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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAZAARVOICE, INC.

Defendant.

Case No. 13-cv-00133 WHO

PLAINTIFF'S POST-TRIAL BRIEF

Judge: Hon. William H. Orrick
Trial Date: September 23, 2013
Time: 8:00 a.m.

PUBLIC VERSION

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8 U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (2010) passim

PRELIMINARY STATEMENT

In June 2012, Bazaarvoice paid \$168 million to acquire PowerReviews. At the time, Bazaarvoice was the leading commercial supplier of PRR platforms in the United States and PowerReviews was its only meaningful rival. Internal company documents show that the parties recognized the transaction for what it was – a merger to monopoly. *See, e.g.*, GX612.

The trial record demonstrates the significance of the pre-merger head-to-head competition between Bazaarvoice and PowerReviews. The two firms clashed in the pursuit of new accounts and worked to dislodge each other from their respective client bases. Customers reaped the benefits of this competition in the form of lower prices and increased innovation. The merger eliminated this competition between the two firms. Sixteen months have passed, and neither in-house solutions nor fringe competitors have filled the competitive gap.

The record is replete with unambiguous admissions establishing Bazaarvoice's intent to reduce competition through the acquisition of PowerReviews. These documents, created in the ordinary course of business, represent the candid judgments of the company's senior executives regarding the key issues in this case, including: (1) the significance of the pre-merger competition between Bazaarvoice and PowerReviews; (2) the gap separating PowerReviews from other competitive alternatives; and (3) the barriers to entry that insulate Bazaarvoice from future competition.

Recognizing the probative value of these documents, Bazaarvoice was reduced at trial to attacking the accuracy of its own executives' business judgments: asserting that the competitive landscape today bears no resemblance to the post-merger world predicted in the company's documents.

Bazaarvoice's primary defense is that, contrary to its executives' expectations, the merged firm cannot exercise market power because it faces competition from a host of new competitors. At trial, this argument took several forms. With respect to market definition, Bazaarvoice argued that firms in adjacent markets, like Facebook, should be treated as PRR market participants because they qualify as "rapid entrants." Additionally, Bazaarvoice argued that firms competing outside the United States should be assigned U.S. market shares based on

1 international sales. Finally, Bazaarvoice argued that entry into the relevant market is easy,
2 pointing to large technology firms that it claimed could quickly and easily replace
3 PowerReviews.

4 Each of these arguments fails because Bazaarvoice did not meet its burden to establish
5 that entry or repositioning will be timely, likely, and sufficient to offset the significant
6 anticompetitive effects likely to arise from this transaction. In fact, there is no evidence that any
7 of the firms Bazaarvoice has identified as potential entrants plan to enter the market, and little
8 reason to conclude that they would be capable of surmounting the barriers to entry in a timely
9 fashion. Rather than depose each of the firms it has identified as potential entrants to obtain
10 testimony regarding their current strategic plans, Bazaarvoice opted to rely solely on paid expert
11 witness testimony. These expert opinions are in conflict with the weight of the evidence.¹

12 The trial record confirms the pre-merger judgments of Bazaarvoice executives that the
13 transaction would leave the merged firm as the only option for many U.S. customers of PRR
14 platforms. Bazaarvoice, however, would have the Court disregard the weight of the evidence
15 and rely primarily upon a collection of conclusory statements made by a group of customers
16 Bazaarvoice selected. But this witness testimony cannot carry the evidentiary burden
17 Bazaarvoice places upon it. These customers did not have access to the wide range of evidence
18 presented to this Court, including the business documents and testimony of Bazaarvoice,
19 PowerReviews, and other competitors regarding their business plans and the nature of
20 competition in this industry. Many of these customers had never looked closely at the PRR
21 alternatives available in the market, and some of them were relying on incorrect information
22 regarding the capabilities of Bazaarvoice's competitors. But more fundamentally, given these
23 limitations, it would be wrong to let the customer testimony presented by Bazaarvoice count for
24 more than the actual decisions made by customers in the marketplace. The customers in this
25 market have spoken through their purchasing decisions, and their verdict is clear: PowerReviews

26
27
28 ¹ For the reasons set forth in the United States' Motion in Limine, the testimony of
Bazaarvoice's proffered shopper marketing expert Jason Goldberg should be excluded or
accorded little weight.

1 was far and away Bazaarvoice's closest competitor. The remaining fringe alternatives were
 2 fundamentally unattractive for many firms and therefore had, and continue to have post-merger,
 3 very few customers. *See* GX1064*.² It is this customer evidence, which is consistent with the
 4 views expressed by executives from Bazaarvoice and PowerReviews, that gives an accurate
 5 picture of the nature of competition in this market.

6 Ultimately, several important facts are largely undisputed. Bazaarvoice is still the
 7 leading supplier of PRR platforms in the United States. PowerReviews was by far its most
 8 significant rival. Other commercial suppliers and in-house solutions have failed to expand and
 9 reposition materially, and have not – individually or collectively – replaced the competition
 10 previously provided by PowerReviews. Bazaarvoice's current competitive position is protected
 11 by substantial barriers to entry. In short, the market structure looks largely as Bazaarvoice
 12 executives predicted it would when they advocated for the transaction. While it is unsurprising
 13 that Bazaarvoice has not attempted to significantly raise prices while facing the scrutiny of this
 14 litigation, the weight of the evidence establishes that the transaction remains likely to
 15 significantly reduce competition in violation of Section 7 of the Clayton Act.

16 ARGUMENT

17 I. Section 7 Is Violated if There Is a Reasonable Probability of an Anticompetitive 18 Effect

19 Section 7 of the Clayton Act prohibits mergers when the effect of a transaction "*may be*
 20 substantially to lessen competition." 15 U.S.C. § 18 (emphasis added). Because of the statutory
 21 language "may be," Section 7 analysis is based on "probabilities, not certainties." *Brown Shoe*
 22 *Co. v. United States*, 370 U.S. 294, 323 (1962). To prevail in this case, the United States only
 23 needs to show that Bazaarvoice's acquisition of PowerReviews has a "reasonable probability of
 24 anticompetitive effect." *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984).

25 Bazaarvoice is wrong that *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir.
 26 1990), creates a special Section 7 standard for evaluating consummated mergers that looks only
 27 to post-merger evidence and requires proof of actual anticompetitive effects. Indeed, that would

28 ² Documents or depositions with an * have an outstanding confidentiality issue.

effectively overrule *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), which held that “a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment” is not “a permissible defense to a § 7 divestiture suit,” because otherwise “violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.” *Id.* at 504-05.

In *Syufy*, the government challenged a series of acquisitions under both Section 2 of the Sherman Act and Section 7 of the Clayton Act. The Ninth Circuit devoted “much” of its analysis to the government’s claim that Syufy had “monopoly power” – an element of the Section 2 monopolization claim. *Syufy*, 903 F.2d at 664. The court found it “conclusive” that another competitor had entered the market and gained significant market share. *Id.* at 665. Because the new entrant had experienced substantial commercial success, Syufy lacked the power to exclude competitors, and therefore lacked monopoly power. *Id.* at 665, 669, 671.

Syufy never said that the Section 7 standard for consummated mergers was any different than for unconsummated mergers. Indeed, the court’s analysis of “monopoly power” applied only to Section 2 – and not Section 7.³ While the court noted in a footnote that the lack of entry barriers doomed the Section 7 claim as well, *id.* at 671 n.21, that would have been true whether the merger was consummated or not. Thus, the brief discussion of Section 7 in the footnote in no way supports a distinction between consummated and unconsummated mergers.

Whether a merger is consummated or not, a merger is illegal if it creates “an appreciable danger” of higher prices in the affected market. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986). That is the case here because, unlike *Syufy*, there are significant entry barriers, and no competitor has emerged to take substantial share from Bazaarvoice since the transaction closed.

³ Monopoly power is not an element of a Section 7 violation. In a Section 7 action, the government only needs to show that a merger creates or enhances “market power.” See *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) (“[s]ubstantial competitive harm is likely to result if a merger creates or enhances ‘market power ’”); cf. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (“Monopoly power under § 2 requires . . . something greater than market power under § 1.”).

II. Bazaarvoice's Acquisition of PowerReviews Is Presumptively Unlawful

In Section 7 cases, courts often follow a burden-shifting approach. See *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004). The transaction is presumptively unlawful if it has significantly increased market concentration and created a firm with a large market share in a relevant product market and relevant geographic market. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). The defendant can rebut this presumption by showing that market shares do not accurately predict the merger's probable effect on competition. *Id.* If the defendant rebuts the presumption, the burden of producing additional evidence of the merger's likely anticompetitive effects shifts back to the government. *Id.*

A. PRR Platforms Used by Retailers and Manufacturers Are a Relevant Product Market

A group of products form a relevant product market if they are "reasonably interchangeable[le] for the purposes for which they are produced – price, use, and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Brown Shoe*, 370 U.S. at 325. Ultimately, "[t]he determination of what constitutes the relevant product market hinges . . . on a determination of those products to which consumers will turn, given reasonable variations in price." *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001); see *Olin Corp. v. FTC*, 986 F.2d 1295, 1298 (9th Cir. 1993). In other words, the parameters of the product market are defined in relation to customer demand substitution. Trial Tr. 940:23-941:5 (Shapiro).

1. Bazaarvoice Concedes That Consumers Would Not Shift Their Purchases to Other Alternatives in Response to a Price Increase in PRR Platforms

The evidence reveals that customers of PRR platforms would not turn to other social commerce tools in response to a small increase in price. In fact, Bazaarvoice has largely conceded that, based on customer demand, PRR platforms are a relevant product market. See Trial Tr. 2172:4-7 (Def.'s Closing) ("So a lot of customers testify that they absolutely have to have R&R. Many said that they would never abandon R&R for features like forums or Q&A. We

dispute none of that. How could we? That's demand substitution.”).⁴ In light of Bazaarvoice’s concession on demand substitution, there is no need to recount all of the evidence here.⁵

2. Providers of Other Social Commerce Tools Could Not Enter the PRR Platform Market So Quickly That They Could Constrain a Price Increase

What remains of Bazaarvoice’s argument is its contention that supply-side considerations dictate a different product market. Bazaarvoice argues that social commerce providers and firms in “adjacent” markets must be included in the market because they are “rapid entrants” into the PRR platforms market.⁶ Def.’s Pre-Trial Br. 32-33. But, as Professor Shapiro testified, there are no “rapid entrants” in this case. Trial Tr. 969:18-972:13 (Shapiro).

“Rapid entrant” is a term of art in merger analysis. As Professor Shapiro explained, rapid entrants are firms that could “come into the market very easily with very low investment.” *Id.* at 940:15-17 (Shapiro). The *Merger Guidelines* similarly describe rapid entrants as firms that would “very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring significant sunk costs.” U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (2010) (hereinafter GX981 or “*Merger Guidelines*”) § 5.1.

However, all of the firms Bazaarvoice has identified as “rapid entrants” would need to incur significant sunk costs to develop and market a PRR platform in order to compete in the market. *See, e.g.*, Trial Tr. 2108:20-2110:14 (Pl.’s Closing) (quoting from GX74 (Eberstadt Dep.)). Because of these sunk costs, they are not currently constraining firms that are competing

⁴ When asked for his conclusions on “demand-side substitution,” Dr. Shehadeh also conceded that “many customers do view ratings and reviews as an important part of their offering, and one that they would be unlikely to consider giving up.” Trial Tr. 1721:12-15 (Shehadeh).

⁵ *See generally* Pl.’s Trial Br. 10-16, and Pl.’s Post-Trial Proposed Findings of Fact (hereinafter “PTPFOF”) ¶¶ 40-129.

⁶ Bazaarvoice also argues that the United States has inappropriately ignored the “cluster market” cases that hold that a group of product can be a relevant product market. These cases, such as *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), stand only for the proposition that a “cluster” of products can be a relevant antitrust market – not that individual products within the cluster cannot be their own market. The United States has explained at length in this case that there is distinct demand for PRR platforms and competition in that market largely operates independently of competition in the sale of other social commerce tools. *See* Pl.’s Trial Br. 10-16; PTPFOF ¶¶ 40-129.

1 in the relevant market today. It was appropriate, therefore, that Professor Shapiro did not expand
2 the product market to include the products they actually do sell.⁷ *Id.* at 2067:11-16 (Shapiro).

3 Professor Shapiro's analysis is consistent with Ninth Circuit precedent. Bazaarvoice cites
4 *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), for the proposition that
5 "defining a market on the basis of demand considerations alone is erroneous." *Id.* at 1436. But
6 *Rebel Oil* did not overrule other Ninth Circuit merger cases, like *Olin*, 986 F.2d at 1298, which
7 look to demand considerations when defining the relevant product market. *Rebel Oil* embraces
8 the hypothetical monopolist test that Professor Shapiro applied in this case. 51 F.3d at 1434 ("A
9 'market' is any grouping of sales whose sellers, if unified by a monopolist of hypothetical cartel,
10 would have market power in dealing with any group of buyers.").

11 In *Rebel Oil*, the Ninth Circuit recognized that: "If the sales of other producers
12 substantially constrain the price-increasing ability of the monopolist or hypothetical cartel, these
13 other producers must be included in the market." *Id.* But this is just another way of describing
14 the analysis that Professor Shapiro applied in this case, and which Dr. Shehadeh conceded was
15 fine in theory: If rapid entrants exist, they should be counted as market participants and assigned
16 market shares. Bazaarvoice's argument that Professor Shapiro and the United States are ignoring
17 the law in their treatment of "rapid entrants" is wrong. Dr. Shehadeh admits that Professor
18 Shapiro properly considered supply-side substitution, although he differs on the conclusion.
19 Trial Tr. 1730:8-18 (Shehadeh).⁸

20 _____
21 ⁷ As Professor Shapiro explained at trial, the standard way to address "rapid entrants" is to
22 consider them when identifying the participants in the market for the purposes of assigning
23 market shares. Trial Tr. 940:9-19 (Shapiro). If a firm qualifies as a rapid entrant, it is assigned
24 a market share in a way that reflects its competitive significance in the relevant market. GX981
25 § 5.2; Trial Tr. 969:18-970:13 (Shapiro). The concept is most commonly applied in markets
with homogenous products and capacity constraints. In those markets, market shares are
assigned to a rapid entrant based on the capacity it has available to divert into the relevant market
from another market. GX981 § 5.2; Trial Tr. 970:14-971:17 (Shapiro). Dr. Shehadeh has
conceded that there is "nothing wrong with that approach in theory." Trial Tr. 1722:9-12
(Shehadeh).

26 ⁸ Moreover, the historical record of entry undermines the manner in which Dr. Shehadeh elected
27 to assign market shares to the "rapid entrants" he identified. [REDACTED]

28 [REDACTED] Lithium created a PRR platform as an add-
on to its core Community product, which it officially released in 2012. *Id.* at 83:25-84:23.
Before that point in time, Lithium would have been a "rapid entrant" into the PRR platform

B. The United States Is a Relevant Geographic Market

In determining the relevant geographic market, a court must identify “where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.” *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 357 (1963). Because PRR platform suppliers can target U.S. customers for a price increase without raising prices abroad, the geographic market is appropriately defined based on the location of those customers.⁹ GX981 § 4.2.2. Professor Shapiro testified that the United States is the effective area of competition in this case. Trial Tr. 941:6-25 (Shapiro). Based on his analysis, he concluded that a hypothetical monopolist controlling all PRR platform sales to manufacturers and retailers with U.S.-facing websites would increase price to them significantly. See GX981 §§ 4.2, 4.2.2.

Bazaarvoice claims that limiting the geographic market to the United States improperly discounts the competitive significance of foreign suppliers. As described in the *Merger Guidelines*, however, when the geographic market is defined based on customer locations “[c]ompetitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.” *Id.* § 4.2.2. Accordingly, foreign suppliers that have demonstrated an interest in or ability to serve customers with a U.S. presence are treated as participants in the U.S. market. Trial Tr. 941:6-25 (Shapiro); see *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 184 (3d Cir. 2005) (market for “the sale of prefabricated artificial teeth in the United States”

market according to Dr. Shehadeh. Trial Tr. 1911:22-1912:5 (Shehadeh). Using Dr. Shehadeh’s methodology for assigning shares to rapid entrants, Lithium’s previous success as a social commerce provider should have been an accurate indicator of its future success in the PRR platform market. *Id.* at 1725:7-24, 1775:22-1777:7, 1911:22-1912:5. In the real world, however, Lithium has struggled mightily in the PRR market.

⁹ Bazaarvoice’s argument that this method of defining geographic markets has “no limiting principle,” and could result in markets as small as a single building, is not a valid criticism. Trial Tr. 1908:11-14 (Shehadeh). First, because competitive conditions do not vary across the United States, there is no need to define a smaller geographic market than the United States. Second, since competitive conditions vary between the United States and other countries, using a worldwide market would obscure the fact that customers with U.S. websites could be harmed even if those elsewhere in the world would not be harmed.

1 defined to include foreign suppliers participating in the U.S.).

2 Bazaarvoice argues that market shares should be based on the worldwide sales of all
3 suppliers and not just sales to U.S. customers. But as Professor Shapiro explained: “[T]he key
4 point is we’re measuring success in the United States and success elsewhere in the world does
5 not really inform that.” Trial Tr. 943:3-6 (Shapiro). Foreign suppliers of PRR platforms have a
6 negligible U.S. presence and have not generally been successful selling to customers in the
7 United States. See PTPFOF ¶¶ 130-137. To base shares on their worldwide sales is misleading
8 because it does not accurately reflect their competitive significance in the United States.

9 Bazaarvoice’s argument on geographic market is simply another variation on its “rapid
10 entrants” claim. Bazaarvoice would count as rapid entrants any PRR provider anywhere in the
11 world, based on its view that those firms could quickly and easily shift into the U.S. market and
12 be effective competitors. This argument fails because there are significant barriers to successful
13 entry into the U.S. PRR platform market, even for established providers of PRR platforms in
14 other geographic markets.¹⁰

15 Reevoo’s experience trying to compete in the United States illustrates this point. Despite
16 serving numerous customers in Europe, Reevoo has signed only [REDACTED] customers since entering
17 the U.S. market. Reevoo recognizes that it faces an uphill battle competing for business in the
18 United States given, among other limitations, its lack of a syndication network and an established
19 reputation in the U.S. market. See PTPFOF ¶¶ 263-268. It would therefore be misleading to
20 measure Reevoo’s competitive significance in the U.S. market based on its success selling in
21 Europe, as that European success has not been readily transferable to the United States. Trial Tr.
22 942:1-943:6 (Shapiro).

23 **C. *The Transaction Significantly Increased Concentration in the U.S. PRR***
24 ***Platform Market***

25 The transaction is presumptively unlawful because it significantly increased
26 concentration in the highly concentrated market for PRR platforms in the United States. *Phila.*

27 _____
28 ¹⁰ Dr. Shehadeh agrees that if foreign PRR platform providers do face barriers to entry in the
United States, “one would want to exclude the international websites” when calculating market
shares. Trial Tr. 1933:10-20 (Shehadeh).

1 *Nat'l Bank*, 374 U.S. at 364 (1963). Professor Shapiro examined concentration in PRR platform
 2 market several different ways, and all of his analyses yielded the same conclusion.¹¹ Trial Tr.
 3 974:12-975:5 (Shapiro). In each analysis, Professor Shapiro found that Bazaarvoice was the
 4 largest commercial supplier, PowerReviews was the close second alternative, and while some
 5 customers use in-house solutions, there were no other significant commercial suppliers in the
 6 market. *Id.* at 909:24-910:13.

7 Using customer revenues to calculate market shares, Professor Shapiro concluded that the
 8 acquisition of PowerReviews increased Bazaarvoice's market share from approximately 40% to
 9 approximately 55%. GX1063. Using the Herfindahl-Hirschman Index ("HHI") of market
 10 concentration, he found that, based on customer revenues, the pre-merger HHI was 2674,
 11 increasing by 1240 points to 3915 after the merger. *Id.* Other approaches produced similar
 12 results. Based on customer count, the pre-merger HHI was 2365, increasing 2226 points to 4590
 13 after the merger. GX1062. By either measure, HHIs in this case significantly exceed the *Merger*
 14 *Guidelines'* thresholds for presuming that the transaction is likely to substantially reduce
 15 competition. GX981 § 5.3.

16 While Bazaarvoice has criticized Professor Shapiro's focus on the IR 500 for the
 17 assignment of market shares, the mere existence of imperfections in the data used to assign
 18 market shares does not undermine his conclusions. "A reliable, reasonable, close approximation
 19 of relevant market share data is sufficient, however." *United States v. H&R Block, Inc.*, 833 F.
 20 Supp. 2d 36, 72 (D.D.C. 2011). Professor Shapiro examined the market structure using the same
 21 indices that Bazaarvoice and PowerReviews relied upon to gauge their competitive success in the
 22 ordinary course of business. PTPFOF ¶¶ 21-22, 28, 219-223. And most importantly, each of
 23 his analyses yielded the same conclusion. Post-merger, Bazaarvoice remains the market leader
 24

25 ¹¹ To analyze the market structure, Professor Shapiro examined market shares based on (1)
 26 customer counts in the raw data reported by the IR 500, GX1074, (2) customer counts in IR 500
 27 data he adjusted using additional data sources, including Bazaarvoice's invoice data, GX1062,
 28 (3) the adjusted IR 500 data, with shares weighted by customer revenues, GX1063, (4) customer
 counts in the Fortune 500 index, GX1078, (5) customer counts in the IR 1000, Trial Tr. 976:16-
 977:5 (Shapiro), and (6) Dr. Shehadeh's sample data from Bazaarvoice's Salesforce database,
 GX1057.

1 and the remaining fringe competitors have insignificant market shares – shares that are
 2 significantly lower than PowerReviews’ pre-merger market share. See GX1064*. Accordingly,
 3 the transaction is presumptively anticompetitive.¹²

4 **III. The Transaction Is Likely to Result in Significant Unilateral Effects**

5 The structural approach is not the only way that the government can prove a Section 7
 6 violation. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008). The
 7 government can also prove that a merger is unlawful by directly showing that it will eliminate
 8 significant head-to-head competition between the merging firms, giving the acquiring firm the
 9 incentive and ability to raise prices or reduce quality after an acquisition, independent of
 10 competitive responses from rival firms. See *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069,
 11 1083 (N.D. Ill. 2012); see also *H&R Block*, 833 F. Supp. 2d at 81-89; *FTC v. Swedish Match*,
 12 131 F. Supp. 2d 151, 169 (D.D.C. 2000).

13 As Professor Shapiro explained during his testimony, when evaluating a merger’s
 14 potential unilateral effects, the focal point of the inquiry is the significance of the head-to-head
 15 competition between the merging parties. Trial Tr. 913:6-14 (Shapiro). The more significant
 16 that pre-merger competition between two firms, the more likely it is that a transaction will give
 17 rise to unilateral effects. In this case, in addition to extensive evidence regarding significant
 18 head-to-head competition between the merging firms,¹³ there is also substantial evidence that the

19
 20 ¹² Contrary to defense counsel’s representation during closing arguments that the significance of
 21 the *Philadelphia National Bank* presumption has declined following the *United States v. Baker*
 22 *Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), decision in the D.C. Circuit, the precedent is still
 23 valid. In fact, recent merger decisions have cited extensively to *Philadelphia National Bank* and
 24 its progeny. See, e.g., *H&R Block*, 833 F. Supp. 2d at 49, 71; *FTC v. Swedish Match*, 131 F.
 25 Supp. 2d 151, 166 (D.D.C. 2000).

26 ¹³ Bazaarvoice now contends that PowerReviews was in the midst of implementing a change in
 27 strategy at the time of the merger, to shift its focus toward the “blue ocean” instead of competing
 28 directly with Bazaarvoice. This strategy, Bazaarvoice seems to claim, would have diminished
 PowerReviews’ competitive significance in the future. But there is no evidence to support this
 proposition. At the time the merger closed, Bazaarvoice and PowerReviews were competing
 head-to-head in many accounts, and PowerReviews was still pursuing large Bazaarvoice clients.
 GX797 at 356-57; GX817*. Even if PowerReviews was in the process of expanding its product
 portfolio to further differentiate itself from Bazaarvoice, there is no indication that the two firms
 would have stopped competing. Nor is there any evidence that another firm would have become
 a more significant constraint on Bazaarvoice’s behavior than PowerReviews as a result of the
 “blue ocean” strategy.

1 firms actually *intended* to reduce price competition through the merger. *E.g.*, GX316 at 431;
 2 GX521 at 088; GX1181 at 158, 162. While intent is not an element of a Section 7 claim,
 3 evidence of anticompetitive intent is highly relevant to merger analysis because it provides
 4 insight into the merger's probable anticompetitive effect. *Brown Shoe*, 370 U.S. at 329 n.48.

5 **A. *The Transaction Eliminated Significant Head-to-Head Competition Between***
 6 ***Bazaarvoice and PowerReviews***

7 There was substantial head-to-head competition between Bazaarvoice and PowerReviews
 8 before the merger. The company's own executives have conceded that Bazaarvoice and
 9 PowerReviews were each other's most significant competitors before the transaction. Trial Tr.
 10 426:10-12 (Luedtke); *id.* at 758:12-16 (Collins). Likewise, there is extensive evidence that pre-
 11 merger competitive pressure from PowerReviews caused significant price erosion for
 12 Bazaarvoice. *See, e.g., id.* at 718:7-719:8 (Osborne); *id.* at 762:3-5 (Collins). It was precisely
 13 this competitive pressure that Bazaarvoice intended to relieve by acquiring PowerReviews.

14 As many witnesses have testified, Bazaarvoice competed much more frequently against
 15 PowerReviews than any other competitor. *See id.* at 633:10-15 (Barton); GX492 (Pacitti Dep.)
 16 156:6-10. This testimony is corroborated by the data analysis Professor Shapiro performed.
 17 Professor Shapiro examined 480 sales opportunities related to ratings and reviews in
 18 Bazaarvoice's Salesforce database in which a competitor was identified and found that
 19 PowerReviews was identified approximately 75% of the time. Trial Tr. 984:3-985:15 (Shapiro);
 20 GX1044. The next closest alternative, in-house, appeared in only 18% of these opportunities.
 21 Trial Tr. 984:3-985:15 (Shapiro); GX1044.

22 Professor Shapiro likewise analyzed the How The Deal Was Done ("HTDWD") emails
 23 that Bazaarvoice salespersons circulated upon signing of a customer contract. He examined
 24 these emails to determine how often Bazaarvoice salespersons noted the presence of a particular
 25 competitor in these sales opportunities. Trial Tr. 986:5-9 (Shapiro). In the 143 HTDWD emails
 26 that mentioned a competitor, PowerReviews was present more than 75% of the time. *Id.* at
 27 986:12-987:1. The next-closest alternative, in-house, appeared in less than 13% of those emails.
 28 GX1047.

1 Taken together, Professor Shapiro’s analysis of these data sets paints a clear picture of
 2 the competitive landscape: PowerReviews was Bazaarvoice’s closest rival, and the next-closest
 3 option, in-house, was a distant one. See Trial Tr. 987:23-988:6 (Shapiro); GX1044; GX1047.
 4 This evidence is consistent with other ordinary course of business records that document
 5 aggressive competition between the two firms. See GX321 at 245; GX334 at 684; GX416 at
 6 683; GX948. It is also consistent with the data Professor Shapiro compiled on the total number
 7 of customers for the fringe suppliers which reveals that these firms have experienced little
 8 commercial success. Trial Tr. 978:4-17 (Shapiro); GX1064*. Professor Shapiro’s data analysis
 9 reveals a “duopoly” market structure that both parties acknowledged before the merger. *E.g.*,
 10 GX275 at 093; GX489 at 172.

11 Bazaarvoice has made no attempt to present its own data analysis to counter Professor
 12 Shapiro’s analysis. Moreover, despite arguing that competitive alternatives have flourished since
 13 the transaction, Bazaarvoice chose not to present any analysis of the information recorded in the
 14 company’s Salesforce database for the period since the merger closed. Instead, Dr. Shehadeh
 15 criticized the reliability of Bazaarvoice’s internal data sets.

16 There is, however, no reason to conclude that either data set is biased. While company
 17 executives have testified about the Bazaarvoice sales team’s Salesforce database “hygiene,” the
 18 same executives acknowledged that they regularly relied upon information from the Salesforce
 19 database for forecasting sales results and reporting information to Bazaarvoice’s board of
 20 directors. See Trial Tr. 734:2-5 (Osborne). Moreover, there is no reason to believe that either
 21 data set systematically overstates the presence of PowerReviews in competitive sales
 22 opportunities. *Id.* at 733:8-15, 734:6-16 (Osborne). The Salesforce database, which was used as
 23 a basis for important internal business purposes, is the only Bazaarvoice database that tracks
 24 information related to competition in individual sales opportunities. GX80 (Bolian Dep.) 67:18-
 25 68:3.

26 **B. The Acquisition Will Allow Bazaarvoice to Exercise Market Power**

27 As numerous pre-merger documents predicted, without PowerReviews in the market,
 28 many retailers and manufacturers have lost substantial negotiating leverage as a result of the

1 transaction. Trial Tr. 915:21-917:2, 988:7-989:6 (Shapiro). Bazaarvoice now has the ability to
 2 exercise market power and charge higher prices. See *Drinkwine v. Federated Publ'ns, Inc.*, 780
 3 F.2d 735, 739 n.3 (9th Cir. 1985) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2,
 4 27 n.46 (1984)).

5 In this market, prices are individually negotiated with each customer and different
 6 customers pay different prices when purchasing the same product. Trial Tr. at 800:13-24
 7 (Collins); *id.* at 704:4-7 (Osborne). Since prices are individually negotiated, the competitive
 8 effects of the merger will not be uniform across all customers. *Id.* at 915:1-20 (Shapiro).

9 The customers most likely to be harmed by the transaction are those that considered
 10 Bazaarvoice and PowerReviews their top two PRR platform alternatives. *Id.* at 915:16-20.
 11 Because PRR platforms are sold through individually negotiated sales, Bazaarvoice is able to
 12 identify and target these firms individually for price increases. During the sales process,
 13 Bazaarvoice learns a great deal of information about each particular customer, including its
 14 needs and whether it is considering competitive alternatives. This information influences
 15 Bazaarvoice's pricing strategy, enabling Bazaarvoice to charge higher prices to those that would
 16 have likely turned to PowerReviews for leverage pre-merger. See *id.* at 998:2-17; *cf. id.* at
 17 709:1-15 (Osborne).

18 For Bazaarvoice to profitably increase prices after the merger, however, it does not need
 19 to have complete information regarding the preferences of each individual customer. There are
 20 readily identifiable groups of customers that are especially vulnerable to post-merger price
 21 increases. As Professor Shapiro explained at trial, the three classes of customers that are
 22 particularly vulnerable to anticompetitive price increases as a result of the transaction are: (1)
 23 legacy PowerReviews customers; (2) legacy Bazaarvoice customers; and (3) customers that use
 24 syndication.¹⁴ *Id.* at 998:18-999:1 (Shapiro).

25 _____
 26 ¹⁴ Bazaarvoice's contention that the theory of harm advanced by the United States at trial has
 27 changed from the theory described in the Complaint is unfounded. The Complaint alleges that
 28 many customers lost negotiating leverage as a result of the transaction, and that customers who
 do not consider in-house solutions an economically viable alternative will be vulnerable to post-
 merger price increases. Compl. ¶¶ 39, 41. This is the same theory that was described in both of
 Professor Shapiro's expert reports, GX983* (Initial Report at 62-63), GX984* (Rebuttal Report
 at 8-17), and advanced at trial.

1 Legacy PowerReviews customers are particularly vulnerable to post-merger price
2 increases. They have already revealed a preference for using a commercial provider over in-
3 house alternatives, which makes them readily identifiable for targeted price increases. Pre-
4 merger, PowerReviews had many large retail clients that were attractive to Bazaarvoice as a part
5 of its strategy to build a robust syndication network. Without the merger, Bazaarvoice would
6 likely have continued to pursue these clients and compete to entice them to switch platforms.¹⁵
7 Bazaarvoice executives considered the acquisition of these legacy PowerReviews customers as
8 one of the principal benefits of the transaction, writing, “[i]t is unlikely that we can attract these
9 retailers to our platform in the foreseeable future nor without significant cost. Estimated costs to
10 acquire the [PowerReviews] customer base is \$32-50 [million] with a substantial percentage of
11 that being attributed to displacing them in large accounts.” GX925 at 941. These legacy
12 PowerReviews customers have already been deprived of the benefits of this competition as a
13 result of the transaction. Trial Tr. 2050:19-2051:19 (Shapiro); *see also* GX332 at 292 (“Most
14 likely, there would also exist a cost premium to achieve competitive steals, which if, on average,
15 was 25% to 50%, equates to an aggregate cost of \$40 to \$50 million.”).

16 Moreover, Bazaarvoice now has the incentive to migrate these legacy PowerReviews
17 customers to the higher-priced Bazaarvoice platform. Historically, Bazaarvoice’s platform was
18 much more expensive than the PowerReviews platform. Now, as legacy PowerReviews
19 customers have contracts that come up for renewal, Bazaarvoice has the incentive to migrate
20 them to its higher-priced platform. Trial Tr. 1003:14-1004:11 (Shapiro). This was
21 Bazaarvoice’s plan before the merger. *See* GX332 at 291; GX514 at 810. And it appears that
22 Bazaarvoice has delayed this pre-merger migration plan due at least in part to the DOJ
23 investigation and this litigation. *See, e.g.*, GX352 at 670-71.

24 Legacy Bazaarvoice customers are also particularly vulnerable to harm from the
25 transaction. Like legacy PowerReviews customers, they too have revealed a preference for using
26 a commercial provider over in-house alternatives, which makes them readily identifiable for
27

28 ¹⁵ Before the merger, Bazaarvoice even went so far to offer its platform to PowerReviews customers for free in order to get them to switch platforms. Trial Tr. 710:10-14 (Osborne).

1 targeted price increases. As Professor Shapiro testified, this group of customers has also lost
2 substantial negotiating leverage as a result of the transaction. Before the merger, PowerReviews
3 provided a more credible threat upon renewal than the remaining commercial providers in the
4 market. Trial Tr. 1000:6-1001:4 (Shapiro). This loss of leverage is evident from the relative size
5 of each provider's customer base. GX1064*. If the remaining fringe suppliers offered a product
6 that was on par with PowerReviews, the fringe suppliers would have experienced a similar
7 degree of commercial success as PowerReviews. Trial Tr. 2062:15-2065:13 (Shapiro).

8 Customers that highly value syndication also are particularly vulnerable to post-merger
9 price increases. *Id.* at 1001:5-1002:13. Before the merger, Bazaarvoice and PowerReviews were
10 the only PRR platform providers that offered a syndication network linking retailers and
11 manufacturers. While Bazaarvoice's network outstripped the network offered by PowerReviews,
12 PowerReviews offered a substantial base of retail clients that was attractive to brands interested
13 in syndication. *Id.* at 129:6-18 (Hurt). Before the merger, when PowerReviews approached
14 Bazaarvoice's brand clients and offered to syndicate their reviews to PowerReviews retailers,
15 Bazaarvoice considered the PowerReviews campaign a significant competitive threat. *See*
16 *generally* GX418. None of the fringe suppliers have the necessary retail client base from which
17 to launch a comparable campaign. *See* Trial Tr. 366:13-19 (Luedtke).

18 Bazaarvoice suggests that even the increased ability to charge many customers higher
19 prices is insufficient to trigger liability under Section 7 because the harm arising from the
20 transaction must be "market-wide." Def.'s Pre-Trial Br. 44. This argument is wrong as a matter
21 of law. All of the cases Bazaarvoice cites for this proposition are inapposite. None involved a
22 defendant with a proven ability to price discriminate among customers. Unlike the defendants in
23 those cases, Bazaarvoice can target many customers for price increases without raising price on
24 the rest. As the Supreme Court has recognized, price discrimination is an important economic
25 reality that courts must weigh when examining market power. *Cf. Eastman Kodak Co. v. Image*
26 *Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992) ("More importantly, if a company is able to price
27 discriminate between sophisticated and unsophisticated consumers, the sophisticated will be
28 unable to prevent the exploitation of the uninformed.").

Moreover, Bazaarvoice's reasoning would effectively limit unilateral effects cases to situations where the defendant had a complete monopoly over the market. This is not the law. Courts have routinely found unilateral effects even where the combined firm commanded a far smaller market share. In *H&R Block*, for instance, the court found likely unilateral effects when the merging parties were not even the two largest firms in the market and were not each other's closest competitor. *H&R Block*, 833 F. Supp. 2d at 83 ("The fact that Intuit may be the closest competitor for both [defendants] also does not necessarily prevent a finding of unilateral effects for this merger."). Likewise, in *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997), the court found likely unilateral effects even though OfficeMax remained as a sizeable competitor (with 55% share in some geographic markets). *See id.* at 1081-82; *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizontal Merger Guidelines* 28 (2006); 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶914a, at 77-79 (3d ed. 2009).

In *Oracle*, the court did suggest that proof of unilateral effects requires "that the merging parties would enjoy a post-merger monopoly or dominant position, at least in a 'localized competition' space." 331 F. Supp. 2d at 1118. Even under this standard, this condition is satisfied because Bazaarvoice acquired a dominant position by buying its only significant competitor. Regardless, no other court has applied *Oracle*'s formulation of the standard for proving unilateral effects. *See H&R Block*, 833 F. Supp. 2d at 84-85 & nn.35-36; *id.* at 88-89. Indeed, the *Oracle* formulation has been criticized because, "[w]hile a dominant position is necessary for monopolization, the concern of merger law is impermissible price increases, something which can be achieved on far lower market shares." 4 Areeda & Hovenkamp, *supra* ¶914a, at 84.

IV. Bazaarvoice Has Not Presented Sufficient Evidence Regarding Entry or Expansion To Rebut the United States' Prima Facie Case

While evidence regarding entry or expansion by other firms may rebut a Section 7 case, the defendant bears the burden to demonstrate that entry will be timely, likely, *and* sufficient to counteract the likely competitive effects from the transaction. *See H&R Block*, 833 F. Supp. 2d at 73 (emphasis added) (quoting *Merger Guidelines* § 9). To meet this burden the defendant

1 must do more than just identify other competitors, it must demonstrate that entry or expansion
 2 will “fill the competitive void” created by the acquisition. *See Swedish Match*, 131 F. Supp. 2d
 3 at 169; *see also Olin*, 986 F.2d at 1305; *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 59 (D.D.C.
 4 2009). Here, that burden is particularly substantial, given the strength of the United States’
 5 *prima facie* case. *See Baker Hughes*, 908 F.2d at 991 (D.C. Cir. 1990) (“The more compelling
 6 the *prima facie* case, the more evidence the defendant must present to rebut it successfully.”).

7 Building a basic PRR platform is relatively easy. Bazaarvoice does not focus its attention
 8 on firms like Rating System that have developed a basic PRR platform. Successful entry into the
 9 PRR platform market, however, requires substantially more than software development.
 10 Commercially successful PRR platforms must be scalable and customizable to serve the needs of
 11 enterprise customers; offer a full range of services and features including 24-hour support,
 12 moderation, syndication, analytics, and search engine optimization; and the PRR vendor must
 13 have a proven track record of serving enterprise customers.

14 There are significant barriers to entry in the PRR platform market in the United States,
 15 including network effects from syndication, high switching costs, and reputation.¹⁶ Considered
 16 together, these barriers are a formidable shield that will deter firms outside the market from
 17 making the investments necessary to meaningfully compete with Bazaarvoice. These same
 18 barriers will also inhibit the ability of existing fringe suppliers to expand. At trial, Bazaarvoice
 19 preferred to discuss each barrier to entry independently. But, in reality, a new entrant faces all of
 20 the barriers to entry simultaneously; therefore, they must be considered together when evaluating
 21 whether entry or expansion will be timely, likely, and sufficient to counteract harm from the
 22 merger.

23
 24
 25
 26 ¹⁶ Before the acquisition, Bazaarvoice admitted that “[s]ignificant barriers to entry” protected its
 27 competitive position and that it “would be very difficult for a new company to enter [its] market
 28 organically or through M&A.” GX650 at 306. In light of its pre-merger statements,
 Bazaarvoice’s claim that there are no meaningful barriers to entry in the PRR platform market is
 not credible. *See CCC Holdings*, 605 F. Supp. 2d at 49-50 (giving substantial weight to pre-
 merger admissions by a defendant regarding the presence of barriers to entry in its market).

A. Existing PRR Platform Alternatives Will Not Expand to Constrain Bazaarvoice

1. Fringe Commercial PRR Platform Providers Will Not Constrain Bazaarvoice

Before the merger, Pluck, Gigya, and Viewpoints each offered a PRR platform, but collectively they had a negligible impact the market. In the 16 months following the merger, this has not changed. The competitive impact of these remaining fringe PRR platform providers is not comparable to the competitive threat that PowerReviews posed to Bazaarvoice before the merger. There is no evidence that these firms—either independently or collectively—have caused, or will likely cause, the sort of competitive threat to Bazaarvoice that PowerReviews did.

Bazaarvoice executives analyzed the benefits of a merger with PowerReviews on at least three different occasions. Each time, Bazaarvoice concluded that the acquisition of PowerReviews would extinguish its primary competitor and give it the ability to profitably raise prices—even though Pluck, Gigya, and Viewpoints were already in the market. Nonetheless, Bazaarvoice now claims that competition from these firms has already replaced the loss of PowerReviews.

The purported shift in the company’s attitude toward these firms is likely attributable to this litigation. At trial, Bazaarvoice offered a handful of anecdotes regarding these firms to support its contention that competition from PowerReviews has already been replaced. A small percentage of customers, however, also elected to purchase a PRR platform from one of these firms before the merger as well. These modest post-merger examples, therefore, do not establish that these fringe competitors have achieved new competitive significance since the merger. Indeed, the evidence at trial established that these fringe competitors continue to achieve only limited sales and provide only a limited competitive check on Bazaarvoice.

Pluck. Pluck has been offering a PRR platform for 7 years and has approximately [REDACTED] customers to show for it. GX62* (Crickmer Dep.) 169:25-170:5. Nothing in the record indicates Pluck will be more successful going forward. As Dr. Shehadeh conceded during cross-examination, he could not identify any change in strategy that would make Pluck more

1 competitive with Bazaarvoice today than it was in the past. Trial Tr. 1945:7-12 (Shehadeh). The
 2 record actually indicates Pluck's competitive significance has declined since the merger. Just
 3 before trial, Bazaarvoice won Pluck's largest customer, Target. *Id.* at 436:21-24 (Luedtke); *id.* at
 4 759:5-11 (Collins). Tellingly, at trial the best thing that Mr. Barton could say about Pluck's
 5 current competitive significance is: "They still exist." *Id.* at 664:24-665:8 (Barton).

6 **Gigya.** The features offered by Gigya's PRR platform are clearly inferior to those
 7 offered by the PowerReviews platform. Gigya offers a very simplistic PRR platform that does
 8 not even allow consumers to rate sub-attributes of products. GX64 (Tarkowski Dep.) 92:24-
 9 93:12. Gigya also does not offer syndication services. Trial Tr. 603:7-15 (Tarkowski). And
 10 even though Gigya offers a PRR platform at no incremental cost to customers using its suite of
 11 social tools, many of its customers concurrently license Bazaarvoice's PRR platform. GX465 at
 12 632.

13 Like Pluck, Gigya's PRR platform has failed to achieve widespread market acceptance.
 14 GX1064*. Dr. Shehadeh also failed to articulate any change in strategy or new investment that
 15 would make Gigya's PRR platform more competitive in the wake of the merger. Trial Tr.
 16 1946:24-1947:13 (Shehadeh). In short, there is no reason to believe that Gigya's competitive
 17 significance is not commensurate with its historic market share.

18 At trial, testimony from one of Bazaarvoice's own witnesses illustrated that Gigya will
 19 not replicate the leverage that customers gained from having PowerReviews as a credible
 20 alternative to Bazaarvoice. Mr. Bausch, Vice President of Interactive Marketing at World
 21 Kitchen, testified that he entered into contract renewal negotiations with Bazaarvoice in late
 22 2012. *Id.* at 1287:10-24 (Bausch). At the time, World Kitchen already had an agreement in
 23 place with Gigya, which included access to Gigya's PRR platform. *Id.* at 1299:19-25. Under the
 24 terms of its agreement with Gigya, World Kitchen could have implemented Gigya's ratings and
 25 reviews features at no incremental cost. *Id.* at 1300:1-4. Nonetheless, World Kitchen ultimately
 26 renewed its agreement with Bazaarvoice. Upon renewal, World Kitchen's contract price
 27 increased from \$105,000 to around \$200,000 per year. *Id.* at 1299:2-18.

28 While Mr. Bausch testified that he received additional features in conjunction with this

price increase, his experience was different from that of many customers who used PowerReviews as leverage before the merger.¹⁷ See GX293*; GX386*; GX802*. As Mr. Osborne, Bazaarvoice's former Chief Revenue Officer, admitted at trial, before the merger there were cases in which Bazaarvoice offered to match or beat the price offered by PowerReviews in order to win a customer's business. Trial Tr. 709:1-15 (Osborne). In Mr. Bausch's case, his next-best PRR platform alternative, Gigya, was *free*. Nonetheless, his company ultimately agreed to accept an even *higher* price to secure renewal of its PRR contract with Bazaarvoice.

Viewpoints. During Bazaarvoice's opening statement, it presented a demonstrative that touted Viewpoints as one of the "bundled social commerce solutions" that has emerged during the "rapid evolution" of the post-merger market. See *Def's Opening Presentation* at 3. Viewpoints, however, exited the market in 2012. GX75 (Moog Dep.) 68:5-17, 68:20.

2. In-House Solutions Will Not Constrain Bazaarvoice

Contrary to GX1253, see *Def's Opening Presentation* at 16, the initial, erroneous iteration of Dr. Shehadeh's chart in which he attempted to index the growth of in-house solutions since 2009, the adoption of in-house solutions has not been expanding. Cf. GX1254 (demonstrative exhibit correcting for the omission of Amazon.com from Dr. Shehadeh's original index); see also Trial Tr. 1921:8-1929:18 (Shehadeh). Moreover, the mere presence of in-house solutions does not negate the evidence regarding the likelihood of competitive harm arising from the transaction. While in-house PRR platforms have long been used by some retailers and manufacturers, they have never been a substantial constraint on Bazaarvoice's competitive behavior. To the contrary, as Professor Shapiro's analysis demonstrates, historically Bazaarvoice and PowerReviews expanded much faster than the adoption of in-house solutions. GX1038; see also Trial Tr. 927:18-928:22 (Shapiro). And there is no reason to believe that in-house solutions will act as a greater constraint on Bazaarvoice's behavior in the future.

¹⁷ Mr. Bausch's testimony also shows that customers do not necessarily have full information about each PRR platform vendor, even if they are actively searching for a PRR provider. Mr. Bausch testified that syndication was "incredibly important" to his business. Trial Tr. 1292:15-1293:6 (Bausch). He also testified that he thought Gigya "might" offer syndication, but he was not certain. *Id.* at 1300:16-20. Gigya does not offer syndication. GX64 (Tarkowski Dep.) 101:4-16.

1 The evidence from Bazaarvoice's ordinary course of business records also indicates that
 2 in-house solutions are a much lesser constraint on Bazaarvoice's pricing behavior than
 3 PowerReviews. Analysis of Bazaarvoice's Salesforce database and HTDWD emails
 4 demonstrates that Bazaarvoice encountered PowerReviews much more frequently than potential
 5 in-house builds in competitive sales opportunities. *Id.* at 2061:9-2062:14 (Shapiro). This is
 6 consistent with the rest of the trial record, which shows that while in-house solutions may be an
 7 alternative for some retailers and manufacturers, they are not a viable alternative for many
 8 others. Many retailers lack the interest or capability to independently fund, design, implement,
 9 and maintain a PRR platform for their own use. *Id.* at 1188:12-1189:12, 1190:9-1191:3, 1193:10-
 10 1194:16 (Friedland); *id.* at 1638:2-15 (Moen); *id.* at 1218:7-13 (Maki); *see also* PTPFOF ¶ 289.

11 3. E-Commerce Platforms Will Not Constrain Bazaarvoice

12 Bazaarvoice also identified a number of e-commerce platform providers that, it contends,
 13 will compensate for the loss of competition from PowerReviews. The record, however, does not
 14 support this proposition. To the contrary, the record shows that these products do not constrain
 15 Bazaarvoice's pricing decisions. Mr. Luedtke testified that e-commerce platforms provide less
 16 ratings and reviews functionality than even the PowerReviews Express platform,¹⁸ which was a
 17 platform with limited features that targeted small-and-medium-sized businesses. Trial Tr. 419:1-
 18 420:3 (Luedtke). Before the merger, Bazaarvoice did not even have a product that addressed that
 19 segment of the market, GX90 (Luedtke Dep.) 116:22-117:9, and it did not believe that it
 20 competed with firms offering self-service solutions for small-and-medium-sized businesses.
 21 GX81 (Collins Dep.) 314:16-315:9.

22 The principal e-commerce platform that Bazaarvoice identified as a competitive threat at
 23 trial was Amazon Webstore. But Amazon Webstore's functionality is very limited. Trial Tr.
 24 1150:16-19 (Godfrey). Indeed, Bazaarvoice currently partners with Amazon Webstore to
 25 provide its PowerReviews Express platform "as the premium review solution/app for their
 26 [W]ebstore clients." GX20. Even though PowerReviews Express only has a fraction of the

27
 28 ¹⁸ Magento, for example, does not even use its own PRR platform on its own website. It uses Bazaarvoice. Trial Tr. 1956:20-22 (Shehadeh).

1 capabilities offered by the PowerReviews Enterprise platform, it is superior to Amazon
2 Webstore's offering.

3 During discovery, Bazaarvoice identified just [REDACTED] clients or prospective clients during
4 the past three years that ultimately elected to use the ratings and reviews functionality provided
5 by Amazon Webstore. Def.'s Supp. Response to Interrogatories 16 & 17, Ex. E. This is in stark
6 contrast to the hundreds of documented instances of head-to-head competition between
7 Bazaarvoice and PowerReviews before the merger. *See, e.g.* GX37 at 7. Based on the evidence
8 in this case, there is no reason to believe Amazon Webstore, or any other e-commerce platform,
9 will replace the competition previously provided by PowerReviews.

10 **B. *Bazaarvoice Did Not Present Any Evidence That the Firms It Considers***
11 ***Potential Entrants Are Likely to Enter the Market***

12 Bazaarvoice has also identified a large, ill-defined group of firms that it considers to be
13 viable entrants into the PRR platform market in the United States. It has not, however, presented
14 any evidence that entry by any one of these firms will be timely, likely, and sufficient to
15 counteract the likely effects of the transaction. "The mere existence of potential entrants does not
16 by itself rebut the anti-competitive nature of an acquisition." *Chi. Bridge & Iron Co. N.V. v.*
17 *FTC*, 534 F.3d 410, 436 (5th Cir. 2008).

18 Tellingly, Bazaarvoice declined to offer trial or deposition testimony from purported
19 entrants Google, Facebook, IBM, Salesforce, or Oracle to support its contention that they are
20 likely entrants. Nor did Bazaarvoice's experts rely on the documents that it subpoenaed from
21 Facebook and Oracle. While Bazaarvoice did offer some deposition testimony from Amazon,
22 that testimony established that Amazon has "no plans" to offer a standalone PRR platform.
23 GX70 (Ahmed Dep. (Amazon.com)) at 114:19. There is no reason to believe that will change.
24 Nor is there any reason to believe that an online retailer would welcome a competitor like
25 Amazon as its PRR provider.

26 Bazaarvoice has instead offered screenshots, speculation, and rhetoric. *See, e.g.*, Trial Tr.
27 1952:11-1953:1 (Shehadeh). These materials do not meet Bazaarvoice's burden. While these
28 firms may compete in adjacent markets, they do not constrain the price of PRR platforms. *See,*

1 *e.g., id.* at 340:17-342:4 (Luedtke). If the mere prospect of entry by these firms were, in fact,
 2 deterring Bazaarvoice from raising prices, Bazaarvoice could not have hoped to eliminate price
 3 erosion through the acquisition of PowerReviews. The company’s contrary views, however, are
 4 well-documented. *See, e.g.,* GX518 at 475; GX519 at 751. This case, therefore, is very different
 5 from other cases where the courts found no Section 7 violation because defendants presented
 6 evidence that their pricing was constrained by the potential entrants. *Cf. United States v. Waste*
 7 *Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (“The existence of haulers in Fort Worth,
 8 therefore, constrains prices charged by Dallas haulers . . .”).

9 **C. Substantial Barriers to Entry Protect Bazaarvoice’s Dominant Position and**
 10 **Impede Significant Entry or Expansion**

11 For entry or expansion to save a transaction from liability, it must replace the competition
 12 lost by the merger. Replacing the lost competition from PowerReviews would require
 13 substantial time, scale, and investment to overcome significant barriers to entry. Bazaarvoice
 14 cannot simply point to small firms, like Rating-System, to demonstrate ease of entry because the
 15 sort of basic solutions it offers is not comparable to the sophisticated solutions PowerReviews
 16 offered to enterprise customers.¹⁹ PowerReviews had spent years and millions of dollars
 17 developing its platform. *See* Trial Tr. 2065:14-2066:17 (Shapiro). Moreover, as the struggles of
 18 Pluck, Gigya, Reevo, and Lithium confirm, even companies with a functioning PRR platform
 19 face other significant barriers to competitive success.

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

21 Network effects are a substantial barrier to entry and expansion when they protect an
 22 incumbent supplier’s customer base. *See DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d
 23 1119, 1137-38 (N.D. Cal. 2010). As Bazaarvoice recognized before the merger, syndication
 24
 25

26 ¹⁹ Indeed, at trial, Mr. Godfrey would not say that Bazaarvoice felt legitimately threatened by
 27 Rating-System. Trial Tr. 1152:3-17 (Godfrey). Mr. Godfrey’s apparent indifference toward
 28 Rating-System is in stark contrast to his pre-merger views regarding the threat from
 PowerReviews. *See* GX554 at 092 (“[W]e are also seeing substantial pressure from PR on the
 high end[.]”).

1 creates a network effect that is a substantial barrier to entering the PRR platform market. *See*
 2 GX406 at 202; GX840 at 942.

3 As Mr. Collins testified at trial, when it comes to syndication, it takes “two to tango.”
 4 Trial Tr. 813:22-814:9 (Collins). To build a viable syndication network, a PRR platform
 5 supplier needs to have a robust client base, which both Bazaarvoice and PowerReviews had. The
 6 fringe players, on the other hand, have been unable to build a sufficient client base from which to
 7 launch a viable syndication offering. This is exactly the advantage Bazaarvoice expected to
 8 exploit as a result of the transaction. *Cf.* GX425 at 926 (“[A]ny company entering the market
 9 would have to start from the beginning by securing all of the retail clients . . .”).

10 Because of its large and growing installed client base, PowerReviews was uniquely
 11 positioned to mount a successful challenge to the Bazaarvoice syndication network. Bazaarvoice
 12 recognized that the PowerReviews retail clients were attractive syndication outlets for many of
 13 Bazaarvoice’s own brands and that PowerReviews was encroaching on the value of its network
 14 proposition. *See* Trial Tr. 169:17-170:5 (Hurt); GX319. To pose a comparable threat to
 15 Bazaarvoice, another player would need to obtain a similar base of retail clients. This would be
 16 extraordinarily difficult post-merger, in light of Bazaarvoice’s entrenched position and switching
 17 costs. Indeed, even before the merger, Bazaarvoice acknowledged that customers using its
 18 syndication network were unlikely to switch to another provider upon renewal because they
 19 would leave the network. GX1220. Perhaps most importantly, Bazaarvoice’s remaining
 20 competitors agree that the syndication barrier to entry will continue to protect Bazaarvoice’s
 21 dominant position in the market. PTPFOF ¶ 248. *See generally* PTPFOF ¶¶ 242-249.

22 Syndication is valued by customers, and its adoption is growing rapidly. GX1059,
 23 GX1052. The contention that a customer or competitor could easily replicate Bazaarvoice’s
 24 syndication network by partnering with a third-party service is belied by the evidence.²⁰ A
 25

26 ²⁰ Bazaarvoice claims, for example, that Webcollage can easily replicate its syndication services.
 27 This claim is contradicted by testimony from Webcollage. Webcollage’s CEO testified that the
 28 company has only ever syndicated reviews for three or four customers, including a small number
 of video reviews, and “just a handful of textual reviews.” Trial Tr. 1237:11-17, 1240:1-3,
 1240:19-23 (Matthews).

substantial fraction of Bazaarvoice's revenue base is derived from customers that are participating in its syndication network. Trial Tr. 1015:21-1017:16 (Shapiro). If it were truly easy to pull together a comparable syndication offering, Bazaarvoice could not extract significant rents from customers participating in its syndication network. See GX699*; GX1090*.

2. Switching Costs and Reputation Are Barriers to Entry

Courts have recognized that high switching costs can insulate incumbent suppliers from competition and impede expansion by fringe players. *CCC Holdings*, 605 F. Supp. 2d at 49; cf. *Eastman Kodak*, 504 U.S. at 476 (stating that high switching costs may cause locked-in consumers to tolerate price increases rather than switch suppliers). Switching costs in the PRR platform market are a substantial deterrent to switching PRR platform providers. GX62* (Pluck Dep.) 190:3-21; 227:16-20, 22-23; GX223; GX1093 at 864.

The importance of switching costs was illustrated by the trial testimony from Mr. Friedland, President of Build.com. Because of switching costs, Mr. Friedland testified that even if Reevoov offered Build.com a price that was 50% of his current Bazaarvoice price, Build.com still would not switch providers. Trial Tr. 1194:21-1195:1 (Friedland). It is clear from Mr. Friedland's testimony and other evidence in the record that switching costs are a barrier to other firms achieving substantial competitive significance in a timely fashion and therefore deter entry.

Dr. Shehadeh admitted that there are switching costs in this market.²¹ *Id.* at 1762:12-13 (Shehadeh). To minimize the impact of switching costs as a barrier to entry, he attempted to carve out a few scenarios where, in his view, they are lower than the prevailing norm. *Id.* at 1762:12-1763:14. But even assuming that he is correct, the isolated examples he identified do not negate the overall significance of switching costs in this market.

Reputational barriers will also inhibit the expansion of fringe players and entry by new firms. In this market, customers rely on customer references to determine whether a supplier is capable of providing the necessary service to support the client's needs. See PTPFOF ¶¶ 253-255. Bazaarvoice erroneously contends that this sort of reputation is not a barrier to entry as a

²¹ Mr. Goldberg, Bazaarvoice's proffered shopper marketing expert, also acknowledged that switching PRR platforms can be "expensive and disruptive." Trial Tr. 1536:2-8 (Goldberg).

1 matter of law because courts have held that “good will achieved through effective service” is not
 2 itself a barrier to entry, *Syufy*, 903 F.2d at 669 (internal quotation marks omitted). But in
 3 markets like this one, where customers require a proven track record before considering a
 4 supplier, courts have found that reputation can act as a formidable entry barrier. See *CCC*
 5 *Holdings*, 605 F. Supp. 2d at 54-55; *Chi. Bridge*, 534 F.3d at 437-38.

6 **D. The Experiences of Recent Entrants Confirm the Presence of Entry Barriers**

7 “The history of entry into the relevant market is a central factor in assessing the
 8 likelihood of entry in the future.” *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 56 (D.D.C.
 9 1998). Here, within the past few years there have been three notable attempts to enter the PRR
 10 platform market in the United States. One entrant, Viewpoints, has exited the market entirely.
 11 GX75 (Moog Dep.) 67:23-24; 68:3-17, 68:20. Another, Reevo, is currently struggling to gain a
 12 toehold in the United States, despite a previous history of success in Europe. PTPFOF ¶¶ 263-
 13 268. The third, Lithium, has struggled to sell its rating and reviews platform, despite its success
 14 selling other complementary social commerce tools. PTPFOF ¶¶ 275-79. The experience of
 15 these three firms confirms that there are high barriers to entry in the U.S. market for PRR
 16 platforms.

17 Bazaarvoice has repeatedly likened this case to *Syufy*. But, unlike *Syufy*, there is no
 18 evidence here that another competitor has emerged to take substantial market share at
 19 Bazaarvoice’s expense. In *Syufy*, a new competitor entered the Las Vegas first-run film market
 20 after the challenged mergers. Two years later, the new entrant was operating more screens than
 21 *Syufy*, and *Syufy* was experiencing falling market share. Thus, by the time of the trial, the
 22 market was “more competitive” than before the challenged transactions. *Syufy*, 903 F.2d at 665.
 23 Here, in contrast to *Syufy*, Bazaarvoice continues to maintain a dominant share of PRR
 24 customers, see GX1064*, no new entrant has gained significant market share following the
 25 transaction, and existing fringe providers have not expanded to fill the void left by
 26 PowerReviews. *Id.*; PTPFOF ¶¶ 262-281.

V. The Customer Testimony Offered by Bazaarvoice Cannot Overcome the Clear Evidence of Likely Anticompetitive Effects Arising From the Transaction

During discovery, Bazaarvoice conducted over 100 abbreviated depositions, many by telephone, of retailers and manufacturers. Counsel for Bazaarvoice claims that the customer deposition testimony was not cherry-picked, but was instead derived from a Government-provided list of 140 customers who were harmed by the merger. *See* Trial Tr. 63:17-20 (Def.’s Opening); *id.* at 2054:18-21 (Shapiro); *id.* at 2143:24-2144:1 (Def.’s Closing). There is no such list. The government has always maintained that all of Bazaarvoice’s and PowerReviews’ current or prospective customers may be harmed by the acquisition. Instead, Bazaarvoice independently picked customers to present to the Court. Bazaarvoice’s “sample” of customers was skewed towards customers who selected a fringe competitor and was not representative of the larger group that may be harmed by the merger.²²

Many of the customers Bazaarvoice chose to depose testified that they had not yet been harmed by the merger. In a clear overreach, Bazaarvoice’s counsel later characterized this testimony as “overwhelming customer testimony . . . in support of the acquisition.” Trial Tr. 2179:25-2180:1 (Def.’s Closing). There is no basis in the record for that assertion.

It is not surprising that many customers may not yet have experienced a price increase. Bazaarvoice’s conduct during the post-merger time period must be assumed to have been colored by the shadow of the DOJ investigation and this litigation. Even where there is no direct evidence of pulling punches, post-merger evidence within the control of the parties is not probative. *See Chi. Bridge*, 534 F.3d at 435; *see also Gen. Dynamics*, 415 U.S. at 504; *Hosp. Corp.*, 807 F.2d at 1384. The likely anticompetitive effects of the merger have not yet occurred. And while customer testimony regarding the customer’s personal experience is often highly

²² Bazaarvoice is also incorrect when it suggests that the government sought to impede its efforts to gather evidence by objecting to its request to double the amount of time it could use to depose non-party witnesses one month before the close of fact discovery. However, at the time, Bazaarvoice had used only about half its originally allotted time. ECF No. 66 at 1; ECF No. 71 at 2:16-17. Ultimately, the Court gave Bazaarvoice an additional 20 hours, which it never completely exhausted.

relevant and helpful in merger cases,²³ the type of customer testimony Bazaarvoice seeks to emphasize in this case should be given little weight.

Several of the deponents selected by Bazaarvoice did not utilize or purchase ratings and reviews at the time of their depositions. *See* PTPFOF ¶ 188. Thus, they were not customers purchasing the relevant product. For customers that did have ratings and reviews, the evidence showed that many had not invested the time and effort to become well-informed on the potential effect of the merger. In fact, many testified that they had not given any thought to the merger. *See id.* ¶ 185. Many customers were either unaware of alternatives or had conducted a limited review of their alternatives.²⁴ *Id.* ¶ 186. Still other customers displayed a misunderstanding of the capabilities of other PRR providers. *Id.* ¶ 187. Moreover, these customers, in forming their opinions, did not have access to Bazaarvoice’s post-merger plans and other internal documents, confidential information from competitors, or data about the behavior of other customers.

Other courts have discounted lay opinion testimony supporting a merger where, as here, the economic and other evidence predict the merger is likely to produce an anticompetitive effect. For example, in *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989), the court found that supportive customer testimony was insufficient to rebut the government’s prima facie case under Section 7. *Id.* at 1428. In *Ivaco*, a number of major customers opined that the combined firm would not raise prices and that the transaction would lead to greater innovation. *Id.* at 1427-28. Nonetheless, the court concluded the transaction violated Section 7, holding that “the customers’ opinions, while significant, are insufficient to offset the evidence of potential anticompetitive effects.” *Id.* at 1428.

²³ For example, customers often provide critical testimony that can assist the court in determining the appropriate scope of the relevant product market. *See* U.S. Dep’t of Justice & Fed. Trade Comm’n, *Commentary on the Horizontal Merger Guidelines*, at 9 (2006). But in this case, Bazaarvoice seeks to emphasize customer testimony that lacks a sound evidentiary foundation and in many cases amounts to pure speculation.

²⁴ While customers can be a reliable source of information about their own preferences in selecting a PRR vendor, the court in *Oracle*, cautioned against placing substantial weight upon customer testimony that amounts to speculation that is not supported by “serious analysis.” 331 F. Supp at 1131. Here, many customers who testified that they had options did not undertake any serious analysis of the market. *See* PTPFOF ¶ 186.

1 Similarly, in *Philadelphia National Bank*, the district court gave significant weight to
 2 testimony by bank officers “that competition among banks in Philadelphia was vigorous and
 3 would continue to be vigorous after the merger.” 374 U.S. at 366-67. The Supreme Court
 4 criticized the district court for relying on this evidence, holding: “There is nothing in the record
 5 of this case to rebut the inherently anticompetitive tendency manifested by [the market shares] . .
 6 . . This lay evidence on so complex an economic-legal problem as the substantiality of the effect
 7 of this merger upon competition was entitled to little weight, in view of the witnesses’ failure to
 8 give concrete reasons for their conclusions.” *Id.* Likewise, much of the customer testimony
 9 offered by Bazaarvoice was not supported by the evidence and should be given little weight.

10 **VI. Bazaarvoice Has Not Presented Any Evidence Of Merger-Specific Efficiencies**

11 Where the government has established a strong prima facie case of competitive harm, to
 12 advance a successful efficiencies defense the defendant has the burden of supplying evidence of
 13 “extraordinary efficiencies.” *Heinz*, 246 F.3d at 720. Efficiencies are “‘cognizable’” only when
 14 they are “‘merger-specific,’” “‘have been verified,’” and “do ‘not arise from anticompetitive
 15 reductions in output or service.’” *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines*
 16 § 10).

17 Bazaarvoice has failed to produce any credible and verifiable evidence of efficiency gains
 18 from this transaction. All of the alleged benefits of the merger that Bazaarvoice has identified
 19 remain speculative and unquantified. Most importantly, they are not merger-specific because
 20 they could have been achieved absent the merger. *See, e.g.*, Trial Tr. 271:18-272:1 (Hurt); GX83
 21 (Collins 30(b)(6) Dep.) 46:13-47:8; GX87 (Godfrey CID Dep.) 51:14-53:9; GX493 (Parsons
 22 Dep.) 82:20-83:13.

23 **CONCLUSION**

24 The United States has proven that the acquisition violated Section 7. The Court should
 25 enter judgment in its favor and order a remedy that will restore the competition that was
 26 extinguished by the transaction.

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Respectfully submitted by:

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