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

13	United States of America,)	CASE NO.: 13-cv-0133 WHO
14	Plaintiff,)	DEFENDANT’S POST-TRIAL
15	v.)	BRIEF
16	Bazaarvoice, Inc.,)	Complaint Filed: January 10, 2013
17	Defendant.)	Judge: Hon. William H. Orrick III
18)	Trial Date: September 23, 2013
19)	

20
21 **PUBLIC VERSION**

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1 **I. INTRODUCTION**

2 Both sides agree that the issue in this case is whether other market forces could replace the
3 competitive constraint that PowerReviews would have provided had it not been acquired. With
4 trial now complete, the answer is apparent. PowerReviews has already been replaced, and,
5 accordingly, its merger with Bazaarvoice poses no threat to competition. Trial established that in-
6 house represents a commanding share of PRR installations, and that Bazaarvoice faces
7 “aggressive” additional competition in each of its accounts from Pluck, Gigya, Reevo, and a host
8 of other competitors. Potential entrants abound. Amazon, for one, has all the assets necessary to
9 sell PRR to websites and testified that it thinks about entering “almost daily.” Tr. 1625:24.¹
10 Amazon alone could eliminate any market power Bazaarvoice might hope to wield post-merger.

11 Bazaarvoice executives made statements in 2011 and 2012 that would give pause to
12 anyone concerned with antitrust policy. Several executives said, often in colorful language, that
13 they believed PowerReviews was their primary (or only) competitor and that the acquisition
14 would allow Bazaarvoice to raise prices and block additional competition. Other stakeholders,
15 however, including members of the board of directors, said at the time that they thought those
16 statements were wrong, occasionally in equally colorful language. Tr. 1394:1-15; DX1880.

17 More importantly, while talk of “permanent competitive moats” and “earthy” metaphors
18 rejecting those ideas can show what various business people involved in the merger thought at the
19 time, stopping with the documents as the government has done is not enough. The real legwork
20 must be done by analysis of market realities. Section 7 of the Clayton Act is not an intent-based
21 statute. As *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990), and other cases
22 demonstrate, courts applying the statute do not condemn mergers based on “bad documents”; they
23 examine competitive realities to determine whether the government (which bears the burden of
24 persuasion at all times) has proven a reasonable probability of competitive harm.

25 The government’s case here fails for three independent reasons.

26
27
28 ¹ The trial transcript is cited as “Tr.” “PFF” refers to Bazaarvoice’s Amended Proposed Findings of Fact, filed concurrently with this brief.

1 1. First, no matter how the relevant market is defined (or concentration measured), the
2 evidence cannot support a finding of actual or probable post-merger harm to competition.
3 Customers testified that they have many equally competitive alternatives to PowerReviews, and
4 therefore have not and will not suffer harm. Multiple competitors testified they compete
5 vigorously for PRR business or have the ability to expand and reposition quickly. Whatever
6 Bazaarvoice employees may have thought at the time of the PowerReviews acquisition, the
7 uncontroverted trial evidence shows Bazaarvoice continues to discount substantially, loses
8 customers to other solutions, and otherwise faces substantial discipline from market forces. The
9 government offered no analysis of post-merger pricing or innovation in response.

10 The government has failed to offer any supportable theory of market harm. Dr. Shapiro's
11 contentions that legacy PowerReviews customers and legacy Bazaarvoice customers would suffer
12 harm each collapsed under rigorous analysis, and he had to concede that (i) not every such
13 customer would suffer harm and (ii) he could not articulate any basis for distinguishing customers
14 that are likely to suffer harm from those that are not. His additional theory of harm to syndication
15 customers was abandoned before trial and, in any event, was proven wrong on the merits.
16 Syndication remains a small (though growing) part of the market, and customers can choose
17 whatever PRR provider they want and still get syndication from Bazaarvoice or other sources. In
18 the end, none of the government's theories of competitive harm survived scrutiny.

19 2. Second, any concern about prospective harm is negated by ease of entry and
20 repositioning. There are no barriers that would prevent sufficient expansion by existing firms or
21 entry by new firms. Smaller PRR players that Dr. Shapiro dismisses as "fringe" are aggressively
22 pursuing Bazaarvoice accounts, fighting for new accounts, and forcing Bazaarvoice to cut prices.
23 Many customers have already deployed robust in-house solutions, and many more could credibly
24 threaten to do so. Amazon could start licensing its "best in class" solution any day it wished, and
25 behemoths like Google and Oracle have all they need to begin selling PRR right away. The
26 prospect of any nontransitory increase in market prices is nil.

27 3. Third, the government did not even establish a prima facie case. By focusing only on
28 the IR500—long the specific focus of PowerReviews' marketing efforts—the government's

1 statistics inevitably inflated PowerReviews’ significance. The government’s IR500 data bore no
2 relationship to PRR revenues; failed to reflect the 10-to-1 disparity between Bazaarvoice and
3 PowerReviews; excluded brands (manufacturers); was based on a market definition that, without
4 any basis, excluded hotels, airlines, cruise lines, marketplaces, ticket vendors, and every other
5 customer not pigeon-holed as a retailer or manufacturer; and even ignored retailer sales through
6 Amazon Marketplace (with PRR by Amazon). The government equally disregarded supply
7 substitution. It assigned zero share to rapid entrants such as Amazon, Google, and Oracle; it
8 discounted the threat of supply from abroad; and it ignored the thousands of PRR customers
9 supplied by Amazon Webstore and smaller firms like Yotpo. In the end, the government’s
10 attempt to prove market shares—even in the narrow U.S. PRR market it alleged—was a complete
11 failure. And its efforts to limit the market to just PRR within the U.S. fared no better.

12 * * * * *

13 The customer evidence demonstrates, not only that the merger has caused no harm, but
14 that it has in fact benefitted customers and will continue to do so unless unwound. The merger
15 has expanded opportunities for customers in syndication and in obtaining better mid-market
16 solutions in addition to Bazaarvoice’s premium products; and Bazaarvoice’s investments in
17 research and development have outstripped the companies’ investments prior to the merger.

18 The ultimate question here is whether market forces will be allowed to work or whether
19 the process of growth through an efficient merger will be short circuited. The Ninth Circuit has
20 recognized that “in a competitive market, buying out competitors is not merely permissible, it
21 contributes to market stability and promotes the efficient allocation of resources.” *Syufy*, 903
22 F.2d at 673. The Court should heed the nearly unanimous customer testimony, the clear post-
23 merger evidence, and the sound counsel of the Ninth Circuit, and enter judgment for Bazaarvoice.

24 **II. KEY FACTS ESTABLISHED AT TRIAL**

25 **A. AS A RELATIVELY SMALL COMPANY IN A COMPETITIVE SPACE, BAZAARVOICE IS** 26 **AT A CRITICAL POINT IN ITS DEVELOPMENT**

27 Founded in 2005, Bazaarvoice has grown to provide solutions that help businesses
28 “capture and display online word of mouth about specific products and services.” PFF 13-14.

1 While Amazon and others pioneered the use of PRR online, Bazaarvoice led the way in
2 providing a commercial PRR solution to websites that had not developed their own solutions. *Id.*
3 14. The company has diversified to offer a suite of social commerce solutions, tracking the
4 evolution of the online commerce industry. *Id.* 15.

5 Despite its rapid growth, including becoming a publicly traded company in 2012,
6 Bazaarvoice has operated at a loss throughout its history. *Id.* 686-87. Going forward, the
7 company expects to further diversify its business by, among other things, (i) entering in the online
8 marketing space through its recent acquisition of Longboard Media, (ii) providing a broader suite
9 of social commerce products, and (iii) competing more directly with larger companies in the “Big
10 Data” space. *Id.* 73; *see also* Tr. 834:18-849:12. This evolution may lead to PRR and
11 syndication being given away to some customers. *Id.* 837:21-840:6; DX0574.

12 **B. POWERREVIEWS’ COMPETITIVE SIGNIFICANCE WAS LIMITED AND FADING**

13 PowerReviews competed aggressively against Bazaarvoice for certain retail customers,
14 especially in 2011. PFF 929-37. During the time of its “red ocean” strategy, it made a specific
15 effort to go after large Bazaarvoice accounts. *Id.* That strategy failed. PowerReviews converted
16 very few accounts and ultimately parted ways with the strategy’s architect. *Id.* 935, 938-43; Tr.
17 1717:9-11. In fact, PowerReviews captured only three Bazaarvoice IR500 accounts in the entire
18 period from 2009 through 2012. DX1883; Tr. 1043:9-1044:4, 1883:21-1884:9. By 2012,
19 PowerReviews realized it needed to refocus away from capturing Bazaarvoice customers and
20 toward differentiating itself in the market by offering a fuller suite to small and medium sized
21 businesses (a “blue ocean” strategy), appointing a new CEO to lead that effort. PFF 943.

22 Despite these turnaround efforts, PowerReviews simply failed to thrive in the market. Its
23 last few months resulted in massive operating losses. DX1387.001 at 8; Tr. 1884:19-1885:21.
24 Documentary and testimonial evidence show it had just \$5.4 million cash on hand at the time of
25 the acquisition, a reserve that would have been depleted by late 2012. GX0324 at 6; Tr. 392:21-
26 393:9. PowerReviews had earlier tried and failed to secure additional capitalization. PFF 1151.
27 It also was attempting to carry forward a policy of *increasing* its prices, a policy Bazaarvoice
28 ended when it acquired PowerReviews. Tr. 1894:10-1895:9.

1 While PowerReviews would not have survived long as an independent company targeting
2 Bazaarvoice's customers, it had assets that complemented Bazaarvoice's strategic vision. Its
3 retail customer relationships enhanced Bazaarvoice's network for gathering data and providing
4 syndication services. PFF 73. It also gave Bazaarvoice a down-market solution it previously had
5 not provided, allowing it to pursue a broader range of customers. *Id.* The financial models that
6 generated the purchase price Bazaarvoice paid for PowerReviews did not build in a premium for
7 potential future price increases because such increases would not be likely to work in light of
8 competitive conditions and would be inconsistent with Bazaarvoice's long-term strategy. *Id.* 61-
9 62. While the purchase price reflected the need to pay PowerReviews' investors a sufficient
10 premium to compensate them for their prior investments, it was not especially high. *Id.* 60. In
11 fact, outside parties viewed the purchase price for PowerReviews as "not great" and lower than
12 would normally be the target for a strong exit by a technology company. *Id.* 63.

13 C. CUSTOMERS HAVE A VARIETY OF PRR OPTIONS

14 The customers overwhelmingly testified that they have a wide array of options for PRR
15 services, and that the options available in 2013 are much more diverse than those available in
16 2011. In-house solutions are growing and have become more accessible since 2011. *Id.* 143-50;
17 Tr. 1458:24-1461:4, 1495:25-1496:3, 1496:14-1497:13, 1868:6-1875:18, 2090:4-2091:1. Ed
18 Macri testified that his company, Wayfair, developed a strong solution in a matter of weeks. PFF
19 236. Signal Group built its own in 15 to 20 hours of work by a single programmer. *Id.* 229.
20 Even though Sears chose to spend more time and resources on its internally developed solution
21 (which powered Sears.com and other Sears-owned sites including Kmart.com), that decision
22 wound up saving the company a substantial amount of money. Tr. 1681:13-1682:21. Smaller
23 companies have done the same. PFF 247-49.

24 Many customers have chosen to obtain simpler PRR solutions so they can focus on other
25 strategies. *Id.* 49; Tr. 1482:5-11. For them, basic ("widget") PRR solutions make sense, and the
26 government has admitted that these customers will not suffer harm from the transaction. *Id.*
27 2081:8-11. Moreover, many e-commerce platforms like Magento and hybris have built-in PRR
28 functionality, and others like Demandware and IBM's Websphere are designed so that switching

1 PRR functionality among competing vendors is as simple as inserting a “cartridge.” PFF 168; Tr.
2 1497:6-13. Customers seeking a full-service commercial solution also have options. Hayneedle,
3 InterContinental Hotels Group (IHG), AutoZone, Princess Cruises, Southwest, New Era, and
4 Golfsmith all testified that they could turn to providers like Pluck, Gigya, and Reevo in addition
5 to Bazaarvoice. PFF 317, 342, 347, 542, 591. Provider integration into e-commerce platforms
6 can help smaller players land major accounts, as happened when IBM introduced Pluck to
7 L’Oreal as an alternative to Bazaarvoice for PRR. DX1009; Tr. 2087:21-2088:10.

8 **D. NEW FIRMS HAVE SIGNIFICANT ABILITY AND INCENTIVE TO COMPETE, AND**
9 **TECHNOLOGY GIANTS COULD CAPTURE SUBSTANTIAL MARKET POSITION**

10 As described by Bazaarvoice’s industry expert Jason Goldberg, the government’s industry
11 expert Professor Chris Dellaroca, and the customer witnesses, both PRR and social commerce
12 more broadly are highly dynamic spaces. PFF 85-95.² Indeed, Gareth Morgan of
13 InterContinental Hotel Group testified that he cannot predict what options might be available to
14 him for PRR services in just 18 months because the industry is so dynamic. Tr. 1360:21-1361:7.

15 In just the last two years, an array of companies that previously did not focus on
16 Bazaarvoice customers have started adding PRR functionality to their offerings, enhancing
17 existing PRR functionality, or shifting customer focus strategies, to take advantage of the
18 opportunities created by PowerReviews’ exit. DX1882 at 19; Tr. 1472:12-1474:15. These
19 include Pluck, Gigya, Reevo, eKomi, Lithium, and several others. PFF 271-438, 468-74, 657.

20 Amazon has particular importance here. First, it is an innovation competitor, and
21 Bazaarvoice must keep its PRR platform up to high standards; otherwise its customers will not be
22 able to compete with Amazon. PFF 610-24. Second, it provides a web platform with a PRR
23 solution that has been adopted by many small to medium customers and even household names
24

25 ² Mr. Goldberg’s trial testimony should remove any doubt that his extensive expertise will aid
26 the Court in understanding the facts of this case. *See Hangarter v. Provident Life & Acc. Ins.*
27 *Co.*, 373 F.3d 998, 1018 (9th Cir. 2004). The government’s attorney did not cross-examine
28 him on the core of his expertise and opinions, and he demonstrated broad command of the
commercial realities of the industry. Even Dr. Shapiro said he had no reason to doubt Mr.
Goldberg’s expertise and “learned a bunch about the industry from him.” Tr. 1065:2-7.

1 like Fruit of the Loom, Samsonite, and Alternative Apparel. *Id.* 439-50. Third, many retailers—
2 including IR500 retailers like Vitamin Shoppe and Office Depot—sell through Amazon
3 Marketplace as well as their own sites, and through those pages utilize Amazon’s PRR solution.
4 Tr. 1516:20-1517:4; 1628:11-13, 1745:6-1746:9. Finally, Amazon could start licensing its “best
5 in class” PRR solution to other sites, which it considers doing “almost daily.” PFF 105, 111, 610.
6 Unsurprisingly, Bazaarvoice and Amazon [REDACTED]
7 [REDACTED]. Ahmed Tr. 92:14-24.³

8 In addition to Amazon, several major potential entrants could easily expand their
9 offerings. Google already has developed and deployed technology for collecting ratings and
10 reviews on its properties, so commercial supply of such a solution would hardly be a stretch. PFF
11 117-20. Oracle, IBM, and salesforce.com all are investing in social commerce, and could enter
12 the commercial provision of PRR with instant credibility. *Id.* 125-32, 205; Tr. 827:15-830:3.
13 The mere possibility that such giants could enter disciplines Bazaarvoice, requiring it to continue
14 to compete to avoid losing its niche to larger companies.

15 Other social commerce companies could enter as well. TurnTo is a great example. The
16 government played a clip in its closing where TurnTo testified that it would have to incur certain
17 costs to enter PRR, including developing and marketing a solution. Tr. 2108:20-2110:14. What
18 the government *did not play for the Court* was TurnTo’s testimony that, [REDACTED]
19 [REDACTED]—qualifying under standard analysis as
20 rapid entry. PFF 100; U.S.D.O.J. & F.T.C., *Horizontal Merger Guidelines* § 1.32 (1992)
21 (hereinafter, “1992 *Guidelines*”).

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25 ³ In a post-trial submission, the government advanced the possibility that some retailers might
26 be “wary” of purchasing from Amazon because it is a retail competitor. ECF. 230 at 3. No
27 such argument was presented at trial. Instead, the evidence was that many retailers elect to
28 sell on Amazon Marketplace, while others use the Amazon Webstore as their e-commerce
platform. PFF 439-50; Tr. 1516:20-1517:4; 1628:11-13, 1745:6-1746:9. In any event, the
argument is inapplicable to non-retailer customers such as brands, travel companies, financial
services companies, and many others.

1 **E. THE MARKET IS DYNAMIC AND EVOLVING TO SUITE COMPETITION**

2 Mr. Goldberg explained in detail through his report and live testimony that the social
3 commerce market has rapidly evolved past the point where social engagement can be thought of
4 in terms of specific point solutions like PRR. Tr. 1468:7-1471:9. Rather, in response to market
5 forces, competitors are now seeking to take advantage of the efficiencies that arise from offering
6 a fuller array of solutions. PFF 138-42. Customer testimony, like that from Pacific Sun, Princess
7 Cruises, and AutoZone, bears out this observation, and Pluck and Gigya have expressly testified
8 that their broader suites provide them with a competitive advantage. *Id.* 297, 305, 345-47.

9 **F. MULTIPLE PRODUCTS SERVE THE SAME OR SIMILAR FUNCTIONS AS PRR**

10 Companies engaged in social commerce have a wide variety of tools to obtain and
11 leverage user generated content (UGC). *Id.* 42-46. These include forums, questions and answers,
12 social login, and other tools beyond PRR. *Id.* 44. While many customers find PRR essential,
13 others are able to use different solutions instead. *Id.* 708-18. Even where they need PRR, the
14 availability of other solutions allows customers to engage in tradeoffs. *Id.* 51 & 725-58. In this
15 way, a customer can partially substitute for PRR by, for example, deploying sophisticated social
16 media interfacing and only using a “widget” or basic PRR solution.

17 **G. THE ACQUISITION HAS SUBSTANTIAL LEGITIMATE BUSINESS JUSTIFICATIONS**
18 **AND WILL ENHANCE COMPETITION**

19 It is undeniable that many of the pre-merger business documents predicted reduced price
20 competition and increased barriers to entry. It is also undeniable that the authors of those
21 documents believed them true at the time. Context, however, is important. First, the board of
22 directors and other stakeholders were not convinced at the time, with many attacking the price
23 increase and reduced competition rationales in extremely harsh terms. Tr. 1394:1-15; DX1880.
24 Second, the purchase price formula did not incorporate any expected price increase; indeed, the
25 price ultimately paid by Bazaarvoice for PowerReviews was “not great” relative to the money
26 PowerReviews’ investors had put into the company over time. PFF 60-63. Finally, and most
27 importantly, the documents also articulate many legitimate reasons for the merger.
28

1 These legitimate reasons included expanded syndication abilities, enhanced innovation
2 prospects, providing Bazaarvoice with a down-market solution it had not had previously, and
3 increased access to valuable data through PowerReviews' customer base. *Id.* 73. Customers like
4 Vitamin Shoppe expect enhanced feature and product options from the transaction, and Clorox
5 testified that it already has benefited from a broader syndication capability. Tr. 320:16-20,
6 1373:12-1374:3. The fact that some of the reasons put forward for the merger reflect propositions
7 that would raise antitrust concerns if borne out by market realities cannot be allowed to obscure
8 the very legitimate goals for the merger that were also articulated at the time. This is particularly
9 important given that (i) the arguments based on enhanced market power were not the arguments
10 that persuaded the Bazaarvoice board of directors to approve the deal, (ii) the purchase price did
11 not reflect reduced competition, and (iii) post-merger market realities have shown that any hope
12 for higher prices was just a pipe dream.

13 **III. STANDARD OF REVIEW**

14 The government bears the burden of establishing a “reasonable likelihood” of competitive
15 harm from the merger, and cannot rest on “ephemeral possibilities.” *See United States v. Marine*
16 *Bancorp.*, 418 U.S. 602, 622-23 (1974) (citation omitted). Under the unilateral effects theory it
17 advances, it “must prove a relevant market in which the merging parties would have essentially a
18 monopoly or dominant position.” *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1123
19 (N.D. Cal. 2004). Where, as here, the company acquired had a declining competitive
20 significance, the acquisition by a stronger and growing competitor “is not merely permissible, it
21 contributes to market stability and promotes the efficient allocation of resources.” *Syfy*, 903
22 F.2d at 673; *see also United States v. General Dynamics Corp.*, 415 U.S. 486, 506-10 (1974).

23 Under the traditional approach articulated in cases such as *Baker Hughes*, the government
24 establishes a “prima facie case” by proving market shares in a relevant product and geographic
25 market that show “undue concentration.” *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982
26 (D.C. Cir. 1990). If the proponent of the merger comes forward with evidence undermining the
27 reliability of the government’s statistics or showing they inaccurately reflect competitive reality,
28 “the burden of producing additional evidence of anticompetitive effect shifts to the government,

1 and merges with the ultimate burden of persuasion, which remains with the government at all
 2 times.” *Id.* at 983. Mergers resulting in substantial shares are often found lawful under this
 3 approach. *See, e.g., Baker Hughes*, 908 F.2d at 983 n.3 (over 75% share); *United States v. Waste*
 4 *Mgmt., Inc.*, 743 F.2d 976, 978 (2d Cir. 1984) (48.8% share); *United States v. SunGard Data Sys.,*
 5 *Inc.*, 172 F. Supp. 2d 172, 187 (D.D.C. 2001) (at least 35% share); *United States v. Country Lake*
 6 *Foods, Inc.*, 754 F. Supp. 669, 676, 679-80 (D. Minn. 1990) (54.2%); *United States v. Calmar*
 7 *Inc.*, 612 F. Supp. 1298, 1306-07 (D.N.J. 1985) (50%).

8 Under some circumstances, however, resort to this traditional approach is unnecessary.
 9 Thus, under *Syufy*, no matter how the market is defined, and no matter what the post-merger
 10 shares are calculated to be, a combination of post-merger price and innovation competition,
 11 customer testimony showing a lack of competitive effects, and evidence of actual or potential
 12 entry suffices to show the lawfulness of an acquisition. *Syufy*, 903 F.2d at 665-71 (merger to
 13 100% of market upheld); *accord Echlin Mfg. Co.*, 105 F.T.C. 410, 475 (1985) (46%).

14 There is no presumption against the merger; rather, the government bears the burden of
 15 proving the merger unlawful. *See, e.g., Baker Hughes*, 908 F.2d at 983; *Syufy*, 903 F.2d at 673;
 16 *Oracle*, 331 F. Supp. 2d at 1175. “[I]t is plaintiffs, not defendant, who carry the burden of
 17 proving market shares and concentration in order to invoke the presumptions of the case law or to
 18 sustain a showing in accordance with the Guidelines.” *Oracle*, 331 F. Supp. 2d at 1165.⁴

19 **IV. ARGUMENT**

20 **A. THE GOVERNMENT FAILED TO PROVE ACTUAL OR PROBABLE HARM TO** 21 **COMPETITION FROM THE MERGER**

22 The government has not proven a prima facie case for reasons explained in IV.C below.
 23 But even if it had, the Court may “bypass as surplusage” that debate and proceed to the heart of
 24

25 ⁴ The government cherry-picked dicta from cases decided under Section 13(b) of the Federal
 26 Trade Commission Act, 15 U.S.C. § 53(b). Tr. 2100:21-2101:2 (quoting *FTC v. Warner*
 27 *Commcn’s, Inc.*, 742 F.2d 1156 (9th Cir. 1984) and *FTC v. Elders Grain, Inc.*, 868 F.2d 901
 28 (7th Cir. 1989)). That statute imposes a “lighter burden” on the FTC in obtaining a
 preliminary injunction pending administrative review, so these cases offer no assistance to
 the Court in this case’s procedural posture. *Warner Commcn’s*, 742 F.2d at 1159.

1 the matter: whether the government proven a reasonable probability of harm to competition. *See*
2 *Syufy*, 903 F.2d at 665; *Echlin*, 105 F.T.C. at 485-90. The uncontroverted evidence shows that
3 the removal of PowerReviews has led and will lead to no competitive harm.

4 The government makes much of the fact that Bazaarvoice has “known about th[e]
5 investigation which led to this lawsuit since two days after the merger closed,” saying
6 Bazaarvoice had an incentive to alter the post-merger evidence, but never providing evidence of
7 any manipulation. Tr. 2103:1-3. The evidence adduced at trial demonstrates that market forces
8 preclude any exercise of market power. Customers testified to alternatives available in the
9 market, and competitors and potential competitors testified as to their intentions to compete more
10 aggressively. Bazaarvoice cannot control the behavior of other market participants. *See, e.g.,*
11 *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991)
12 (crediting “significant factors that are not, and cannot be, controlled by defendants”).

13 From the beginning of the case, the government has struggled to articulate a theory of
14 harm that matched the realities of the market. Its theory of harm went through several iterations,
15 each flawed analytically and factually. The constant shifts in the theory of harm, represented in
16 the chart attached as an Appendix to this brief, reveal the government’s case for what it is: a set of
17 “hot” documents in search of a legal theory. As demonstrated at trial and discussed below, each
18 theory put forward fails because each fails to account for the realities of the market. The lack of
19 actual or probable competitive harm alone justifies entry of judgment in favor of Bazaarvoice.

20 **1. The Government Has Not Proven Harm to the Market as a Whole or**
21 **to Any Identifiable “Localized Competition Space”**

22 Antitrust law concerns itself with conduct implicating the “market *as a whole*,” not issues
23 solely of concern to individual customers with strong preferences. *See Jefferson Parish Hosp.*
24 *Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984) (emphasis added); *Tops Mkts., Inc. v. Quality Mkts.,*
25 *Inc.*, 142 F.3d 90, 96-97 (2d Cir. 1998); *Moore Corp. Ltd. v. Wallace Computer Servs., Inc.*, 907
26 F. Supp. 1545, 1581-82 (D. Del. 1995). Just to start, it is essentially uncontested that in-house
27 users—over 40% of the market by the government’s own math—have suffered and will suffer no
28 harm. Tr. 1879:5-12. That alone negates any claim of harm to the market as a whole.

1 In-house aside, it is clear that, at a minimum, the government must identify some discrete
2 set of customers with identifiable characteristics that constitute a “localized competition space” in
3 which Bazaarvoice would be dominant. *Oracle*, 331 F. Supp. 2d at 1118 & 1172. *See PepsiCo,*
4 *Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107 (2d Cir. 2002) (plaintiff must identify a “discrete class
5 of customers that has such a strong preference . . . that it would not consider substitutes if other
6 factors (especially price) changed”); *Thurman Indus., Inc. v. Pay ‘N Pak Stores, Inc.*, 875 F.2d
7 1369, 1376 (9th Cir. 1989); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir.
8 1997); *In re R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 158-60 (1995); *In re Midcon Corp.*, 112
9 F.T.C. 93, 141 (1989). The government identified two very broad sets before trial, legacy
10 Bazaarvoice customers and legacy PowerReviews customers, and added syndication customers to
11 its claims at trial. The government has failed to prove harm to any of the three groups.

12 ***No Harm to Legacy Bazaarvoice Customers.*** Dr. Shapiro admitted that some legacy
13 Bazaarvoice customers will not suffer harm—such as customers who would not seriously
14 consider PowerReviews as an alternative to Bazaarvoice (a description fitting, *e.g.*, Bed Bath &
15 Beyond). Tr. 2082:12-21. Even looking more broadly, the government has no evidence that *any*
16 customer could not gain sufficient bargaining leverage by threatening to go in-house or to go with
17 a solution from Pluck, Gigya, or other vendors. Pressed in cross-examination, Dr. Shapiro *could*
18 *not name a single customer* who could not use these vendors as leverage to get pricing as
19 favorable as PowerReviews’ leverage had offered. *Id.* 2073:18-2074:8. The government
20 identifies no characteristic to distinguish legacy Bazaarvoice customers who could suffer harm
21 from those that could not. In fact, Bazaarvoice customers have specifically testified that they
22 have not been harmed by the merger, believe that there are a sufficient number of credible
23 alternatives in the market today, and do not believe they have lost negotiating leverage. *See infra*
24 Part IV.A.2. The government has not carried its burden as to legacy Bazaarvoice customers.

25 ***No Harm to Legacy PowerReviews Customers.*** Legacy PowerReviews customers have
26 an even more credible threat to switch because they were already using a turnkey solution. PFF
27 924. The government concedes that PowerReviews Express customers could readily switch to a
28 widget supplier and thus would not suffer harm. Tr. 2081:8-11. Indeed, Bazaarvoice *ended* a

1 PowerReviews policy of raising prices to its legacy customers, recognizing that such customers
2 easily could move to another solution. *Id.* 1894:23-1895:9.

3 The additional theory that Bazaarvoice will force legacy PowerReviews customers to
4 upgrade fails. *Id.* 1890:11-1891:21. It is at best unclear whether moving a customer to a better
5 product at a higher price constitutes competitive harm. Even so, any customer facing an upgrade
6 could switch to a competitor offering a less richly featured solution for less money. Finally, the
7 evidence establishes that Bazaarvoice must innovate and compete for all its customers. PFF 608-
8 48. In fact, legacy PowerReviews customers anticipate benefits from the acquisition. Tr.
9 1373:12-1374:4. There is thus no evidence of harm to legacy PowerReviews customers.

10 ***No Harm to Syndication Customers.*** The government's expert expressly abjured reliance
11 on a theory of harm to syndication customers, GX0984 at 9, and the theory is not properly before
12 the Court. Even entertaining the theory on the merits, the removal of PowerReviews from the
13 market simply does not impact syndication customers. Over 95% of PowerReviews' customers
14 did not participate in syndication. PFF 950. Its one stab at syndication was just a press release,
15 with zero new technology. *Id.* 1070-78. It was never a meaningful competitive alternative to
16 customers looking for syndication. *Id.* 949-50. Syndication can also be done separately from
17 PRR—through the purchase of syndication services from Bazaarvoice, use of another syndication
18 vendor like Webcollage, or directly contracting with a syndication target to receive syndication
19 data. *Id.* 189-93. Even customers that use syndication normally have few syndication links, so
20 there is simply no reason to believe that syndication customers are locked into Bazaarvoice at all,
21 let alone more locked in than they were prior to the merger. Tr. 1770:4-1772:13.

22 ***No Loss of Bidding Competition.*** The evidence is beyond serious dispute that bidding
23 competition remains intact post-merger. Bazaarvoice sees multiple competitors in every bidding
24 situation, customers continue to have the option of going in-house, and customers can deploy
25 alternative social commerce tools. DX1012. Given that the departure of PowerReviews removed
26 only a single bidder, the multiplicity of available solutions (even within PRR alone) ensures
27 customers continue to have leverage in negotiating with Bazaarvoice. As noted above, when
28 pressed on this point, Dr. Shapiro could not identify any customer that could not use Pluck or

1 Gigya as equal leverage in PowerReviews' place. The contrary evidence was abundant. For
2 example, Crate & Barrel and Golfsmith used Pluck to secure a substantially lower price from
3 Bazaarvoice post merger, and IHG used Reevo. PFF 505, 518, 549, & 591.

4 Dr. Shapiro noted that winning bids is not necessary to preserve competition. Describing
5 the significance of PowerReviews despite its lack of success, he said, "[T]he key activ[ity in]
6 competition is bidding to win customers and fighting with each other. Sometimes you win
7 sometimes you don't . . . [b]ut in terms of unilateral effects, you're looking for the bidding and
8 the attempts to win customers" Tr. 915:24-916:16. The same is true for players like Pluck
9 and Gigya.

10 Both customers and competitors confirm that these alternatives are credible. The
11 government's only argument is that the installed base of these other suppliers is small today in
12 comparison to that of PowerReviews, which began by giving ratings and reviews away for free
13 starting in 2005. PFF 923. But the key act of bidding for competitive effects purposes is trying
14 to win, not necessarily winning, as Dr. Shapiro acknowledged. Tr. 915:24-916:6. The evidence
15 of competitors like Gigya, Pluck and Reevo bidding against Bazaarvoice to win customers is
16 voluminous and uncontroverted—and the government offers no basis to distinguish their success
17 or lack of it from PowerReviews in this respect.

18 ***No impairment of innovation.*** The government and its economist speculate that
19 Bazaarvoice will face a reduced incentive to innovate post-merger. But the government's other
20 expert, Professor Dellarocca, disagreed; he testified that he expected innovation in the dynamic
21 PRR space to continue into the future. Dellarocca Tr. 129:1-131:23. Dr. Shehadeh demonstrated
22 that Bazaarvoice has increased research and development spending to levels exceeding the pre-
23 merger investment of both firms combined. Tr. 1905:19-1906:9. Moreover, any slackening of
24 innovation by Bazaarvoice would be quickly disciplined by existing and potential competitors.
25 PFF 608-48. Amazon drives market innovation far more than PowerReviews ever did. *Id.* 622.
26 Likewise, as Mr. Goldberg testified, e-commerce platforms face intense competition and have
27
28

1 responded by adding social commerce functionality, including PRR in the case of SAP/hybris.
2 Tr. 1466:1-1467:7. The government’s innovation loss theory does not match market realities.⁵

3 2. **The Customer Testimony Eviscerates the Government’s Case**

4 “Perhaps the most telling evidence” came from the “supposed victims” of the merger,
5 namely the customer witnesses. *See Syufy*, 903 F.2d at 669. Bazaarvoice identified and deposed
6 customers based on the government’s discovery responses concerning who it believed would be
7 harmed. DX1433 ¶¶ 43-44, App. C. Bazaarvoice was prepared to take discovery from *all* those
8 customers until the government obtained an order preventing it. The government claimed
9 additional deposition discovery would be “unnecessarily duplicative” since nothing would be
10 “[addressed] in its 91st deposition that [Bazaarvoice] has not already addressed during its first 90
11 depositions.” ECF. 66 at 3-4. Bazaarvoice ultimately took deposition testimony from 99
12 customers, including 52 of the 89 customers identified by the government its Initial Disclosures
13 as well as 14 other IR500 customers. It also obtained six customer declarations.

14 Far from being “cherry-picked,” these customers reflect the diversity of demand in the
15 market. They are sophisticated businesspeople who assessed their options and made a variety of
16 different PRR choices, from using Bazaarvoice or PowerReviews, to developing in-house
17 solutions, to using a commercial alternative like Pluck, Gigya, or Amazon Webstore. The only
18 thing they had in common was their well-informed views that they were unharmed.

19 The government had no answer to the customer testimony Bazaarvoice presented. It put
20 on a video from a Bed Bath & Beyond witness complaining about a negotiation as to which the
21 witness had no personal knowledge and that resulted in expanded service for only a modest fee

22
23 ⁵ Additionally, the government’s allegations of reduction of “choice” miss the point. Some
24 “loss” of choice is a consequence of every horizontal merger. “[A]llegations that an
25 agreement has the effect of reducing consumers’ choices [do] . . . not sufficiently allege an
26 injury to competition,” for such an effect is “fully consistent with a free, competitive
27 market.” *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012); *see also*
28 Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*,
81 FORDHAM L. REV. 2405, 2413-14 (2013) (describing flaws in prioritizing “choice” in
merger analysis). Moreover, there is no evidence that the acquisition will reduce customer
choice. Bazaarvoice has launched low-end and mid-range products comparable to those
previously offered by PowerReviews, and other competitors have expanded their offerings.
Tr. 1891:3-21. The government simply lacks evidentiary support for its claim.

1 increase⁶; used an angry e-mail from a Warner Brothers employee without providing the full
2 context for the negotiations that occurred afterwards⁷; and pulled out-of-context quotes from a
3 Footlocker witness trying to suggest the witness was not knowledgeable about PRR solutions
4 even though Footlocker has evaluated multiple options and, in fact, has built an in-house solution
5 for one of its brands. Tr. 582:12-583:22, 770:16-771:18, 2185:25-2186:20.

6 In prior cases, the government sought substantial customer support. In *SunGard*, for
7 example, it presented over 50 customer declarations. 172 F. Supp. 2d at 191. In *Oracle*, it
8 presented multiple live customer witnesses to testify about the harm they expected from the
9 merger at issue. 331 F. Supp. 2d at 1125-30. The total lack of informed customer complaints in
10 this case seriously undermines any claim that customers will be harmed by the merger. *See Syufy*,
11 903 F.2d at 669 (“[F]ew if any of the distributors were willing to say anything to support the
12 government’s claim.”); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 351 (S.D.N.Y.
13 1995) (rejecting state attorney general’s merger challenge where “Plaintiff offered no evidence
14 that retailers object to, or have been harmed by, the Acquisition”).

15 It is true that customer testimony, to be helpful, must be informed. *See generally* Hon.
16 Vaughn R. Walker, *Search for a competition metric: the role of testimony from customers,*
17 *competitors and economists*, 2 COMPETITION L. INT’L 3, 4 (2006) (“[W]hen a customer has
18 analysed alternatives (for purposes unrelated to litigation), the decisionmaker gets something
19 more than an assurance that the customer’s stance towards the merger is not merely preference-
20 based.”). This is why the *Oracle* court rejected the government’s customer testimony, as those
21 customers failed to analyze the markets. 331 F. Supp. 2d at 1131. By contrast, the court credited
22 the customer witnesses presented by the defense because “the Oracle witnesses testified about
23

24 ⁶ Bed Bath & Beyond received more services with the removal of the previous cap on how
25 many reviews it could collect and negotiated down from a proposed 33% Annual Service Fee
(ASF) increase to just 11% without even pursuing other options. Tr. 1892:6-1893:17.

26 ⁷ Warner Brothers wanted to withhold bad reviews and was subject to a pre-existing
27 PowerReviews policy of increasing prices on legacy customers. Tr. 1894:2-1895:22.
28 Bazaarvoice personnel addressed the issue, including reducing Warner Brothers’ price, and
the government never called Warner Brothers to testify. *See* DX1892; DX1894.

1 concrete and specific actions that they had taken and been able to complete[.]” *Id.* at 1133. It is
2 undisputable that the customers who testified for Bazaarvoice had evaluated multiple options and
3 thought seriously about their options. The Appendix to Bazaarvoice’s Amended Proposed
4 Findings of Fact summarizes the more salient customer testimony.

5 Dr. Shapiro agreed with the 2006 *Commentary on the Horizontal Merger Guidelines* that
6 customer testimony is “typically . . . the best source, and in some cases . . . may be the only
7 source” for information on what products they would turn to in the event of a price increase. Tr.
8 1030:19-1031:2. He then claimed at trial, surprisingly, that he knows better than the customers
9 what they could do in the event of a post-merger increase in price or decrease in innovation (and,
10 thus, whether the customers would suffer harm from the merger). *Id.* 2073:8-12, 2083:23-
11 2084:18. But maximizing the value of PRR solutions, and minimizing the associated cost, is the
12 job that the customer witnesses in this case perform every day. Their views are far more
13 informed than those of an academic encountering this business for the very first time.

14 **3. The Government’s Error in Competitive Effects Here Mirrors Its**
15 **Market Definition Errors in *Oracle* and *SunGard***

16 In the end, the government is left with the argument that (i) there are customers who, pre-
17 merger, viewed Bazaarvoice and PowerReviews as the closest substitutes, (ii) these customers
18 were injured irrespective of the other alternatives available by the time of the lawsuit, and (iii) the
19 government need prove no more. But, where the affected set of customers is “made up of only a
20 few buyers with extremely strong preferences, antitrust law is not implicated.” *AD/SAT v.*
21 *Associated Press*, 181 F.3d 216, 228 (2d Cir. 1999). The argument that *some* customers have
22 very strong preferences for Bazaarvoice or PowerReviews is no more persuasive than the fact that
23 some customers in *Oracle* only wanted either Oracle or PeopleSoft; or that some wanted only
24 SunGard or Comdisco in *SunGard*; or that some only wanted electronic delivery in *AD/SAT*; or
25 that some wanted only foodservice distributor delivery in *Pepsi*. Here, there is not even a few.
26 The trial evidence revealed no customer, post-merger, lacking in choices beyond the merging
27 firms. The government failed to identify even one.

28

1 The government's argument is a replay of the same arguments it made and lost in *Oracle*
2 and *SunGard*. In both cases, the government unsuccessfully sought to exclude "lower-end" and
3 in-house alternatives from the market by arguing that the alternatives were too weak. *Oracle*, 331
4 F. Supp. 2d at 1159-61; *SunGard*, 172 F. Supp. 2d at 184-93. Here, the government concedes
5 that these alternatives are in the relevant market, but it simply takes the concession back by
6 asserting (again) that they are too weak. The government's failure in *Oracle* and *SunGard* is
7 mirrored here: it cannot prove localized competition between Bazaarvoice and PowerReviews in
8 a product space where there is no serious competition. *Oracle*, 331 F. Supp. 2d at 1109.

9 The failure of the government's competitive effects theory alone merits judgment in favor
10 of Bazaarvoice.

11 **B. EVIDENCE OF ACTUAL AND POTENTIAL ENTRY AND EXPANSION DISPOSES OF**
12 **ANY POSSIBLE COMPETITIVE CONCERNS**

13 The leading cases firmly establish that actual or potential entry constitutes a complete
14 defense to a Section 7 claim. *Syufy*, 903 F.2d at 665-69 & 671 n.22; *Baker Hughes*, 908 F.2d at
15 987-89; *Waste Mgmt.*, 743 F.2d at 981-84. While Dr. Shapiro disagrees with these cases, they
16 remain the law and reflect the consensus of antitrust economists and judges. Indeed, *Baker*
17 *Hughes* was authored by then-Judge Clarence Thomas and joined by then-Judge Ruth Bader
18 Ginsburg, demonstrating how broadly based the consensus view on entry as a defense really is.

19 While the time frame for entry and competitive effects analysis is subject to some debate,
20 it is clear that customer harm must be reasonably likely to occur in the near future and likely to
21 endure for more than a transitory period. *See Oracle*, 331 F. Supp. 2d at 1112 ("foreseeable
22 future").⁸ Here, the government has simply failed to show any harm at all.

25 ⁸ The consensus view is a two-year time frame, but other authorities have endorsed time
26 frames as long as five years. *See Syufy*, 903 F.2d at 666 n.11 (2 years); *cf. Gulfstream Park*
27 *Racing Ass'n v. Tampa Bay Downs, Inc.*, 294 F. Supp. 2d 1291, 1310 (M.D. Fla. 2003), *aff'd*,
28 479 F.3d 1310 (11th Cir. 2007) (price increase that ended after five years viewed as
"transitory"); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 30-31 (1984)
(advocating five year time horizon).

1 **1. The Evidence of Amazon’s Ability to Discipline Any Possible**
2 **Competitive Harm is Dispositive and Uncontested**

3 If there were any doubts about the ability of entry and expansion to discipline any
4 reduction of competition post-merger, the evidence concerning Amazon put them to rest. The
5 evidence showed that Bazaarvoice must constantly innovate to keep up with Amazon. PFF 610-
6 24. ██████████ retailers use Amazon Webstore as their e-commerce platform and PRR
7 supplier. *Id.* 439-50. And even retailers with their own major sites sell on Amazon Marketplace,
8 and thus use Amazon’s PRR to drive those sales. Tr. 1516:20-1517:4, 1628:11-13, 1745:6-
9 1746:9.

10 The evidence concerning Amazon as a potential entrant into commercial PRR supply was
11 devastating. Asked whether “there’s ever been any discussions at Amazon about licensing . . .
12 rating-and-review technology to other eCommerce vendors,” Amazon.com’s 30(b)(6) witness,
13 Waqas Ahmed, answered “[t]hat type of conversation occurs almost daily because we keep
14 reevaluating what decisions we’ve made” *Id.* 1625:21-25. Amazon has all the assets
15 necessary to participate in the market, could do so quickly, and actively considers that course of
16 action. PFF 104-11. Mr. Ahmed’s testimony establishes that Amazon meets even the excessively
17 high standard for rapid entry advocated by the government: it would not even have to turn a dial.

18 The government had no response at trial to this evidence. It did not mention Amazon
19 once in its closing; and even after defense counsel devoted significant time to Amazon and
20 invited a response—arguing the case could be dismissed on that evidence alone—the government
21 failed to address Amazon in rebuttal. Tr. 2167:23-2168:1. It is uncontested that Amazon already
22 exerts substantial competitive influence on the market, and that it could begin commercial supply
23 of its “best in class” PRR virtually overnight.

24 **2. The Government Gives Insufficient Weight to Expansion by**
25 **Aggressive Competitors Like Gigya, Pluck, and Reevo**

26 Bazaarvoice’s post-merger documents show it faces “aggressive” competition in every
27 account from other PRR providers. DX1012. Gigya, Pluck, Lithium, and Reevo have rushed in
28 to fill the space left by PowerReviews, and others such as eKomi have just begun to take up the

1 opportunity. While Dr. Shapiro dismisses these competitors as “fringe,” the mere fact that they
2 do not have the same installed base as PowerReviews says nothing about their significance going
3 forward. Tr. 1714:12-1715:3 & 2025:16-2026:8. Likewise, the expansion of Rating Systems
4 shows that even a part-time entrepreneur can gain noteworthy customers in this space by offering
5 a solution that is sufficient for customers with more simple PRR needs. *See Id.* 1309:11-1310:8.
6 Rating Systems also serves as a potential partner for retailers to develop customized,
7 sophisticated solutions. *Id.* 1857:20-1858:9.

8 Dr. Shapiro notes that these competitors do not have the same market shares according to
9 his measures that PowerReviews had, and the government also points out these competitors find it
10 difficult to compete with Bazaarvoice. These arguments miss the point. As both Dr. Shapiro and
11 Dr. Shehadeh discussed, the key fact for antitrust purposes is that these companies are *competing*
12 and trying to gain business. Tr. 916:2-6, 1749:8-15. Their lack of immediate success does not
13 matter as they are still providing a competitive check on Bazaarvoice. Moreover, these
14 competitors have taken significant accounts like Acer, Skype, Princess Cruises, Pacific Sun, and
15 others, meaning they certainly have credibility in any competitive interaction. *See* PFF 660-81.⁹
16 Finally, any lack of immediate growth by other competitors “reflects only the existence of
17 competitive, entry-forestalling prices[.]” *Waste Mgmt.*, 743 F.2d at 983. Dr. Shapiro has
18 admitted that he has not studied responses to a price increase, so his rejection of the evidence of
19 entry and expansion cannot reflect the necessary economic analysis. Tr. 1734:13-25. In the end,
20 the evidence of “aggressive” competition by these firms, especially in light of customer testimony
21 that these are credible alternatives (even without dramatic increases in their market shares),
22 suffices to show the market has remained and will likely remain competitive. *See Syufy*, 903 F.2d
23 at 668; *Baker Hughes*, 908 F.2d at 988; *Country Lake*, 754 F. Supp. at 679-80.

24
25
26 ⁹ Any frustration by these new competitors with their failure to steal a significant number of
27 Bazaarvoice shows only that Bazaarvoice continues to compete aggressively. PowerReviews
28 had the same frustrations pre-merger, and replacing its competitive constraint does require
that an entrant achieve greater success than PowerReviews did.

3. The Government Improperly Discounts Rapid Entry

1 The government cannot rebut the fact that Oracle, Google, salesforce.com, and other
2 major companies today possess the various assets necessary to begin offering PRR with relatively
3 little incremental effort. PFF 96-132. Likewise, existing social commerce vendors like TurnTo
4 also have sufficient assets that could be used to extend their product offering to include PRR.
5 Bazaarvoice has consistently recognized such potential entry as a material risk to its business.
6 PFF 682-83; Tr. 222:8-223:11. The government noted the costs like development and marketing
7 that such rapid entrants might face, but those costs are not the type of unrecoverable sunk costs
8 that would foreclose rapid entry, and not the type faced by the numerous rapid entrants already
9 selling social and e-commerce solutions to retailers and manufacturers. The government has
10 failed to present any evidence that these competitors could not enter, and therefore has failed to
11 rebut the likelihood of rapid entry by well-capitalized firms in the event of a reduction of
12 competition. The government's only answer concerning some of these firms is that Bazaarvoice
13 never deposed them. But the government has the burden of proof, and it failed to produce any
14 contrary evidence. The testimony offered by Mr. Goldberg and Dr. Shehadeh as to the ease of
15 new entry stands uncontroverted.

4. In-House Development is a Constant Threat

17 There is no evidence to support the government's assertion that in-house solutions are
18 somehow waning. By any measure, in-house solutions had more competitive significance than
19 PowerReviews by 2011, and multiple customers have gone in-house in recent years. PFF 143-50;
20 Tr. 1458:24-1461:4, 1495:25-1496:3, 1496:14-1497:13, 1868:6-1875:18, 2090:4-2091:1;
21 DX1901. Wayfair and Signal Group built their in-house solutions in a matter of weeks, and
22 others testified they could do the same. PFF 229 & 236. While not every customer can deploy
23 in-house solutions, every customer can credibly threaten to do so, and there is no characteristic
24 distinguishing those who can go in-house from those that cannot.

25 This fact devastates the government's case, for the ability of customers to self-supply
26 necessarily precludes competitive harm. The government in *SunGard* sought to exclude in-house
27 development from the relevant market, and accordingly lost on market definition. *See* 172 F.
28

1 Supp. 2d at 186-93. Here, by admitting the ability of customers to build in-house solutions and
2 failing to identify any criteria for distinguishing those that can from those that cannot, the
3 government cannot claim that no outside vendor could exercise the kind of market power
4 necessary for a finding of unilateral anticompetitive effects. In-house substitution would
5 necessarily discipline even a vendor that accounted for 100% of commercial supply.

6 5. No Meaningful Barriers to Entry Exist

7 *Competitive Advantages and Commercial Obstacles Are Not Legally Cognizable*
8 *Barriers to Entry.* It is important to distinguish between competitive advantages and barriers to
9 entry as antitrust economics uses that term. *See* W. KIP VISCUSI, *et al.*, *ECONOMICS OF*
10 *REGULATION & ANTITRUST* 168-72 (4th ed. 2005) (surveying debate on what constitutes a barrier
11 to entry). While business people and others may view such advantages as “barriers to entry,”
12 antitrust law deploys a different use of the term. *See Los Angeles Land Co. v. Brunswick Corp.*, 6
13 F.3d 1422, 1427-28 (9th Cir. 1993). It is thus unsurprising that the government had to
14 acknowledge that corporate culture—deemed a “barrier to entry” in business documents—does
15 not constitute a barrier to entry for antitrust purposes. Tr. 224:4-21. All of the proposed “barriers
16 to entry” forwarded by the government amount to nothing more than competitive advantages, and
17 do not reflect the kind of barriers like government regulation or intellectual property rights that
18 foreclose entry in a way meaningful to antitrust analysis. *See Syufy*, 903 F.2d at 666-68.

19 *Bazaarvoice’s Syndication Advantage Will Not Prevent Entry.* The ability to offer
20 syndication alongside PRR is undeniably a competitive advantage for Bazaarvoice, but nothing
21 establishes that it forecloses meaningful entry. Since the issue is replacement of PowerReviews,
22 the fact that 95% of PowerReviews’ customers did not use syndication means the vast bulk of its
23 market position would not be foreclosed to a competitor merely because it lacked syndication
24 capabilities. Moreover, only 27.1% of Bazaarvoice’s customers syndicate, and most syndication
25 customers only have a few syndication links. DX1433 ¶¶ 222, 226. A number of customers will
26 not use syndication because it can harm search engine rankings. Tr. 1525:20-1527:11. Since
27 there are ample opportunities for an entrant to secure non-syndication customers, syndication
28 simply does not rise to the level of a “barrier to entry.” Moreover, because customers own their

1 content, syndication is not subject to economically meaningful “network effects” as there is no
2 need for both the sender and the recipient to be on the same network to engage in an exchange of
3 syndicated content. PFF 190. Syndication simply does not “constrain[] the normal operation of
4 the market to the extent that [a competitive] problem is unlikely to be self-correcting.” *Rebel Oil*
5 *Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995).

6 ***Switching Costs Are Insufficient to Prevent Entry.*** While it is undeniable that customers
7 incur costs when they switch out their software, the government has not established that such
8 costs prevent entry. Competitors have taken Bazaarvoice accounts despite any purported
9 switching costs. The availability of so many new customers and the frequency of replatforming
10 means there are regularly customers who have virtually no additional switching costs. Tr.
11 1763:10-1764:9. To the extent the cost of moderation comprises a switching cost—and the
12 government has never advanced any theory for moderation as a freestanding barrier to entry—it
13 can readily be obtained through commercial vendors, and many companies have found it trivial to
14 automate or take in-house. *Id.* 1758:12-1760:3. Lastly, a customer would incur no more cost
15 switching to Pluck or Gigya than it would have incurred switching to PowerReviews. Thus, there
16 is no reason to think a competitor would be barred from entering by virtue of switching costs.

17 ***Reputation is a Product of Competition, Not a Barrier to Entry.*** The Ninth Circuit has
18 foreclosed, as a matter of law, any claim that reputation is a barrier to entry. *See, e.g., Omega*
19 *Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997). Moreover, as a factual matter,
20 many competitors would face no reputation issues (like Google and Amazon), and others have
21 relationships that would allow them to easily establish credibility. For example, Pluck’s
22 relationship with IBM gave it the credibility it needed to secure the L’Oreal account. DX1009.
23 Moreover, once a company has serious customers, its reputation issues become meaningless
24 because it can point to those accounts as proof of its abilities. Tr. 1775:5-1778:2; DX1897 at 320.
25 Reputation can thus be completely discounted as a barrier to entry.

26 **6. Ease of Entry Requires Judgment For Bazaarvoice**

27 Ease of entry provides a defense to a Section 7 claim because “a substantial existing
28 market share is insufficient to void a merger where that share is misleading as to actual future

1 competitive effect.” *Waste Mgmt.*, 743 F.2d at 982. Because of this, “the *threat* of entry can
2 stimulate competition in a concentrated market, regardless of whether entry ever occurs.” *Baker*
3 *Hughes*, 908 F.2d at 983; *Echlin*, 105 F.T.C. at 485-90. The evidence shows that entry has
4 already occurred, existing rivals are expanding, and industry titans like Amazon could easily
5 eliminate any market power Bazaarvoice would hope to wield. This evidence provides an
6 additional ground for entry of judgment in favor of Bazaarvoice. *See Syfy*, 903 F.2d at 665-69.

7
8 **C. THE GOVERNMENT FAILED TO PROVE THE MARKET STRUCTURE ELEMENTS OF
A *PRIMA FACIE* CASE**

9 Bazaarvoice has focused on the dispositive issues of entry and the absence of customer
10 harm. But the government also failed to prove a *prima facie* market structure case. *See generally*
11 *United States v. Syfy Enters.*, 712 F. Supp. 1386, 1387 (N.D. Cal. 1989) (rejecting market
12 definition where “the government has given little, if any, consideration to the vast and rapid
13 technological changes in the industry”), *aff’d*, 903 F.2d 659 (9th Cir. 1990).

14 **1. The Government’s Product Market Definition is Invalid**

15 The Ninth Circuit has held that market definition requires consideration of both demand
16 and supply elasticity. *Rebel Oil*, 51 F.3d at 1436; *Twin City Sportserv., Inc. v. Charles O. Finley*
17 *& Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532
18 F.2d 674, 691 (9th Cir. 1976).

19 ***Demand.*** It is true that many customers view PRR as essential. But differentiated
20 products that are not used interchangeably at current prices can be in the same market. *See IGT v.*
21 *Alliance Gaming Corp.*, 702 F.3d 1338, 1343-47 (Fed. Cir. 2012) (wheel games not in separate
22 relevant market from other casino games). Some customers can go without PRR, and some use
23 other solutions for gathering UGC. PFF 42-46. These include direct substitutes for PRR, such as
24 using product-specific “likes” and social media comments to provide ratings and review proxy, as
25 well as different tools such as forums. *Id.* 708-18. The government has offered no evidence
26 showing the portion of customers who would refuse to downgrade in response to a nontransitory
27 price increase. It thus fails to show that a hypothetical monopolist of PRR would find a price
28 increase profitable. *See Oracle*, 331 F. Supp. 2d at 1116-18.

1 In this regard, Dr. Shapiro’s claimed implementation of the Hypothetical Monopolist Test
2 (HMT) adds nothing to the discussion. The test depends on margins, but the margins Dr. Shapiro
3 used by his own admission reflect margin on the *suites* of products Bazaarvoice and
4 PowerReviews sold rather than simply PRR.¹⁰ Tr. 1084:11-14. Dr. Shapiro also admits that his
5 implementation of the test does not reflect customer behavior in response to a price increase; his
6 “recapture rate” is merely a “proxy” based on what customers have done at prevailing pre-merger
7 prices. Tr. 935:13-936:15. As Dr. Shehadeh testified, there are no data available to implement an
8 HMT, and Dr. Shapiro’s recapture “proxy” thus says nothing about whether a hypothetical
9 monopolist of PRR could profitably raise prices. Tr. 1733:12-1735:24.

10 Significantly, moreover, the Supreme Court has recognized that a product grouping can
11 operate as a cluster market. *See United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 356-57
12 (1963). *See also JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011, 1016-17 (9th Cir.
13 1983); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1205 (9th Cir. 1997).
14 Social commerce tools have all the features of such a market, for e-commerce sites normally
15 deploy multiple social commerce strategies. PFF 759-74.

16 **Supply.** Dr. Shapiro’s failure to address supply substitution at the relevant market stage
17 also undermines his relevant market opinion. While economic theory might not demand that
18 supply substitution be considered in defining the market, Ninth Circuit precedent does. *Rebel Oil*,
19 51 F.3d at 1436.¹¹ In fact, Dr. Shapiro ultimately disregards supply substitution entirely. Tr.
20 1722:4-1722:16. He claims that there are no rapid entrants; and he discounts completely the
21 ability of suite providers to enlarge and enhance their offerings. By contrast, Dr. Shehadeh’s
22 analysis encompasses supply-side factors because vendors of other social commerce solutions

23
24 ¹⁰ The fact that industry participants do not break out PRR revenue separately from that
25 attributable to sales of other solutions is itself powerful evidence that the market is broader.
See Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

26 ¹¹ The government attempts to distinguish *Rebel Oil* on the grounds that it involved supply
27 substitution between full-service and self-service gasoline stations, but it offered no evidence
28 showing that entry by social commerce vendors would be more costly here than the switch
contemplated in *Rebel Oil*. Tr. 2182:9-2183:15. Indeed, entry into commercial provision
would be “virtually costless” for Amazon. PFF 104-11.

1 could readily expand into PRR to discipline a hypothetical monopolist of PRR, placing these
2 other solutions in the market. *Id.* 1725:7-20. Thus, the government’s relevant product market
3 fails and, with it, the government’s entire case. *Oracle*, 331 F. Supp. 2d at 1161.

4 ***Customers in the Market.*** The government’s product market definition does not define
5 an area of localized competition and should be rejected. The government alleges a product
6 market targeted to a subset of all users of the relevant product—retailers and manufacturers.
7 Compl. ¶ 30. The government’s market definition describes neither the entire market (all users of
8 product ratings and reviews) nor a well-defined area of localized competition. *See Oracle*, 331 F.
9 Supp. 2d at 1158-61. The government presented no evidence supporting a market limited to such
10 customers, and in fact included other customers in its analyses. Tr. 1732:6-1733:11; DX1897 at
11 10. Moreover, as discussed above, the government concedes that many retailers and
12 manufacturers will not be harmed by the merger, and Dr. Shapiro concedes that he cannot identify
13 which customers might be harmed. Thus, a product market limited to “PRR platforms used by
14 retailers and manufacturers” does not define a “product . . . space in which there is no serious
15 competition.” *Oracle*, 331 F. Supp. 2d at 1109.

16 2. The Government’s Geographic Market Fails

17 The geographic market is the region “in which the seller operates, and to which the
18 purchaser can practicably turn for supplies.” *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S.
19 320, 327 (1961). Establishing the market requires “a dynamic as opposed to static analysis of
20 where consumers could practicably go, not on where they actually go.” *California v. Sutter*
21 *Health Sys.*, 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001) (citation omitted).

22 The government has failed to prove its proposed geographic market. The evidence at trial
23 showed that there is no structural barrier for U.S. customers to turn to foreign suppliers in the
24 event of a price increase. Indeed, Hayneedle testified that Reevo’s status as a British company
25 gave it no concerns. Tr. 1635:17-1636:11. The government’s theory that U.S. customers can be
26 targeted with a price increase has no limiting principle and could justify finding the market is a
27 single city or even a single customer. *Id.* 1908:1-15. Customers here can practically turn to
28 foreign suppliers as software can be easily transmitted across national borders. PFF 791-814.

1 Foreign suppliers, at most, need only deploy a handful of sales and support staff to the U.S. to
 2 market to U.S. customers now. Because the government’s geographic market fails, its entire
 3 *prima facie* case fails too. *Oracle*, 331 F. Supp. 2d at 1164-65.

4 **3. The Government’s Market Concentration Statistics Are Meaningless**

5 *Market Shares are Not Useful in Unilateral Effects Cases with Differentiated Products.*

6 In the first place, the differentiated nature of PRR products and bidding structure of the market
 7 mean concentration statistics will offer very little insight into whether the merger will have
 8 significant unilateral effects. *Oracle*, 331 F. Supp. 2d at 1121-23. Dr. Shapiro himself has
 9 remarked that, while market concentration statistics have been successfully linked to the risk of
 10 coordinated effects and the risk of unilateral effects in markets for *homogenous* goods, “there is
 11 no good theoretical link between the level of [market concentration] and unilateral price effects
 12 with differentiated products.” Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From*
 13 *Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 63 n.53 (2010). Likewise, bidding
 14 markets only require two acceptable competitors to achieve a competitive outcome. DENNIS W.
 15 CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 174 (4th ed. 2005). All
 16 of this means that the market structure analysis forwarded by the government provides no
 17 meaningful insight into the likely competitive effects of this merger.¹²

18 *The Government Has Not Offered Actual Market Shares.* A basic point that merits
 19 emphasis: the government admits that it has not calculated market shares. Rather, Dr. Shapiro
 20 forwarded two “proxies” for market share. Tr. 944:6-21, 952:11-15, 1090:19. He thus has failed
 21

22 ¹² One methodology articulated by the government in its 1992 *Horizontal Merger Guidelines*
 23 provided for allocating an equal market share to all market participants (including
 24 “uncommitted entrants” who could engage in supply substitution) in bidding markets. 1992
 25 *Guidelines* §§ 1.32 & 1.41 n.15. *Accord* Louis Kaplow & Carl Shapiro, *Antitrust*, in 2
 26 HANDBOOK OF LAW AND ECONOMICS 1077, 1177-78 (A. Mitchell Polinsky & Steven Shavell,
 27 eds., 2007) (“Uncommitted entrants are firms that would likely enter the market in response
 28 to an SSNIP in less than one year and without the expenditure of significant sunk costs. . . .
 [I]n computing market shares, their capacity is taken into account.”). Under this approach,
 multiple competitors would be deemed to have equal shares, including Bazaarvoice,
 PowerReviews, Gigya, Pluck, Reevoo, Lithium, Amazon, Google, SAP/hybris, Oracle, IBM,
 and Salesforce.com, as well as in-house. Even if share were allocated to only seven
 competitors, the post-merger HHI levels and change in HHI would be below the levels
 necessary to invoke any concentration-based presumptions of competitive harm.

1 to meet the government's burden by failing to actually establish the market size and the shares of
2 the market participants in the market it alleges. *See United States v. Nippon Sanso K.K.*, 91-CV-
3 41, 1991 U.S. Dist. LEXIS 6130, at *2 (E.D. Pa. Mar. 26, 1991). Dr. Shehadeh, by contrast,
4 actually estimated the shares of the parties to the merger. Tr. 1909:18-1915:7. This alone
5 justifies rejecting the government's *prima facie* case. *Oracle*, 331 F. Supp. 2d at 1165.

6 ***The IR500 is Not an Appropriate Proxy for the Relevant Market.*** Even considering Dr.
7 Shapiro's "proxies," however, he has failed to offer a reliable approach to calculating market
8 share. Most fundamentally, his shares depend on using the IR500 as a proxy for the market as a
9 whole. Mr. Goldberg and Dr. Shehadeh have catalogued the flaws in the IR500 and its
10 inappropriateness to the uses Dr. Shapiro makes of it, and the publisher of the IR500 has
11 acknowledged the relevant facts that make it inappropriate for a market share analysis here. PFF
12 821-850. Suffice it to note here the most fundamental problem: because the IR500 focuses on
13 retailers—to the exclusion of brands and other major customers—it automatically overstates the
14 share of PowerReviews, which obtained much of its prior installed base through a focus on
15 retailers. Roughly three-quarters of Bazaarvoice's customers (by revenue) and 34 of its top 50
16 customers do not appear on the IR500. PFF 830. By contrast, PowerReviews' most significant
17 customers appear on the IR500. It also excludes a variety of important in-house players,
18 including eBay, which by on-line revenue would be the second largest firm in the IR500.

19 Dr. Shapiro's "checks" do not help. The Fortune 500 is even less representative of e-
20 commerce than the IR500 because it does not even attempt to focus on enterprises that engage in
21 significant e-commerce activities. And the IR1000 simply extends the same methodology of the
22 IR500 to smaller sites, with all the same flaws.

23 ***None of Dr. Shapiro's Market Share Calculations Meaningfully Reflects the***
24 ***Competitive Significance of the Market Participants.*** The government's failure to establish
25 actual market shares alone suffices to reject its *prima facie* case. But even setting aside that flaw,
26 the statistics forwarded by the government vastly overstate PowerReviews' competitive
27 significance. First, the use of customer revenues rather than units or revenue of the suppliers has
28 no grounding in economics; it is like surveying the 500 wealthiest households to determine the

1 scope of the U.S. market for cars. Dr. Shapiro admitted that this metric had never, to his
2 knowledge, been used before, and Dr. Shehadeh confirmed that it had never been used in his
3 experience either. Tr. 1090:16-19, 1747:9-17

4 Second, Dr. Shapiro admits that his alternative customer count method overstates
5 PowerReviews' market prominence because it counts customers paying very little for basic
6 services as equivalent to customers spending substantial amounts on high-end solutions. He
7 attempts to claim that the biases of both methods even out, but he has offered no authority for the
8 proposition that two biased methods can be averaged to obtain a useable result. Indeed, Dr.
9 Shehadeh credibly testified that one cannot rely on two biased methods. *Id.* 1746:22-1747:8.

10 Third, the government includes no share for rapid entrants and expanders. They assign no
11 share to Amazon as a rapid entrant even though it considers entering commercial PRR every day.
12 They likewise allocate no share to Google, Oracle, and other powerful potential entrants, offering
13 no evidence to justify rejection of them potential as entrants.

14 Fourth, the government's market share statistics fail to capture the 10-to-1 difference in
15 size between Bazaarvoice and PowerReviews. By failing to offer any method that captures that
16 differential, the government has failed to offer any method that truly captures PowerReviews'
17 relative competitive significance. All of these flaws, individually and collectively, render the
18 government's market share analysis meaningless.

19 **4. Proper Post-Merger Market Share for Bazaarvoice is Less Than 22%**

20 Dr. Shehadeh presented a method grounded in accepted economic principles that accounts
21 for supply substitution in calculating market shares for the merging parties. He took a statistical
22 sample of the "Total Addressable Market" identified in Bazaarvoice's planning documents. As
23 even Dr. Shapiro conceded, this sample more accurately captures the competitive landscape than
24 other proxies for the market. Tr. 980:12-16, 1912:18-23. Dr. Shehadeh noted that the post-
25 merger Bazaarvoice would have an 11% market share in that sample using a method consistent
26 with the approach in the *Gogo* case, in which Judge Chen held the market must include all
27 potential customers. *See Stewart v. Gogo, Inc.*, No. C-12-5164 EMC, 2013 WL 1501484, at *4
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1 (N.D. Cal. April 10, 2013). It also would comport with Bazaarvoice's estimates that its market
2 share was in the range of 8.5 to 11%. DX1379 at 2.

3 Dr. Shehadeh then went further and *removed* all sites that did not deploy any functionality
4 for capturing user-generated content. Tr. 1909:18-1915:7. Within that sample, he calculated a
5 market share of less than 22%. This conservative approach likely overstates PowerReviews'
6 competitive significance since it uses customer count, meaning a widget solution customer has
7 the same weight as a customer paying for a sophisticated solution. *Id.* 1914:2-17. These market
8 shares make clear that the government cannot establish any structural presumption.

9 Dr. Shapiro's attack on Dr. Shehadeh's method has no basis. He stated that Dr.
10 Shehadeh's method would not find acceptance in peer-reviewed literature, but Dr. Shehadeh
11 pointed out that Dr. Shapiro's *own colleagues* deployed the same method in their successful
12 support of the Sirius/XM merger. *Id.* 1915:13-1919:3. Dr. Shehadeh's analysis comports with
13 economic standards and provides the only evidence of market share in a market defined by both
14 supply and demand conditions as required by Ninth Circuit precedent. It should be credited, and
15 the Court should find that Bazaarvoice's post-merger market share does not raise any
16 presumption of harm.

17 **D. JUDGMENT IN FAVOR OF THE GOVERNMENT WOULD HARM CONSUMERS**

18 The Court should not underestimate the harm a judgment in the government's favor would
19 do. The merger benefits customers by enabling a broader, more efficient syndication capability.
20 PFF 1124-31. It also facilitates Bazaarvoice's expansion into the broader social commerce and
21 Big Data spaces, enhancing competition and consumer welfare there as well. *Id.* 1145-47. In
22 short, the merger will result in real benefits to competition, and its reversal would undermine the
23 very market efficiency that antitrust seeks to promote.

24 **V. CONCLUSION**

25 The Court should enter judgment against the government and in favor of Bazaarvoice.
26
27
28

1 Respectfully submitted,

2 Dated: October 25, 2013

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1 **Appendix: The Government’s Changing Theories of Harm**

2

Theory	First Advanced	Refuted
3 “[T]argeted price increases” 4 to customers who “do not 5 consider in-house solutions 6 to be a viable alternative.”	Complaint ¶ 39	DX1433 ¶¶ 30-97
7 Undue Concentration	GX0983 at 6	DX1736 ¶¶ 3-7
8 Price Increases to Legacy 9 PowerReviews and 10 Bazaarvoice Customers	GX0984 at 8-9	Trial (Tr. 1880:16-1895:22)
11 Post-Merger Price Increases	Trial (Tr. 918: 5-7)	Withdrawn (Tr. 1021:5-9)
12 Price Increases to 13 Syndication Customers	Trial (Tr. 998:25-999:1)	Trial (Tr. 1896:5-1900:3)
14 Harm to In-House 15 Customers	Trial (Tr. 2053:16)	Withdrawn (Tr. 2071:14- 16 20)

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