certification required under
Paragraph IV.H in the PFJ. *See infra* n.6.

25 ² Determining the scope of the relief that is necessary to remedy a Section 7 violation is a case-
26 specific inquiry. *Int’l Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947). Bazaarvoice’s
27 reliance on the consent decree in *United States v. Heraeus*, therefore, is misplaced. *See Opp’n*
Mot. at 13-14. The relief that was necessary and appropriate to address the violation in that case
has no bearing on the scope of the relief that is necessary to restore competition in this case.

- 1 (2) [REDACTED]
- 2 (3) [REDACTED]
- 3 (4) [REDACTED]
- 4 (5) [REDACTED]
- 5
- 6 (6) [REDACTED]
- 7 (7) provide transitional services, including moderation, to the divestiture buyer;
- 8 (8) [REDACTED] and
- 9 (9) provide notice to the Department of Justice if it intends to enter any agreement to
- 10 purchase assets related to R&R technology with a value exceeding \$10 million.

11 Opp'n Mot. at 6-7. These provisions are not in dispute and should be included in the Final
 12 Judgment. Other provisions in the PFJ remain subject to outstanding Bazaarvoice objections.
 13 For the reasons discussed below, the Court should decline to modify the PFJ in response to
 14 Bazaarvoice's opposition.

15 **A. Bazaarvoice Must License Additional Assets To The Divestiture Buyer If The**
 16 **Divestiture Sale Will Not Transfer A Large Number Of Customers To The**
 17 **Divestiture Buyer.**

18 Before the merger, PowerReviews was the only rival to Bazaarvoice that had achieved
 19 any meaningful level of commercial success. Mem. Op. ¶ 181. Accordingly, to step into the
 20 position PowerReviews would have occupied today absent the merger, the divestiture buyer must
 21 acquire a viable R&R platform with an established base of customers. Without these assets, the
 22 divestiture buyer will be unable to quickly achieve the competitive significance that
 23 PowerReviews would have occupied today absent the transaction. Paragraph IV.H of the PFJ

24 ³ In its opposition brief, Bazaarvoice claimed the PFJ requires Bazaarvoice to enter a *cross-*
 25 *license* with the divestiture buyer. Opp'n Mot. at 7. This is not correct. The divestiture buyer is
 26 not obligated to license its intellectual property to Bazaarvoice. PFJ ¶ V.D. Paragraph V.D in
 27 the PFJ is necessary to ensure Bazaarvoice will not raise the buyer's costs through litigation
 related to IP rights that became commingled as a result of the transaction. Mot. at 10.
 Bazaarvoice does not need the same protection because [REDACTED]

1 establishes a benchmark for determining whether a viable R&R platform with a critical mass of
2 customers, weighted by revenue, will be transferred to the divestiture buyer through the sale of
3 the PowerReviews assets. If this benchmark is not met, Bazaarvoice must license a copy of the
4 then-current version of the Bazaarvoice R&R platform to the divestiture buyer.

5 When establishing this benchmark, it would have been reasonable for the United States to
6 insist that Bazaarvoice transfer the contracts for every customer that was using the
7 PowerReviews Enterprise R&R platform at the time of the acquisition to the divestiture buyer.
8 The United States recognizes, however, that transferring all of these contracts is no longer
9 possible due to churn in the PowerReviews customer base.⁴ The United States proposed a more
10 conservative benchmark—80% of PowerReviews customers, weighted by revenue—that
11 accounts for reasonable churn in the PowerReviews customer base, while still ensuring that the
12 divestiture buyer receives a viable R&R platform with a critical mass of customers. If this
13 benchmark is met, divestiture of the PowerReviews assets, combined with the other provisions in
14 the PFJ, will effectively restore the lost competition.

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20 ⁴ As the United States noted in its remedy brief, a number of enterprise customers stopped using
21 the PowerReviews platform after the merger closed. Based on Bazaarvoice's initial response to
22 the Court's Order Regarding Remedy Phase, ECF No. 248 ("Remedy Order"), the United States
23 estimated that [REDACTED] customers were using the PowerReviews Enterprise R&R platform at the time
24 of the merger and [REDACTED] customers continued to use the platform as of January 2014. After the
25 United States filed its brief, Bazaarvoice provided additional information that allowed the United
26 States to improve the accuracy of its estimates through the consolidation of certain parent and
27 subsidiary accounts. The United States now estimates that approximately [REDACTED] customers were
28 using the PowerReviews Enterprise R&R platform at the time of the merger. Using the same
information, the United States estimates that the total number customers using the
PowerReviews Enterprise R&R platform in January 2014, accounting for customers that first
started using the platform after the merger closed, [REDACTED]. The
United States estimates that only around [REDACTED] customers that were using the PowerReviews
enterprise platform at the time of the merger were still using the PowerReviews Enterprise R&R
platform in January 2014. These revised estimates have no impact on the relief requested in the
PFJ.

1 In opposing this provision, Bazaarvoice claims the 80% benchmark bears no connection
2 to the unlawful transaction's anticompetitive effects,⁵ because "[t]here is no evidence, and DOJ
3 never claimed at trial, that the source of PowerReviews' competitive significance was in the
4 amount of customer 'revenue' it was generating at the time of the acquisition." This argument,
5 however, is merely an attempt to re-litigate whether commercial success is an appropriate proxy
6 for measuring a firm's competitive significance in the R&R market. Contrary to Bazaarvoice's
7 view, when the Court concluded that fringe R&R competitors had not, and would not, effectively
8 replace PowerReviews, it found that an R&R provider's past commercial success provides an
9 accurate and reliable indication of the firm's competitive significance. Mem. Op. ¶ 181. The
10 benchmark proposed by the United States is weighted by revenue, a measurement of commercial
11 success, to ensure that the divestiture buyer assumes a customer base comparable to that which
12 PowerReviews would have held absent the merger. The revenue-weighted benchmark, therefore,
13 has a direct relationship to Bazaarvoice's violation of the statute.

14 At the time the United States filed its remedy brief, the size of the PowerReviews
15 enterprise customer base exceeded this benchmark.⁶ There is no guarantee, however, that the
16 benchmark will be still exceeded at the time of the divestiture sale. As more time passes,
17 customers may migrate to Bazaarvoice's platform or leave the PowerReviews platform for
18 another competitor. Indeed, Bazaarvoice's own opposition brief affirms the company's desire to
19 continue migrating customers away from the PowerReviews platform up until the time of the
20 divestiture sale. Opp'n Mot. at 18-19.

21 _____
22 ⁵ Bazaarvoice also seems to imply that the 80% benchmark is too high because it fails to "match
23 the competitive realities of a private SaaS businesses, and reflect a lower percentage as time
24 lapses and churn invariably increases." Opp'n Mot. at 15. Bazaarvoice fails to reconcile this
argument with the high switching costs in the R&R market, *see* Mem. Op. ¶ 253, and
PowerReviews' historic retention rates in excess of [REDACTED]

25 ⁶ After the United States filed its remedy brief, the parties discussed the methodology used by the
26 United States to estimate the percentage of legacy PowerReviews enterprise customers,
27 measured by revenue, that are still using the PowerReviews Enterprise R&R platform. For
clarification, Exhibit A to this brief is a supplemental Appendix B to the PFJ, and it describes the
methodology for the required calculation. Bazaarvoice should use the same methodology used
by the United States when performing the calculation that is required for the certification
described in Paragraph IV.H of the PFJ.

1 As customers leave the PowerReviews platform, the competitive viability of the
 2 PowerReviews assets undeniably diminishes. Paragraph IV.H in the PFJ is necessary to ensure
 3 that the buyer acquires a set of assets from which it can build a significant competing business.⁷
 4 Without this provision, Bazaarvoice could benefit from the decline in the competitive
 5 significance of the PowerReviews assets caused by lack of investment and customer attrition. In
 6 that case, competition would not be restored, and Bazaarvoice would effectively achieve its goal
 7 of reducing competition in the R&R market. A conditional license to the then-current version of
 8 Bazaarvoice's platform is thus "necessary to eliminate the effects of an acquisition" to ensure
 9 that Bazaarvoice does not improperly benefit through its violation of the antitrust laws. *United*
 10 *States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 229 (9th Cir. 1978).

11 **B. The PFJ Compensates Bazaarvoice For The Cross-Network Syndication Services It**
 12 **Is Required To Provide To The Divestiture Buyer.**

13 Bazaarvoice [REDACTED]
 14 [REDACTED] objected that the PFJ requires these services to be provided "for free."
 15 Opp'n Mot. at 16. Under the terms of the PFJ, however, the right to receive syndication services
 16 from Bazaarvoice is an asset that the buyer will purchase at the time of the divestiture sale. PFJ
 17 ¶ II.D.3. Thus, the asset purchase price includes payment for the right to receive these services.
 18 Just like the food in an all-you-can-eat lunch buffet is not "free," the syndication services that
 19 Bazaarvoice is required to provide to the divestiture buyer under the PFJ are not "free." *See*
 20 *Babu Nahata, Krzysztof Ostaszewski & Prasanna Sahoo, Buffet Pricing*, 72 J. Bus. 2, 215 (Apr.
 21 1999). Accordingly, Bazaarvoice's suggestion that the syndication provision proposed by the
 22 United States violates the Fifth Amendment is clearly without merit. *See* Opp'n Mot. at 18.

23 [REDACTED]
 24 [REDACTED]
 25 _____
 26 ⁷ If the PowerReviews assets have become so diminished that the benchmark is not met, then a
 27 license to the then-current Bazaarvoice platform is the only available asset that is likely to
 provide the divestiture buyer with the technology necessary to be competitive.

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 **C. The PFJ Does Not Prevent PowerReviews Customers From Switching To**
6 **Bazaarvoice Before The Divestiture Sale.**

7 Bazaarvoice mistakenly claims that the PFJ “prohibits customers that wish to switch to
8 Bazaarvoice’s platform prior to the time that the remedy is ordered from being able to do so.”
9 Opp’n Mot. at 19. The PFJ only requires Bazaarvoice to transfer the contracts for customers
10 using any PowerReviews R&R platform at the time of the divestiture sale. It does not impose
11 any affirmative obligation on those customers to continue using a PowerReviews R&R platform.
12 Customers that are currently using any PowerReviews platform are free to switch to other
13 providers, including Bazaarvoice. In fact, the remedy proposed by the United States specifically
14 accounts for possible customer attrition. Paragraph IV.H in the PFJ requires Bazaarvoice to
15 license a copy of its platform to the divestiture buyer if a critical mass of customers is no longer
16 using PowerReviews technology at the time of the divestiture sale.

17 **D. Bazaarvoice Must Release All Current Or Former Employees Who Work For The**
18 **Divestiture Buyer From All Trade-Secret Restrictions Related To R&R Technology.**

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 The PFJ requires Bazaarvoice to waive *all* trade-secret restrictions that are related to *any*
27 R&R technology. PFJ ¶ IV.C. This provision will allow the buyer to leverage the expertise of

1 Bazaarvoice employees to close the innovation gap created by the transaction. [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] The

9 illegal transaction allowed Bazaarvoice to obtain unfettered access to all of PowerReviews’ trade
 10 secrets, and the company has used them to improve its own products. Mot. at 8 n.7. Allowing
 11 the divestiture buyer to have access to comparable information from Bazaarvoice is necessary to
 12 compensate for the lack of similar post-merger investments in the PowerReviews platform.

13 **E. To Gain Traction In The Market, The Divestiture Buyer Must Be Well Positioned**
 14 **To Solicit Bazaarvoice’s Customers.**

15 Bazaarvoice has objected to two provisions in the PFJ that are intended to allow the
 16 divestiture buyer to gain traction in the market through solicitation of Bazaarvoice’s customers.
 17 As discussed below, both of these provisions are necessary to effectively restore competition.

18 *(1) Customers Must Be Permitted To Terminate Their Existing Agreements With*
 19 *Bazaarvoice At Will For A Limited Time Following The Divestiture Sale.*

20 Bazaarvoice objects to Paragraph IV.I in the PFJ, which requires Bazaarvoice to waive
 21 breach of contract claims against its customers if they switch to the divestiture buyer. While
 22 Bazaarvoice acknowledges that it has sued its customers under similar circumstances before,
 23 Opp’n Mot. at 20 n.19, the company insists that the Court should strike Paragraph IV.I from the
 24 PFJ. The company maintains this provision is unnecessary to restore competition because
 25 “PowerReviews has more Enterprise customers today than it did when Bazaarvoice acquired it.”
 26 Opp’n Mot. at 19. Bazaarvoice can only make this assertion because it takes credit for
 27 approximately [REDACTED] “new” PowerReviews enterprise sales that closed after the merger.

1 These “new” sales, however, were largely in the pipeline at the time of the merger, and there is
2 no reason to believe that PowerReviews would not have closed these deals as an independent
3 firm. *See* GX87 (Godfrey CID Dep. 131:12-132:5; 132:15-133:1) (approximately [REDACTED]
4 prospects that were already in the PowerReviews sales pipeline at the time of the merger elected
5 to license the PowerReviews platform between June 12, 2012, the date the acquisition closed,
6 and October 25, 2012).

7 Contrary to Bazaarvoice’s approach, sales that were in progress at the time of the merger
8 should be considered assets that Bazaarvoice acquired through the transaction, rather than
9 organic growth that occurred after the merger. Because these sales were not “new” post-merger
10 opportunities, the addition of these customers did not increase the competitive significance of the
11 PowerReviews assets relative to where PowerReviews was at the time of the acquisition, let
12 alone where it would have been today absent the merger. When accounting for customers that
13 began using the PowerReviews platform after the merger, Bazaarvoice should have deemed all
14 prospects in the sales pipeline at the time of the merger to be customers that were already using
15 the PowerReviews platform at the time the merger closed.⁸

16 The divestiture buyer needs an opportunity to overcome the disadvantage created by
17 PowerReviews’ customer losses and the lack of investment during the time it was owned by
18 Bazaarvoice. Requiring Bazaarvoice to waive breach of contract claims removes a barrier to
19 switching and gives the divestiture buyer a better chance of successfully winning business from
20 existing Bazaarvoice customers. These customers were denied the opportunity to have
21 PowerReviews compete independently for their business after the merger. Allowing these
22 customers to switch to the divestiture buyer without limitation rectifies to some extent the loss of

23 _____
24 ⁸ The approach used by the United States does not make the same error. Instead of including
25 post-merger sales in its inquiry, the United States evaluated changes within the set of
26 PowerReviews customers that were using the PowerReviews Enterprise R&R platform on the
27 date the merger closed. This methodology excludes all sales to customers that first began using
the PowerReviews Enterprise R&R platform after the merger closed because post-merger sales
appear to have been limited to customers that were prospects at the time of the merger. This was
the approach the United States used in its Motion for Entry of Final Judgment when it
determined that the PowerReviews customer base had declined after the merger. *See* Mot. at 11.

1 competition during the post-merger period and will provide a solid foundation for the divestiture
2 buyer to build its business going forward.

3 Contrary to Bazaarvoice's protests, the waiver is reasonably limited in both scope and
4 duration. If a customer switches to another R&R provider, Bazaarvoice's contract rights remain
5 intact. Moreover, this provision is only in effect for a limited time. The waiver expires at the
6 earlier of (1) the end of the customer's current contract; or (2) one year from the date of the letter
7 described in Paragraph IV.J of the PFJ.

8 *(2) Requiring Bazaarvoice To Provide A List of Customers That Signed Agreements*
9 *Since The Merger Closed Will Compensate Those Customers For The Competition*
Extinguished By The Merger.

10 Customers that have signed new contracts with Bazaarvoice since the merger closed have
11 been deprived of the benefits of price competition between Bazaarvoice and PowerReviews.
12 Using the information that is produced under Paragraph II.D.4 in the PFJ, the divestiture buyer
13 can immediately solicit these customers, allowing them to benefit from competition between
14 Bazaarvoice and the divestiture buyer. In objecting to this provision, Bazaarvoice complains that
15 it provides the divestiture buyer an "unfair advantage" when competing against Bazaarvoice.
16 Opp'n Mot. at 20. Bazaarvoice ignores, however, that it has had access to the same information
17 regarding legacy PowerReviews customers since the merger closed. Contrary to Bazaarvoice's
18 contentions, this provision is necessary to provide the buyer a real opportunity to compete for the
19 customers that signed agreements with Bazaarvoice when there was not another strong, viable
20 competitor in the market.

21 **F. A Special Master Is Necessary To Ensure Bazaarvoice Complies With The Final**
22 **Judgment.**

23 Bazaarvoice's suggestion that a court may only appoint a Special Master under
24 extraordinary circumstances is incorrect. The language of Rule 53 provides that a Special
25 Master may be appointed to "address . . . posttrial matters that cannot be effectively and timely
26 addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53
27 (a)(1)(C). And it is well established that district courts have broad discretion to appoint a Special

1 Master to “aid a district court in the enforcement of its decree.” *United States v. Suquamish*
2 *Indian Tribe*, 901 F.2d 772, 774 (9th Cir. 1990). The appointment of a Special Master is
3 particularly appropriate in this case because the task of continuously monitoring Bazaarvoice’s
4 compliance with the Final Judgment would be a significant burden on the Court. *Cf. Sukumar v.*
5 *Direct Focus Inc.*, 224 Fed. App’x. 556, 560 (9th Cir. 2007) (suggesting the district court appoint
6 a special master to inspect delivered goods for defects during the remedy phase of a breach of
7 contract action).

8 As described in the PFJ, the Special Master serves two distinct roles in ensuring
9 Bazaarvoice complies with the terms of the Final Judgment. First, the Special Master monitors
10 the divestiture process and effectuates the final sale if Bazaarvoice does not negotiate an
11 acceptable agreement within thirty days after entry of the Final Judgment. Second, the Special
12 Master ensures that Bazaarvoice complies with other conduct remedies in the PFJ. Bazaarvoice
13 has failed to articulate a compelling justification for modifying either provision in the PFJ.

14 While Bazaarvoice contends that it has already complied with the divestiture process
15 outlined in the PFJ, there is no guarantee that Bazaarvoice will actually sell the assets in a timely
16 fashion following entry of the Final Judgment. Bazaarvoice stands to benefit from any delay in
17 divestiture sale because delay puts off the creation of a new R&R competitor. The Special Master
18 will prevent this sort of gamesmanship.

19 The Special Master’s role in overseeing Bazaarvoice’s compliance with the conduct
20 obligations in the Final Judgment is also critical. Bazaarvoice contends that the Special Master’s
21 oversight is unnecessary because the behavioral provisions in the PFJ would also be outlined in
22 the divestiture sale agreement. The company claims its compliance is guaranteed because the
23 divestiture buyer will have the ability to assert a breach of contract claim if Bazaarvoice violates
24 the terms of the agreement. Opp’n Mot. at 21. Contractual relief, however, is not enough.

25 Unlike a typical counterparty in a private commercial transaction, Bazaarvoice has little
26 incentive to uphold its end of the bargain. Any step Bazaarvoice may take to undermine the
27 relief in the Final Judgment will weaken the divestiture buyer as a competitor, which ultimately

1 will benefit Bazaarvoice. Additionally, when pursuing such a breach of contract claim, the
2 divestiture buyer may prefer to request monetary relief rather than specific performance of the
3 contract's terms. An action for monetary damages would not protect competition and ensure that
4 Bazaarvoice complies with the Final Judgment. Such an action would only serve to protect a
5 single competitor—the divestiture buyer—at the expense of competition.

6 **CONCLUSION**

7 For the foregoing reasons and those set forth in its initial memorandum, the United States
8 respectfully requests that the Court enter the Amended Final Judgment proposed by the United
9 States.

10
11 Dated: March 12, 2014

Respectfully submitted by:

12
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EXHIBIT A

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PLAINTIFF'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION FOR
ENTRY OF FINAL JUDGMENT
(EXHIBIT A)

CASE NO. 13-CV-00133 WHO

APPENDIX B

This Appendix provides a step-by-step description of the procedures for performing the calculation that is required in Paragraph IV.H of the PFJ.

1. Calculate the total revenue (TR) that PowerReviews received between January 1, 2011 and June 11, 2012 from customers that were using the PowerReviews Enterprise R&R platform at the time of the merger. This fixed amount, which is derived from the Appendix A+B supplement that Bazaarvoice produced to the United States on February 4, 2014 (reflected in Table 1 on the next page), is [REDACTED]
2. Calculate retained revenue (RR), which is the total revenue PowerReviews received between January 1, 2011 and June 11, 2012 from customers that (1) are identified in Table 1; and (2) are using the PowerReviews Enterprise R&R platform at the time of the certification.
3. Divide RR by TR, and multiply the result by 100%.

TABLE 1

Remainder Of Document Filed Under Seal

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