BORIS FELDMAN, State Bar No. 128838
DYLAN J. LIDDIARD, State Bar No. 203055
DOMINIQUE-CHANTALE ALEPIN, State Bar No. 241648
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100
Email: boris.feldman@wsgr.com;
dliddiard@wsgr.com; dalepin@wsgr.com

Attorneys for Defendant Bazaarvoice, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

United States of America, Plaintiff, v. Bazaarvoice, Inc., Defendant.	CASE NO.: 13-cv-0133 WHO **DEFENDANT'S PRE-TRIAL BRIEF (REDACTED)** Complaint Filed: January 10, 2013 Judge: Hon. William H. Orrick III Trial Date: September 23, 2013

REDACTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

MISCELLANEOUS

I. INTRODUCTION

The government claims the June 2012 merger of Bazaarvoice and PowerReviews violated Section 7 of the Clayton Act, 15 U.S.C. § 18, by reducing competition in the sale of product rating and review ("PRR" or "R&R") platforms to manufacturers and retailers. The issue in this case, as in every case under Section 7, is whether the removal of the acquired company (here, PowerReviews) will raise prices in the relevant market as a whole, and thereby substantially lessen competition. *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974). Here, the government lacks the evidence necessary to prove actual (or even threatened) harm to competition from the acquisition. The post-merger evidence and customer testimony in this case conclusively demonstrate the merger has not increased marketwide prices or given Bazaarvoice market power, rendering any other issue "mere surplusage" and requiring a judgment in Bazaarvoice's favor. *See United States v. Syufy Enters.*, 903 F.2d 659, 665 (9th Cir. 1990).

The government's case is based entirely on (i) documents hypothesizing one of several scenarios that executives in 2011 thought might occur (but that have since been proven wrong by actual market events), and (ii) a deeply flawed economic analysis that admittedly contradicts controlling precedent. Neither can carry the government's burden of proof. The evidence at trial will instead show that PRR platforms are one of many offerings in the highly competitive and dynamic social commerce tools market, that competition in PRR platforms remains just as (if not much more) intense now as before the merger, and that PRR platform purchasers have not been harmed in any way.

Since 1976, when the Hart-Scott-Rodino Act was passed, almost every governmental challenge has been to mergers that have not yet been consummated. Those cases require a *prediction* as to whether the probable future effect of the merger will be to raise prices to customers marketwide. This case is different because the merger was consummated 15 months ago. The Court does not need to guess what the effects of this merger will be since it has the benefit of concrete post-merger facts. And those facts are that, since the deal closed, prices have not increased; new competitors have entered and expanded; and the social commerce business has seen continued rapid evolution and innovation. Bazaarvoice made inquiries to well over 100

customers before the government insisted that the inquiries stop, and the overwhelming majority testified under oath that they have not been harmed by the merger and do not expect to suffer any harm from it going forward.

The government claims that the merger will have so-called "unilateral effects," meaning it will allow Bazaarvoice to raise prices on its own without regard for other competitors. The government and its economist, however, admit, as they must, that the question under Section 7 is whether the loss of the competition provided by PowerReviews is unique or whether other forces could replace it. GX0983 at 68. The post-merger evidence shows conclusively that PowerReviews in fact *has* been replaced. Replacement has come from new entrants into the market (such as Lithium), energized competition and expansion from existing players (such as Amazon, Pluck, Reevoo, and Gigya), and the threat of potential rapid entrants (such as Google, Oracle, and IBM). The government fails to grapple with these market realities, offers only speculative predictions of possible harm, and relies on a flawed economic and legal model that has been rejected by the Ninth Circuit.

The Government's Case Rests on Dated Documents. The government's case depends largely on documents written by Bazaarvoice employees prior to the merger. In the government's exhibits, Bazaarvoice employees (1) said that PowerReviews was Bazaarvoice's "primary" competitor; (2) articulated a desire to beat PowerReviews and willingness to go to great lengths to do so; and (3) stated that the acquisition of PowerReviews would stop "price erosion" and "feature driven one-upmanship." The first two categories of these documents do not require substantial analysis. As Bazaarvoice employees have testified, these documents date mostly from 2011 and, during that time, PowerReviews was a significant competitor for some customers. But buying a competitor does not itself raise an antitrust problem, and often reflects healthy competition. This is true no matter how colorfully the documents may describe the competitive process.

The third category of documents, while admittedly more relevant, still does not support finding a Section 7 violation here. Objective market facts will demonstrate that the predictions made in those documents have been proven wrong by later events. Customers will testify that they have many alternatives, and the evidence will show that multiple competitors have

repositioned or expanded to fill the role previously played by PowerReviews. The discovery responses of customers and competitors show that there are simply too many options available to customers today for Bazaarvoice to have any control over prices or the pace of innovation, despite the hopes expressed in the documents the government will likely highlight at trial.

Section 7 is not an intent-based statute. Rather, it requires a close analysis of market realities to determine whether harm to competition in a relevant antitrust market is likely to occur. Tellingly, nothing predicted by the government (or by the documents it relies on) has happened in the 15 months since the transaction closed in June 2012. To the contrary, customers continue to receive competitive prices, and ratings and reviews technology and features continue to improve. The government has no meaningful answer to this evidence.

The Government's Expert Analyses Are Irrelevant and Fatally Flawed. The government's expert testimony, properly viewed, does not support the government's case. Its industry expert, information systems Professor Chris Dellarocca, admits that he "ha[s] not been asked to evaluate, and ha[s] not considered, the commercial aspects of firms that provide social media technologies." In contrast, Bazaarvoice's expert, Jason Goldberg, offers a detailed overview of the social commerce industry rooted in years of practical experience on behalf of customers to assist the Court in understanding this dynamic, innovative, and highly competitive space. Professor Dellarocca does not dispute his key conclusions, conceding the industry is dynamic. Having written previously that "[w]hat we have seen has barely scratched the surface of what is coming and what is possible with respect to social media," Professor Dellarocca had to admit in his deposition that:

> I believe that there will be innovation. There will be new tools introduced. Some old tools will remain relevant. Others might prove to be less relevant. Some of the current market players might persist. Others might be displaced and new players may come in. Which is true of any dynamic market. . . . Dynamic is a market where there is a lot of innovation. Yeah, I think it's a dynamic market.

Dellarocca Dep. 129:16-18 & 131:7-23. Thus, the government's own industry expert concedes that Bazaarvoice is competing in a "dynamic market" subject to constant change – meaning no "presumption" can be derived from historical market shares. *See United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1121-23 (N.D. Cal. 2004) (Walker, C.J.). This means the government

REDACTED

cannot show, as it must, that this merger is a matter for judicial intervention rather than regulation by the free market alone. *See California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1137 (N.D. Cal. 2001) (Chesney, J.) ("'[A] court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market force, bringing about the very ills the antitrust laws were meant to prevent.' This appears to have even more force in an industry . . . experiencing significant and profound changes.") (citations omitted), *amending* 84 F. Supp. 2d 1057 (N.D. Cal. 2000), *aff'd*, 217 F.3d 846 (9th Cir. 2000) (Table).

The government's economist, Dr. Carl Shapiro, is well respected. But in this case he presents a formulaic analysis performed largely by his staff and replete with obvious and significant errors. He bases his opinion on high market concentration, a mode of analysis that he has admitted elsewhere is of little value in "unilateral effects" cases that involved differentiated products like this one. *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 715 n.53 (2010) ("there is no good theoretical link between the level of [market concentration] and unilateral price effects with differentiated products"). Indeed, the courts have rejected such an approach in technology markets where products are highly differentiated. *See Oracle*, 331 F. Supp. 2d at 1118. Even if it were relevant, his reports' calculations of market share suffer from glaring flaws. He initially relied upon incorrect data that inflated PowerReviews' market share and, even after some of the mistakes were corrected, he continues to overstate PowerReviews' competitive significance. Moreover, as Bazaarvoice's economist, Dr. Ramsey Shehadeh, will testify, Dr. Shapiro fails to assign *any* market share to key market participants, as required by good economic practice and the very resource he relies on, the 2010 *Horizontal Merger Guidelines* – as well as the case law. *See* U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* §§ 5.1-5.2 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

Dr. Shapiro's myopic reliance upon a publication called the *Internet Retailer 500* ("IR500") in calculating shares in the market he defines is grounds to exclude his market share opinions. It is undisputed that the IR500 covers but a small fraction of the websites using PRR. In fact, roughly three-quarters of Bazaarvoice's ratings and reviews revenue comes from businesses that are not in

the IR500. Dr. Shapiro's share calculations are therefore meaningless. Had he considered an appropriate universe of customers, he would have realized that Bazaarvoice's post-merger market share is much too low to create any risk of harm to competition.

Moreover, much of Dr. Shapiro's testimony is inconsistent with governing precedent. The Ninth Circuit's decision in *United States v. Syufy Enterprises* deems post-merger competition evidence controlling in assessing the competitive effects of a consummated merger, yet Dr. Shapiro provides no evidence that prices have increased post-merger and fails to counter Dr. Shehadeh's conclusion that quality-adjusted prices have not increased. *See* 903 F.2d at 663-71. Similarly, Dr. Shapiro ignores cumulatively significant (but individually smaller scale) entry (and entry that has not yet occurred) notwithstanding unbroken precedent that those factors may be dispositive. *See, e.g., United States v. Baker Hughes Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 982-84 (1984). Dr. Shapiro also treats a good "reputation" as a "barrier" to entry, even though reputation is not a barrier to entry as a matter of law. *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997) (quoting *Am. Prof'l Testing Serv. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns*, 108 F.3d 1147, 1154 (9th Cir. 1997) & *Syufy*, 903 F.2d at 669). Worst of all, Dr. Shapiro attempts to define the relevant antitrust market in this case by reference to "demand conditions, not supply conditions," but the Ninth Circuit *requires* that the market be defined by reference to both supply and demand conditions. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995). Dr. Shapiro also calculates market shares by looking only at customers that already have deployed a PRR solution, directly contrary to a decision of this Court issued only a few months ago. *See Stewart v. Gogo, Inc.*, No. C-12-5164 EMC, 2013 WL 1501484, at *4 (N.D. Cal. April 10, 2013) (Chen, J.). In short, to accept Dr. Shapiro's analysis, the Court would have to ignore governing precedent. The Court should decline to do so and should reject Dr. Shapiro's testimony.

By the close of the evidence, it will be clear that "even following the acquisition, there remain a number of credible ratings and reviews providers that continue to offer robust functionality to all different types of customers, that prices are unlikely to increase, and that there will be no reduction in the quality or innovation of ratings and reviews tools and functionality," as

Bazaarvoice's expert, Mr. Goldberg has said. DX-1432 at 6. The fact that *PowerReviews never turned a profit and generated revenues (not profits) of just $29 million in its entire seven-year lifetime* underscores how difficult it is to see Bazaarvoice gaining market power as a result of this acquisition. The Court should reject the government's attempt to undo this merger.

II. BACKGROUND

A. KEY ECONOMICS CONCEPTS

In this case, as in any antitrust case, concepts borrowed from the field of economics structure the analysis of the factual record. *See Oracle*, 331 F. Supp. 2d at 1111 ("[T]he economic concept of competition . . . is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act.") (citation omitted). Key concepts for this case include the following:

- ***Differentiated Products***: Many markets involve products that are virtually identical in features and quality, *i.e.*, "homogenous" (such as salt). Software and technology markets, however, tend to involve "differentiated products." "Differentiated products are imperfect substitutes representing as they do different features or characteristics that appeal variously to different customers." *Oracle*, 331 F. Supp. 2d at 1115. While the parties here disagree on the scope of the relevant product and geographic market, both parties agree that the products at issue are all highly differentiated.
- ***Unilateral Effects***: A theory of unilateral effects from a merger posits that the post-merger entity will have the ability to increase market prices on its own without regard for competition from other players in the market. *Id*. at 1113. An alternate way a merger can harm competition is through "coordinated effects," *i.e.*, where removal of one competitor makes it easier for the remaining competitors to increase prices jointly (through either explicit or tacit coordination). *Id*. at 1112-13. The government, however, only advances a unilateral effects theory in this case.
- ***Entry***: "[T]he government itself . . . recognizes that ease of entry is a relevant factor in analyzing the impact of a merger upon competition, and that it may indeed be the most important factor." *United States v. Syufy Enters.*, 712 F. Supp. 1386, 1401 (N.D. Cal.

1989) (Orrick, J.), *aff'd*, 903 F.2d 659 (9th Cir. 1990). Actual or potential entry by new competitors (or expansion by existing competitors) into a market disciplines market participants and prevents them from raising prices or reducing quality, for "any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less." *Syufy*, 903 F.2d at 664. Given the *possibility* of entry, "a firm that *never* enters a given market can nevertheless exert competitive pressure on that market." *Baker Hughes*, 908 F.2d at 988. Entry is sufficiently timely if it is likely to occur within two years. *E.g.*, *Syufy*, 903 F.2d at 666 n.11

B. OVERVIEW OF THE PRODUCTS AND FEATURES AT ISSUE IN THIS LITIGATION

E-commerce consists of the buying and selling of goods and services over electronic networks and using the Internet to influence purchases made online, as well as purchases made offline in traditional stores. Many kinds of businesses operate e-commerce websites, including, retailers, manufacturers/brands, travel companies, ticket distributors, and digital content vendors.

E-commerce remains a nascent market and, since e-commerce emerged in the 1990s, there has been continuous, dramatic innovation in both the marketing/advertising techniques and the technical tools available to e-commerce sites to influence online and offline purchases. As Mr. Goldberg observes, "the disruptive evolution of e-commerce best practices has fundamentally changed the needs of e-commerce websites. This disruptive evolution has changed, and will continue to change, the nature of competition among vendors that develop and sell software tools for social commerce applications." DX-1432 at 6.

E-commerce websites are built on an **e-commerce platform** that hosts and delivers their webpages and serves as the software foundation for the website. Businesses either build their own e-commerce platforms or outsource them. Oracle, IBM, hybris (being acquired by SAP), and GSI (owned by eBay) provide e-commerce platforms for larger sites, while Magento, Shopify, and Volusion cater to smaller ones. Commercial and in-house e-commerce platforms integrate over 35 different kinds of features or "add-ons" ranging from analytics and payment tools to logistics and

REDACTED

shipping. Social commerce features such as ratings and reviews, social sign-on, and Q&A are only a few of the many add-ons e-commerce platforms may employ.

Today, e-commerce websites use many tools to attract customers to their sites, stimulate interest in their products and services, convince customers to make a purchase, and promote their brand. Many tools can be developed and maintained in-house or purchased and managed through a third-party vendor. Recently, with the commercial success of social sharing websites like Facebook, e-commerce sites have expanded their use of "social" tools that promote consumer interaction with their products and services. The use of this functionality is generally referred to as **social commerce**. To engage in social commerce, e-commerce websites have focused on ways for a consumer to generate and share with other consumers his or her perceptions of products.

This **user generated content ("UGC")** can serve important commercial functions, and there are a growing number of software "tools" that websites may use to collect and use UGC on an e-commerce site. "**Social Sharing**" on Facebook, Google+, Pinterest, and Twitter allows users to share items of interest with their friends on their social networks. **Social sign-in** allows users to login to a site using their Facebook or other account which encourages the creation and sharing of authenticated UGC, including reviews. **Questions & Answers ("Q&A")** allow users to ask questions and receive answers to their questions from other users or employees. **Ratings** are often "stars" (e.g., four stars or ****), reflecting general and high-level user opinion of a product or service. Ratings are sometimes combined with reviews, but they are often used on their own. **Reviews** are customer-written details about products and services. Surveys are often requested of customers when they provide reviews or ratings to address topics like sizing and fit. **Tags** are similar to surveys and allow users to provide "pros/cons" or suggested "best uses" for products. **Gamification** uses game tactics to incentivize customers, often with badges or discounts, to generate UGC and participate in loyalty programs. **Comments**, **Forums**, and **Discussions** allow users to provide unstructured UGC about a product or service read by other customers.

Although these social tools have different features, they all fulfill the same goals: employing shared UGC to stimulate purchases, improving ranking in search engine results (called Search Engine Optimization or "SEO") when the content is not duplicated elsewhere, and

REDACTED

providing customer feedback to the retailer or manufacturer. Many of the above-mentioned tools are just beginning to gain popularity, and many new and innovative social tools have entered the market and gained traction in the last year. This trend has led Mr. Goldberg to conclude that, although "a 'ratings and reviews' website feature [was] one of the first ways e-commerce brands and retailers were able to collect and make use of consumer generated opinions about products," the market has shifted so that "[t]oday, ratings and reviews are no longer the only way to collect and use 'user generated content,'" and customers now have a wide array of options. DX-1432 at 8. E-commerce sites today select the social tools which best suit their needs based on: (1) their own ambitions and preferences for their websites, (2) their budget for the site, and (3) the potential for diminishing returns in adding more features and UGC to the site.

C. RATINGS AND REVIEWS

The government's case focuses only on one social commerce tool called "**ratings and reviews**." Technically speaking, R&R is a software component (an "add-on" or "plug-in" feature of the sort mentioned above) for a commercial website. R&R software lets e-commerce sites collect ratings and reviews for products from customers. These ratings and reviews are then "shared" with other potential customers by making them available to read while they shop. The most prominent user of R&R online is Amazon.com, which famously introduced its star ratings and user reviews in the early 2000s to facilitate consumer decision-making while shopping online (while also generating valuable data for Amazon on consumer preferences).

R&R software is not hard to write. In fact, almost every website operator has the technical and commercial means to write R&R software code. Indeed, in this case, many customers testified that they view R&R software as a "commodity" given that it is so easy to develop. One customer, Wayfair, testified that it developed R&R functionality on its own in less than two months with a single engineer, allowing it to drop its commercial vendor (PowerReviews). Also, major e-commerce solution vendors could easily launch R&R. For example, Mr. Goldberg believes Oracle "could add this functionality very easily, in little time, probably less than six months," and that IBM, Facebook, and Google are already able to service R&R needs.

E-commerce sites can screen or **moderate** reviews before posting them to their sites. Moderation can be performed by a person (or team of people) or by an automated filter. Moderation varies significantly from site to site. Some sites have no filter; some have a minimal technical filter meant to catch fraud and profanity; some employ a mix of automated filters and manual review; some employ only manual review; some sites moderate their reviews internally; and some rely on a commercial vendor for moderation. Many firms – beyond those that provide R&R software – offer moderation services to sites preferring to outsource this function.

UGC can be shared between e-commerce sites, a process called **syndication**. Syndication for R&R is the practice of making reviews available on multiple e-commerce sites. This may be beneficial for certain brands and retailers. But syndication also has negative SEO implications, as search engines typically value *unique* content. Content that appears on multiple sites thus *lowers* search rankings. For a number of reasons, including negative SEO implications, price, and/or a desire to keep their R&R proprietary, only a small percentage of sites syndicate.

D. CUSTOMERS OF SOCIAL COMMERCE FUNCTIONALITY

There are many potential users of social commerce tools, including retailers like Sears and Target, manufacturers and brands like Kraft and Procter & Gamble, digital content distributors like Apple and Google, ticket sellers like StubHub and Live Nation, travel sites like Orbitz, entertainment sites like Netflix, and a wide variety of others. While a number of e-commerce sites have implemented social commerce tools, roughly *half of e-commerce sites* have not deployed R&R software to date. This leaves many more e-commerce sites that are contemplating implementing social commerce tools in the next two years and, thus, that are potential customers.

Bazaarvoice uses a "prospect list" to identify potential R&R customers, which it refers to as the "Total Addressable Market" ("TAM"). As of May 2013, Bazaarvoice identified [redacted] businesses as existing and potential customers. From a random sample of 1,000 of these businesses, Bazaarvoice's expert, Dr. Shehadeh, found that Bazaarvoice and PowerReviews had sold R&R to a combined 11% of them. Within the sample, 51% of these prospective customers implemented a social commerce solution; the rest had not. Of customers that had deployed social commerce solutions, only 21% used Bazaarvoice or PowerReviews. DX-1433 ¶¶ 248-54

REDACTED

& Exs. 8-10. Thus, the addressable market for ratings and reviews is significant and varied, and to date is significantly unpenetrated. Bazaarvoice estimates in its business planning documents that its market share ranges from 8.5% to 10%.

Mr. Goldberg observes that social commerce customers necessarily must "pick and choose the number of features [they] will use." DX-1432 at 36. With the wide array of options available and the "considerable overlap in the benefits they offer . . ., the incremental value to the ecommerce operator of each individual tactic is reduced as the operator implements additional tactics." *Id*. This means the return on investment (ROI) of such products, that is, the amount of extra revenue driven by the tool compared to the cost of implementing it, "is reduced, including as measured relative to with these other social features. As a result, the extent to which an e-commerce site employs more social tactics on its website will affect how much a customer should be willing to pay for any given feature." *Id*. at 37. Each feature thus constrains the pricing of the others as customers can mix and match the features that offer the best overall ROI potential.

E. MAJOR VENDORS OF SOCIAL COMMERCE PRODUCTS

1. Commercial Suppliers of PRR Platforms

Bazaarvoice. Bazaarvoice was founded in May 2005 and provides social commerce tools including R&R, Q&A, stories, recommendations, and photograph and video sharing. Bazaarvoice's customers span a wide range of industries including retail, consumer products, travel and leisure, technology, telecommunications, financial services, healthcare, and automotive. Bazaarvoice has focused on targeting large enterprise companies with expanding e-commerce sites. Its first customers included Home Depot, Golfsmith, and CompUSA; today, its largest customers include Procter & Gamble, Best Buy, and Expedia.

PowerReviews. PowerReviews began in 2005 with a completely different business model. From 2005 to 2009, PowerReviews offered R&R for free to e-commerce retailers that displayed their R&R on PowerReviews' product reviews website, Buzzillions. PowerReviews charged those retailers when Buzzillions referred users to sites. PowerReviews' R&R solution was minimal and largely non-customizable and its customer base largely consisted of smaller retailers that sought

customer referrals from Buzzillions. In 2009, PowerReviews discarded its Buzillions-based business model, and began charging for its product. PowerReviews began to target larger enterprises, but it made few modifications to its R&R product. It remained a simple, turnkey solution, and it offered fewer features and was less customizable than Bazaarvoice's product. The vast majority of its customers continued to be smaller online retailers. As a result, PowerReviews generated less than $12 million in revenue the year before it was acquired *and less than $29 million in revenue over its seven year lifetime*. By 2011, before the acquisition, PowerReviews' losses were mounting; it decided to *stop focusing on large customers* and instead seek out the "blue ocean" – namely, to focus on selling a suite of social commerce functionality to smaller e-commerce firms who had not yet made the decision to deploy such functionality.

Gigya. Gigya is a strong and growing firm in the social commerce industry and has the industry's most popular social sign-in functionality. In 2011, as a natural addition to its social sign-on product, Gigya began offering a ratings and reviews feature that it integrated with its social sign-in functionality. Gigya believes that its ability to offer a social suite to customers is advantageous in sales opportunities and has enabled it to win business in competitive engagements, including engagements against Bazaarvoice. Gigya counts among its clients David's Bridal, New Era, and Pacific Sunwear. Several current Bazaarvoice customers have expressed interest in Gigya's products.

Pluck. Pluck was founded in 2003 as a platform that enabled user comments and blogs to be added to websites including e-commerce sites. Pluck has aggressively added social commerce functionality to its social suite. Pluck has counted many of the largest Internet companies as customers for its social suite, including: Target, Crabtree & Evelyn, Autozone, and Black & Decker. Today, Pluck also offers (on a stand-alone basis or as part of a social suite) a rich ratings and reviews feature, tagging, blogs, comments, and social media syndication. Pluck has competed with Bazaarvoice for many accounts, including very recently for [redacted]

Reevoo. Reevoo was founded in 2005 as a shopping comparison site and has since developed into a social marketing company that sells R&R and Q&A. Reevoo offers moderation, syndication, analytics, and other various social commerce tools. Prior to the summer of 2012,

Reevoo operated primarily in Europe, and counted Ford, Sony, Black & Decker, T-Mobile, Hertz, and Toshiba among its customers. Reevoo announced the opening of a U.S.-based office in Miami in September 2012, after the acquisition of PowerReviews. By 2013, Reevoo had partnered with IBM, integrating its products into IBM Websphere. Acer and Skype (owned by Microsoft) are two prominent US customers for R&R. Reevoo also has competed against Bazaarvoice for business from [redacted]

Lithium. Lithium was founded in August 2001. Lithium's social solution combines social commerce functions, such as reviews and answers, with social marketing (aimed to build "brand advocates"), social support (enabling trained social agents), and social innovation (crowdsourcing new ideas). Like Pluck and Gigya, Lithium's social commerce customer list is impressive, and includes Best Buy, Home Depot, and Sephora. Lithium took [redacted] and spent [redacted] to develop an R&R feature comparable to Bazaarvoice's offerings.

Viewpoints. Viewpoints was founded in 2006, and provides "product intelligence" through ratings and reviews. Viewpoints started as a private label R&R provider and competed head-to-head with Bazaarvoice for customers. In 2012, Viewpoints launched a website portal for R&R that operates like a shopping comparison site, showcasing consumer and expert reviews.

Rating-System. Rating-System was founded in 2008 as a provider of online reviews, customer Q&A and social media. Since its founding, the company has grown significantly. Its products are now featured on the websites of over 3,500 companies, generating more than five million unique page views a day. Current customers include Astral Brands, Pet-Super-Store.com, and Wool Overs.

TurnTo. TurnTo was founded in 2007. It provides Q&A functionality to its customers by creating "multiple, fast answers from real purchasers with continuing back-and-forth dialog." [redacted]

Yotpo. Yotpo is an Israeli company that provides a "plug and play" R&R solution that can integrate with multiple different e-commerce platforms. It has provided its solution to over 3,000 customers, over half of which are based in the United States.

2. Native E-commerce Platform Features

To meet customer demand for social commerce features, e-commerce platforms are beginning to offer their own social commerce features. For example, the following e-commerce platforms offer their own ratings and reviews: Amazon, GSI Commerce, Red Prairie, hybris, IBM WebSphere (pre-integration with Pluck, Bazaarvoice, Reevoo), Magento, Shopify (integration with "plug-ins" like Yotpo, Reveizi), and Volusion. Indeed, within weeks of the acquisition, Google entered the social marketing space through the acquisition of Wildfire, a vendor that various social marketing tools. Several customers have left Bazaarvoice for these e-commerce providers. They include: [redacted]

3. Internally Developed Solutions

As with e-commerce platforms, companies build internal social commerce tools such as R&R. The characteristics of the companies that have chosen to build an R&R tool internally vary greatly: they are brands and retailers; they sell everything from jewelry to mattresses; they have thousands of reviews or a few hundred; and they have differing resources available for development and maintenance of the R&R on their site. Some companies started with an in-house tool, and others have dropped their commercial vendor for an internally developed solution.

Customers who currently use a commercial vendor have testified that they are capable of developing their own internal solution. Defendant's expert, Jason Goldberg, who regularly advises customers on competitive alternatives to outsourcing for ratings and reviews, believes a typical e-commerce development team would take only four-to-six weeks to develop a basic ratings and reviews solution including development, testing validation, optimization, and deployment. Indeed, Wayfair did exactly that. Today, not just small customers, but numerous large customers also provide their own R&R in-house. These include Amazon, Apple, and Sears.

F. THE ACQUISITION

On June 12, 2012, Bazaarvoice completed its acquisition of PowerReviews, paying approximately $31 million in cash, and issuing approximately 6.4 million shares of common stock. The Complaint points to documents that claim the merger would eliminate "price erosion" caused by competition from PowerReviews. Several employees doubted that thesis at the time, and the uncontroverted post-merger evidence has proven it astonishingly incorrect. The more realistic understanding of the transaction, recorded in Bazaarvoice's contemporaneous business documents and forming the basis for Bazaarvoice's Board of Directors' approval of the merger, was that it would allow Bazaarvoice to achieve greater reach through PowerReviews' retail customers to compete more effectively in the dynamic market for social commerce tools. In fact, one clear outcome of the merger is that PowerReviews and Bazaarvoice brand and retailer customers have benefitted from a broader syndication offering and have access to a greater number of potential syndication partners as a result of the merger.

III. ARGUMENT

Few acquisitions of competitors violate Section 7 of the Clayton Act, for in a competitive market, buying out competitors "contributes to market stability and promotes the efficient allocation of resources." *Syufy*, 903 F.2d at 673. To show a violation of Section 7, the government, which bears the ultimate burden of persuasion at all times, must establish that a transaction may "substantially lessen competition" or "tend to create a monopoly" in a line of commerce. *Baker Hughes*, 908 F.2d at 982-83. There must be a "reasonable likelihood" of substantial, durable competitive harm; "ephemeral possibilities" and transitory effects do not suffice. *See United States v. Marine Bancorp.*, 418 U.S. 602, 622-23 (1974).[1]

[1] The government will likely place great weight on the 2010 *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and Federal Trade Commission. While the *Guidelines* can be a useful tool for practitioners, they are not binding in any way on the courts. *See IGT v. Alliance Gaming Corp.*, 702 F.3d 1338, 1345 n.3 (Fed. Cir. 2012). *See also Oracle*, 331 F. Supp. 2d at 1117 ("Although the Guidelines' discussion . . . may be a helpful start, the factors described therein are not sufficient to describe a unilateral effects claim."). This brief thus focuses on merger analysis under controlling precedents. However, it should be noted that courts have held the government may not take positions in court that are inconsistent with its own *Guidelines*. *See Waste Mgmt.*, 743 F.2d at 983.

The government's claim fails under both (A) the framework for post-merger challenges articulated by the Ninth Circuit and (B) the traditional framework the government seeks to apply. As discussed below in III.A, under the Ninth Circuit's decision in *United States v. Syufy*, the combination of (i) post-merger price competition and innovation, (ii) customer testimony that the merger is not harmful, and (iii) undeniable ease of entry all require a judgment in Bazaarvoice's favor. Thus, the Court need not spend extensive time on an elaborate market definition analysis because these three factors dispose of the case no matter how the market is defined. Nonetheless, as discussed in III.B, even under the traditional burden-shifting framework for merger challenges set out in cases like *Baker Hughes*, the government's case fails because it does not and cannot establish a cognizable relevant market, demonstrate market shares, or show probable adverse effects on customers in the market as a whole. In sum, the government simply cannot prove its case under any potentially-applicable legal standard.

The fatal error underlying the government's entire case is the assumption, based on comments in outdated documents, that PowerReviews was the only meaningful constraint on Bazaarvoice. To maintain that position, the government (and its expert) are forced to ignore the existing and potential competition from firms like Pluck, Gigya, and Reevoo; the imposing threat of inhouse substitution; and the looming competition from giants like Amazon, IBM, and Oracle. [redacted] example demonstrates how an inhouse solution can be developed at little cost in a matter of weeks. And several firms, prominently including Amazon as one example, could wipe Bazaarvoice off the map almost immediately. The idea that, if prices were to rise, the combination of these powerful forces would not replace the prior constraint imposed by PowerReviews borders on the preposterous. There is simply no doubt that this acquisition poses no threat to competition. The Court should enter judgment in favor of Bazaarvoice accordingly.

A. THE GOVERNMENT CANNOT MEET THE STANDARDS FOR POST-CONSUMMATION MERGER CHALLENGES ESTABLISHED BY *SYUFY*

The Ninth Circuit's decision in *United States v. Syufy Enterprises* provides a framework for analyzing post-consummation merger challenges that can obviate the need for the extended traditional analysis set forth in cases such as *Baker Hughes*. In *Syufy*, the government sued a

movie theater operator in Las Vegas for purchasing all of the first-run theaters in the area, alleging the acquisitions violated Section 2 of the Sherman Act and Section 7 of the Clayton Act and claiming the operator would be able to unduly suppress competition for first-run films from film distributors. 903 F.2d at 661-62. Judge Orrick of this Court rejected the government's claims, finding "the government has given little, if any, consideration to the vast and rapid technological changes in the industry," that there were "no entry barriers," and crediting the testimony of film distributors that they faced no competitive harms from the acquisitions. 712 F. Supp. at 1387, 1396 & 1403. The Ninth Circuit affirmed. 903 F.2d at 673. In the course of affirming, it established several important principles for post-merger analysis.

First, the Ninth Circuit made clear that post-close evidence can be dispositive in the review of a consummated transaction. *See id*. at 665-67 (evidence of entry and expansion post-merger *required* a judgment against the government). Thus, in a post-merger challenge, the government cannot simply dismiss post-acquisition evidence as irrelevant. Where evidence reflects changes in market structure beyond the parties' control (*e.g.*, evidence of a dynamic market, new entry, aggressive discounting from new or repositioned competitors, or customer satisfaction with the transaction), this evidence provides *dispositive* proof that a transaction raises no competitive concerns.

Second, the Ninth Circuit also found customer testimony confirming no concerns of competitive harm to weigh heavily against the government. The court found that "[p]erhaps the most telling evidence of Syufy's inability to set prices came from movie distributors, Syufy's supposed victims." *Id*. at 669. Contrary to the government's allegations, "distributors uniformly proclaimed their satisfaction with the way the Las Vegas first-run film market operates; none complained about the license fees paid by Syufy." Moreover, "few if any of the distributors were willing to say anything to support the government's claim." *Id*. Thus, customer testimony that a merger poses no competitive concerns is virtually dispositive under *Syufy*.

Third, the Ninth Circuit *skipped* the traditional merger analysis, and concluded that the merger could not be considered anticompetitive because, post-merger, one new competitor had entered the market and expanded. *See* 903 F.2d at 665 ("We bypass as surplusage the hundreds of

pages of expert and lay testimony that support the district court's finding, and focus instead only on a single – to our minds conclusive – item."). The court found that even a merger generating a 100% share in a relevant market (with documents eerily similar to those here) does not violate the antitrust laws if new, existing, or adjacent competitors can reposition their products to compete effectively against the merged entity. *Syufy*, 903 F.2d at 669-71.[2] This is because, absent significant barriers to entry, any attempted price increases by the merged firm will cause repositioning and new entry. *Id*. at 664 (citing *Metro Mobile CTS, Inc. v. NewVector Commc'ns*, 892 F.2d 62, 63 (9th Cir. 1989)). Thus, in cases where new entry can defeat any attempt to control prices, a market could have a single provider that has no market power. *Id*. at 670.

These three factors – post-merger evidence, informed customer testimony, and ease of entry – structure and govern the analysis of post-consummation merger challenges. All three here weigh clearly against the government, so the government's challenge to the Bazaarvoice-PowerReviews merger fails under *Syufy*.[3]

1. Continued Robust Competition For Ratings and Reviews Sales

The government takes the untenable position that this Court should ignore post-merger evidence, a position foreclosed by the Supreme Court's decision in *United States v. General Dynamics Corp*. There, the Supreme Court held that post-merger evidence is probative where it demonstrates that market forces beyond the control of the defendant made it impossible to exercise market power. *See* 415 U.S. at 506. And if there were any residual doubt, *Syufy* makes crystal clear that such evidence can control the outcome in a post-merger challenge. *See* 903 F.2d at 665.

---

[2] The government in *Syufy* relied on documents saying, for example, that the merger would "end the blood bath of competition" that was "a result of the bidding" in Las Vegas. *United States v. Syufy Enters.*, No. 89-15475, Br. for Appellant, at 5 (9th Cir. Apr. 21, 1989) (copy attached). *See also, e.g., id.* at 6 ("As [one witness] said, 'there was basically no – no more competition in the town.'. . . . Syufy 'had the power' to tell MGM/UA what price he would pay for films. Even Syufy's lawyer admitted that 'it looked like there was monopoly power.'" (Citations omitted.)

[3] Notably, the government's economist expressly rejects *Syufy* because it relied on what he and a co-author view as "a single contested example of fringe firm expansion" to reject the government's challenge. *See* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 235, 241 (Robert Pitofsky ed., 2008).

The record in this case is even clearer than that in *Syufy*: post-merger, Bazaarvoice continues to face substantial competition. Competitors have expressed a willingness to compete aggressively against Bazaarvoice, and Bazaarvoice faces at least the same degree of competition as it did pre-merger, even without PowerReviews. In the ten months prior to the merger, Bazaarvoice lost [redacted] customers. Of these, only [redacted] opted for PowerReviews; the remainder went to other options, including in-house development and other vendors. In the ten months following the transaction, Bazaarvoice lost [redacted] customers, virtually the same as prior to the merger. Bazaarvoice's discounting practices have not changed following the close of the merger either, and customers confirmed in sworn testimony that there are sufficient alternatives post-merger. DX-1433 Exs. 7a-7b. Post-merger innovation has continued as well, and Bazaarvoice's research and development expenditures have *increased* in the post-merger period relative to the combined resources devoted to research and development by PowerReviews and Bazaarvoice pre-merger. *Id.* Ex. 11.

The government's position that Bazaarvoice is intentionally delaying anticompetitive behavior is specious, supported by no evidence whatsoever. There has been aggressive post-merger competition from third parties, and continued customer demands for discounts. These "significant factors [] are not, and cannot be, controlled by defendants." *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991). The government cannot credibly contend that customers chose competitors or demanded price discounts because of this litigation. Since neither the government nor Dr. Shapiro fully analyzed the post-acquisition evidence, the government has no proof that, since the acquisition, competition has diminished. The government, in fact, had to admit in its interrogatory responses it has no evidence that any customer prices went up without a corresponding increase in services.

The evidence of post-merger innovation in particular refutes any claim that the merger will harm competition. The government's own industry expert, Professor Dellarocca, testified that, "there's a lot innovation" in ratings and reviews and that "[t]his technology has been evolving together with a lot of social e-commerce technologies." Dellarocca Dep. 130:9-11. He also thought the pace of innovation would not change going forward even in light of the merger.

Bazaarvoice completely agrees, which is why, post-merger, the company continues to invest heavily, and has surpassed historical spend levels in R&D. If the merger reduced the incentives to innovate, as the government claims, Bazaarvoice would not have continued to increase the pace of its innovation efforts. As sites strive to consolidate features, Bazaarvoice faces increasing competition from platforms with a broader set of e-commerce and social commerce features. *See* Part II.E above. Bazaarvoice also continues to face competitive pressure to innovate from in-house solutions and leading rivals like Amazon.

Amazon. Amazon testified that it was the first to introduce ratings and reviews, and it considers its ratings and reviews to be "best in class." Innovation is constant. Amazon provides its own PRR and also offers a turnkey solution to other e-commerce merchants. [redacted] Amazon has added a number of improvements to its ratings and reviews. Amazon has also introduced other social commerce features such as Q&A, forums, and sharing on Facebook and Twitter.

Bazaarvoice must compete to keep its customers competitive with Amazon. Bazaarvoice's Vice-President of Strategy wrote that [redacted] Pehr Luedtke, former CEO of PowerReviews, wrote that [redacted]

Suite Vendors. Commercial competitors innovate by improving their ratings and reviews and expanding the breadth of their social commerce platforms in order to offer customers more features in a single platform at a lower price point. Gigya offers a suite of products including social sign-on, Facebook sharing, comments, ratings and reviews that are SEO friendly, chat, gamification, and analytics. [redacted]

[redacted]

Likewise, Pluck claims [redacted]

E-commerce Vendors. As websites move to consolidate functionality in fewer vendors, e-commerce platform providers like hybris, IBM, and Magento have added more native functionality. Magento, hybris, Shopify, and Volusion all offer their own ratings and review functionality. IBM's Global Business Services division built a ratings and review platform for one of its customers. Amazon's Webstore competes by offering customers a single platform hosted entirely by Amazon with ratings and reviews built-in. [redacted] Competition from rivals will likely drive other ecommerce platforms like Oracle and GSI to add R&R to their platforms. Bazaarvoice will increasingly face competition from solutions preinstalled in its customers' ecommerce platforms.

2. Overwhelming Customer Testimony of a Lack of Any Harm

Bazaarvoice will present evidence from a wide variety of customers, including major retailers and brands, smaller players, and customers across the spectrum in between. These

customers include legacy Bazaarvoice customers, legacy PowerReviews customers, and customers who have left one or the other for different vendors (like Pluck or Gigya) and different solutions (like in-house PRR platform development or dropping PRR functionality entirely). They cover a range of industries, including travel, clothing, toys, consumer electronics, and many others. The one thing that these widely varying customers have in common is that they are not concerned about the transaction. Many, in fact, are happy with it and have enjoyed or soon will enjoy substantial benefits from the merger. This is entirely expected: a host of alternatives are available to customers, and many efficiencies and benefits will flow to customers and potential customers of Bazaarvoice and PowerReviews.

Outside this case, the government generally gives great weight to customer testimony, often viewing it as the most critical element of any antitrust investigation. Under *The 2010 Merger Guidelines*, the government concedes that merger analysis must account for customer views on how they would respond to a price increase, the relative attractiveness of different products, and how they have reacted to historical events, like entry by a new supplier. *Guidelines* § 2.2.2. According to the then-head of the Antitrust Division, customers are the most objective marketplace participants because "[t]heir incentives generally are aligned with our goals of protecting competition, and the decisions they make in the ordinary course of business frequently provide a better window onto [sic] how the market actually functions than an economist's model or the court's intuition." Thomas O. Barnett, *Antitrust Enforcement Priorities: A Year in Review* (Nov. 19, 2004), *available at* http://www.justice.gov/atr/public/speeches/206455.htm. Similarly, in its 2006 *Commentary on the Horizontal Merger Guidelines*, the government said:

> Customers typically are the best source, and in some cases they may be the only source, of critical information on the factors that govern their ability and willingness to substitute in the event of a price increase. The Agencies routinely solicit information from customers regarding their product and supplier selections. In selecting their suppliers, customers typically evaluate the alternatives available to them and can often provide the Agencies with information on their functional needs as well as on the cost and availability of substitutes. Customers also provide relevant information that they uniquely possess on how they choose products and suppliers. In some investigations, customers provide useful information on how they have responded to previous significant changes in circumstances.

U.S. Dep't of Justice & FTC, *Commentary on the Horizontal Merger Guidelines* 9 (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf.

Here, the customer evidence in favor of Bazaarvoice is overwhelming. More than 90 customers testified they had no concerns with the acquisition. The government will present at most only [redacted] customers who claim to have no options aside from Bazaarvoice and PowerReviews. This testimony is not probative of anything. First, these firms testified that they had not conducted a market search since 2010 or 2011, meaning they are not testifying about current market realities. Second, firms that look identical to these customers testified precisely the opposite – namely that many choices were valid substitutes. The views of these [redacted] customers, therefore, say nothing about the broader market impact of the transaction. Such unenlightening testimony cannot carry the government's burden, and the overwhelmingly positive response of informed customers should be dispositive. *See Oracle*, 331 F. Supp. 2d at 1131-33.

3. Ease of Entry is Dispositive in this Case

An acquisition cannot be considered a violation of Section 7 of the Clayton Act if either (1) firms in adjacent markets can reposition and compete, or (2) new firms can enter and compete effectively. *Waste Mgmt.*, 743 F.2d at 982-84; *Baker Hughes*, 908 F.2d at 987-89. To preclude a finding of liability on a unilateral effects theory, actual or potential entry need only *replicate the constraint imposed by the acquired firm*, *see Baker Hughes*, 908 F.2d at 987; *Oracle*, 331 F. Supp. 2d at 1108-09, as the government concedes. GX0983 at 68. Thus, here, if the evidence demonstrates that existing competitors can reposition their products to replace PowerReviews (a firm with only $12 million in revenue), then there is no harm to competition. *Oracle*, 331 F. Supp. 2d at 1117-18. Notwithstanding the law, the government misleadingly suggests that a proper analysis must consider whether new entrants can replace the competition provided by Bazaarvoice, the *acquiring* company. This is just plain wrong. Bazaarvoice is not the firm that is disappearing as an independent entity, and the government forwards no evidence that Bazaarvoice ever constrained PowerReviews' pricing.

If entry or expansion is easy, there can be no harm to competition: any attempt by the acquiring company to reap a monopoly profit will lure new competitors into the market. *See Syufy*, 903 F.2d at 664-65 (defendant's 100% share at the time of the merger proved irrelevant, because "this utopia proved to be only a mirage"); *Waste Mgmt.*, 743 F.2d at 981-83 (finding a 48.8%

market share insufficient because of easy entry); *Metro Mobile*, 892 F.2d at 63. The time frame for such entry is two years. *Syufy*, 903 F.3d at 666 n.11. Entry "barriers" are deemed "low" if entry is not unduly costly and can be accomplished quickly. *See, e.g.*, *Baker Hughes*, 908 F.2d at 988-89; *Waste Mgmt.*, 743 F.2d at 982. The defendant is not required to prove that entry will be "quick and effective" because "[s]uch evidence is rarely available." *Baker Hughes*, 908 F.2d at 988. Although a defendant may present actual examples of firms that are "poised for future expansion," such examples are not required as "a firm that *never* enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs." *Id*. at 988-89.

In this case, the possibility of entry has already been demonstrated by the ubiquitous availability of internal solutions and the entry of new (and expansion of existing) competitors. Despite this evidence, the Dr. Shapiro concludes that there is no evidence that "rapid expansion or entry, at scale, will very likely occur immediately following the merger" and that "several factors combine to make entry and expansion difficult in the PRR platform market." GX0983 at 71. But Dr. Shapiro has asked the wrong question: instead of asking how difficult it would be for one or more rivals to replace PowerReviews going forward, Dr. Shapiro bases his conclusion on *past market shares*. Dr. Shapiro's conclusions are directly contradictory to the law. *See Waste Mgmt.*, 743 F.2d at 983 (entry was "so easy that any anti-competitive impact of the merger before us would be eliminated more quickly by such competition than by litigation," even though there was no evidence that entry had already occurred).

The government and Dr. Shapiro have identified three purported "barriers to entry": syndication, reputation, and switching costs. But reputation is not a barrier to entry as a matter of law, there is no evidence that switching costs substantially deter entry, and syndication cannot be considered an entry barrier where most customers do not use it.

a. As a Matter of Law, Reputation is Not an Entry Barrier

Although not alleged by the government in its Complaint, Dr. Shapiro concludes that reputation is a barrier that may inhibit entry in this case. Dr. Shapiro states that competitors have

"lost business because of Bazaarvoice's reputation." GX0984 at 27. In his deposition, Dr. Shapiro disagreed with controlling Ninth Circuit case law that holds reputation is not an entry barrier. *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d at 1164 (quoting *Harcourt*, 108 F.3d at 1154 & *Syufy*, 903 F.2d at 669).

Moreover, Dr. Shapiro's conclusion that reputation is inconsistent with the experience of other competitors such as Rating-System, Pluck, and Reevoo that were able to capture the business of large, well-known companies such as Target, Sears, Lands End, Microsoft, and Acer. If reputation were indeed a "barrier" to entry that no other firm could match, it would be difficult to fathom why these large retailers and manufacturers have not selected Bazaarvoice. And who has a better "reputation" in this field than Amazon? Or IBM? Or Google?

Rivals have also begun associating their ratings and reviews functionality with some of the best ecommerce platform providers such as IBM and GSI Commerce, as a way of having their product "endorsed." For example, [redacted] Competitors may also gain reputations from their operations in other geographies. For example, Reevoo counts Sony, Acer, Hertz, Toshiba, DeWalt, and Ford as customers. Finally, ratings and reviews providers such as Gigya, Pluck and Lithium already have well-established reputations because they provide a full suite of social commerce functionality that gives them access to the largest retailers and brands in the world. For example, Gigya's customers include Dell, Microsoft, Intel, Nike, Walmart, Pepsi, Verizon, Pacific Sunwear, LG, Honda, Panasonic, and Michael Kors. Lithium's customers include Best Buy, Home Depot, Verizon, AT&T, and Lenovo. Given these facts and the clear law, Bazaarvoice's reputation cannot be considered a barrier to entry.

b. Switching Costs Are Not an Entry Barrier

Dr. Shapiro undertakes no analysis establishing the degree to which switching costs would limit entry on a scale to replace PowerReviews; his opinion on switching costs rests entirely on speculation and ignores important undisputed facts. First, Dr. Shapiro's own data show that PowerReviews itself was a singular failure in getting customers to switch, converting just three customers from 2009 through 2012. Second, new customers by definition do not have any

switching costs. Less than half of e-commerce sites have deployed ratings and reviews software to date, and, in the government's preferred "market," roughly one-third of the IR500 companies have not adopted ratings and reviews and thus face no cost of switching (since there is nothing to switch from). Third, when customers change their e-commerce platform for their website, they face implementation costs for every aspect of the new site, including for ratings and reviews. Therefore, e-commerce platform switching creates an opportunity for customers to consider new ratings and reviews suppliers without switching costs playing any role in the decision. Within the next two years, it is estimated that roughly half of all e-commerce websites will implement new platforms. Indeed, customers have testified that changes in their platform caused them to consider different ratings and reviews vendors. Fourth, firms like Pluck and Gigya as well as e-commerce platform providers have incentives to add R&R functionality as a component of their product bundles, regardless of the standalone market opportunity they may have to sell R&R. Finally, there is no evidence that switching from Bazaarvoice to these firms is any more costly than switching from Bazaarvoice to PowerReviews was. Thus, there is no basis to conclude that the existing installed base of Bazaarvoice customers would deprive a new or growing firm of the incentive to add and continue to market R&R in competition to Bazaarvoice.

c. Syndication is Not an Entry Barrier

The government contends that there is a barrier to entry because the acquisition added more retailers to Bazaarvoice's syndication network, allowing greater syndication between Bazaarvoice's manufacturing customers and PowerReviews retailers. However, the strengthening of Bazaarvoice's syndication capability – a benefit of the merger – says nothing about whether rival competitors can now take the place of PowerReviews in the marketplace.

PowerReviews competed despite trivial demand for syndication by its customers: pre-merger, only **3.4%** of PowerReviews total customers used syndication and, even among PowerReviews large enterprise customers, fewer than **10%** used syndication. Despite Bazaarvoice's documents suggesting that syndication could insulate it from competition, only [redacted] of Bazaarvoice retailers and **27.1%** of all customers deploy this allegedly "critical" feature. Many customers disdain syndication because of its negative effect on search engine rankings.

The fact is that some customers value Bazaarvoice's syndication, while others do not. That is simply competition in a differentiated product market. *See Oracle*, 331 F. Supp. 2d at 1115-17.

Importantly, moreover, syndication is readily available to rivals. Syndication can be duplicated by third-parties and can be obtained from outside providers, such as Demandforce, so Bazaarvoice's syndication network would not be an impediment to replacing the competitive constraint provided by PowerReviews, even if syndication were pervasive.

As the Ninth Circuit has held, "[t]o justify a finding that a defendant has the power to control prices, entry barriers must be . . . capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting. . . . Barriers to entry are insignificant when natural market forces will likely cure the problem. In such cases, judicial intervention into the market is unwarranted." *Rebel Oil*, 51 F.3d at 1439. Syndication simply does not meet this standard.

B. NO CASE UNDER STANDARDS FOR PRE-CONSUMMATION MERGER CHALLENGES

The post-merger evidence, customer testimony, and ease of entry make the type of analysis ordinarily conducted unnecessary here. However, even under the government's traditional framework for merger challenges, the result is the same.

The predictive analysis for determining whether a transaction violates Section 7 proceeds under a "burden shifting" framework. To make out a *prima facie* case, the government bears the initial burden of proving that the merger "will lead to undue concentration in the market for a particular product in a particular geographic area." *Baker Hughes*, 908 F.2d at 982-83. If the government establishes a *prima facie* case, the defendant bears the burden of *producing* evidence that "the *prima facie* case inaccurately predicts the relevant transaction's probable effect on future competition." *Id.* at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.* "If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* at 983.

The government has assumed an additional burden here by pursuing this case solely as a "unilateral effects" case. Since the government does not assert a coordinated effects theory, it must show that, after the merger, Bazaarvoice "would enjoy a post-merger monopoly or dominant position, at least in a 'localized competition' space." *Oracle*, 331 F. Supp. 2d at 1118; *see also FTC v. Lab. Corp. of Am.*, No. SACV 10–1873, 2011 WL 3100372, at*19 (C.D. Cal. Mar. 11, 2011). Since the merger concerns highly differentiated products, the government must show that Bazaarvoice's and PowerReviews' products are uniquely close substitutes, that "other products [are] sufficiently different from the products offered by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging firm," and that entry or repositioning by other firms is "unlikely." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 68 (D.D.C. 2009) (citing *Oracle*, 331 F. Supp. 2d at 1117-18).

The government's decision to proceed solely on a unilateral effects theory precludes reliance on *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011). The court there found the proposed merger of two tax software companies would cause adverse *coordinated* effects. *See id*. at 81 ("the Court need not reach the issue of unilateral effects."). Although the court chose to discuss unilateral effects, its discussion relied on its previous finding of coordinated effects, as well as a statistical model rooted in rich data analysis and a rejection of this Court's *Oracle* decision. *Id*. at 81-89; *see id.* at 88 ("Since the Court has already found that HRB and Intuit would have coordinated pricing incentives post-merger, that finding implies that repositioning by Intuit would not prevent HRB from raising prices. By relying on its finding of coordinated effects to predict the likelihood of repositioning by Intuit, the Court acknowledges that its unilateral effects finding is not strictly 'unilateral' in the sense that it does take coordination into account."). Since there is no allegation of coordinated effects here, since the government's statistical models here are worthless for reasons Bazaarvoice's economist has explained, and since *Oracle* has been relied on repeatedly by courts in this Circuit, *H&R Block* provides no meaningful guidance in this case. Importantly, moreover, the *H&R Block* court acknowledged that the consumer products case before it was not analogous to business software cases like this one. *See id*. at 58 (distinguishing *United States v. SunGard Data Sys., Inc.*, 172 F.

Supp. 2d 172 (D.D.C. 2001) as "show[ing] that 'self-supply' substitutes should be included in the relevant market" because *SunGard* "involved a consumer market consisting of vertically integrated companies and explicitly distinguished cases, such as this one, involving markets of individual consumers").

Here, the government's case fails from the start because it cannot establish well-defined product and geographic markets. It thus cannot show market concentration statistics that have any probative value. The government's economist presents a concentration analysis that relies on useless data and poorly-conceived methodologies that ignore market realities. As a result, the government cannot establish a presumption of anticompetitive effects. Finally, the evidence clearly rebuts any claim of competitive harm from the merger, and the merger has substantial efficiency justifications. All of these reasons compel a judgment in favor of Bazaarvoice.

1. The Alleged Relevant Market Is Impermissibly Narrow

"Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act." *Marine Bancorp.*, 418 U.S. at 618. The relevant market must include "all goods or services 'reasonably interchangeable by consumers for the same purposes'" and encompass all geographic regions "where consumers could practicably go, not on where they actually go." *Sutter Health*, 130 F. Supp. 2d at 1119-20. An unduly narrow market definition would potentially exaggerate the perceived competitive effects of the merger. *See Oracle*, 331 F. Supp. 2d at 1121 ("[I]n differentiated product markets, some measure of market power is inherent and an unduly narrow product market definition proves too much."). Software markets in particular must encompass all potential alternative suppliers, including the possibility that business customers like those at issue here would self-supply. *See SunGard*, 172 F. Supp. 2d at 184-90 (alternative software solutions in the market).

Defining the relevant product market "involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989). "[A] product market is typically defined to include the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability

of use and cross-elasticity of demand." *Id.*; *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008). Critically, here, it also depends on "supply elasticity," *i.e.*, "the responsiveness of producers to price increases," for "[i]f producers of product X can readily shift their production facilities to produce product Y, then the sales of both should be included in the relevant market." *Rebel Oil*, 51 F.3d at 1436.

In this case, the government relies on a product market definition that does not reflect market realities and a geographic market definition that has absolutely no evidentiary support. The government's proposed relevant product market ("PRR platforms used by retailers and manufacturers") excludes other social commerce tools which act as a competitive constraint on the pricing for PRR platforms; it dismisses internally developed solutions to which customers can and have turned; and, worse, it expressly excludes admitted substitutes in supply. Its geographic market definition (limited to the U.S.) likewise does not reflect the reality that the relevant software can be purchased from suppliers worldwide. These flaws justify rejection of the government's market definition and, with it, the government's entire case.

a. The Product Market Includes Other Social Commerce Tools

A relevant market limited to "product ratings and reviews platforms" is too narrow because it excludes social tools that perform the same function as PRR and affect the prices a PRR vendor can charge and fails to account for the reality that social commerce competition occurs between platforms, not isolated functionalities. Social tools like Q&A and forums collect and use UGC to spur sales by providing "social proof," improve a website's SEO, and provide actionable customer feedback. All of these products are components of various social commerce platforms and thus compete together as part of the direct competitive alternatives available to customers.

The Supreme Court has often found that the relevant product market is a product *grouping* (or "cluster market"). *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356-57 (1963) (although checking accounts and safety deposit boxes were each "distinctive," they were properly considered part of the broader commercial banking market because the products and services are so typically supplied together); *United States v. Phillipsburg Nat'l Bank & Trust Co., Inc.*, 399 U.S. 350, 361 (1970) (same). Following *Philadelphia Nat'l Bank*, courts have found such markets

REDACTED

in a number of circumstances where, as here, products serve the same broad function, are used in different combinations, are functionally integrated, or have other indicia of being competitive constraints on each other. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966) (the relevant services provided a single use, the protection of property through a central service station); *J.B.L. Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011, 1016-17 (9th Cir. 1983) (a single market is recognized "where the product package is significantly different from, and appeals to buyers on a different basis from, the individual products considered separately"); *Image Tech. Servs, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1205 (9th Cir. 1997) (finding there was a particular lack of consumer recognition of the individual part markets, weighing in favor of an "all parts" market); *Science Prods. Co., Inc. v. Chevron Chem. Co., Inc.*, 384 F. Supp. 793, 799 (N.D. Ill. 1974) (relevant products and combinations of products were "functionally interchangeable"); *United States v. Rockford Mem. Corp.*, 717 F. Supp. 1251, 1260 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990) (Posner, J.) (acute care hospital has the ability to perform a variety of services under one roof).

The government tries to exclude non-PRR functionalities from the market by arguing that they have some differentiated characteristics and that they are used "with" PRR and not "instead of" PRR. Neither argument has merit. First, the argument is inconsistent with the product grouping cases just discussed. Second, that these products are differentiated from PRR does not mean they are not in the same market. While they have differences, they all serve basically the same purpose, using UGC to drive conversion rates and meet other e-commerce goals. The best that the government can say is that they do the same thing differently. But in any differentiated product market, the products in the market will have different characteristics. This is not a sufficient basis to exclude these products from the market. *See Oracle*, 331 F. Supp. 2d at 1120 (citing *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D.Cal.1988) (Legge, J.), *aff'd sub. nom. Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, 895 F.2d 1417 (9th Cir. 1990) (Table)). Third, that the products are sometimes used together does not by itself provide a sufficient basis to say that they are not "substitutes" for each other. Competing products can be used together and still be in the same relevant market

where, as here, the customer has the ability to increase its use of one product in response to an increase in the price of the other. For example, the Court of Appeals for the Federal Circuit (applying Ninth Circuit law) recently held that wheel games at casinos are not in a distinct relevant market from other casino games, even though they are deployed together by casinos. *See IGT*, 702 F.3d at 1343-47.

To see that other social commerce tools should be included in the relevant market, one need only look to the government's theory of how PRR prices are set. The government argues that PRR prices are set based on the perceived value received by a customer. It further argues that the value of PRR is determined by its ROI – how much incremental benefit the product provides the customer. Thus, even when a customer uses other social commerce tools "with" PRR, the incremental ROI of the PRR solution is diluted. Under the government's theory, this impact on ROI would limit the PRR vendor's pricing power. From an economic perspective, these other social commerce products are in fact substitutes, even though one does not fully "replace" another.

Some websites use social commerce tools, but do not use PRR. Others use PRR, but not other tools. Many employ a combination of tools. When a customer does use other social commerce tools, it can also use a simpler, cheaper PRR solution. Even Bazaarvoice executives recognized that PRR as a standalone product is rapidly becoming a commodity. Indeed, neither Bazaarvoice nor PowerReviews even tracked pricing data for PRR separately from other social commerce products. While customers at this point may say they would not "drop" PRR, they would nevertheless view PRR has having less "value" and less "ROI" benefits – all resulting in the same limitation on a PRR vendor's pricing power as it would experience from another PRR product. The government's characteristically simplistic analysis would (again) misleadingly exclude from the market substantial and growing competitive pressure from the proliferating set of alternatives a website operator has in accomplishing the same commercial objectives of PRR. *See Syufy*, 712 F. Supp. at 1387 (rejecting narrow market definition where "the government has given little, if any, consideration to the vast and rapid technological changes in the industry").

Moreover, and crucially, Dr. Shapiro expressly bases his analysis of the relevant product market solely "on demand conditions, not supply conditions." GX0984 at 2. Dr. Shehadeh, by

contrast, accounts for the fact that all commercial suppliers of social commerce tools must be in the relevant market by assigning them share as supply substitutes (or "rapid entrants") into the market since they could easily shift their offerings to supply PRR, meaning supply elasticity is high. Under principles of supply substitution, even if (contrary to fact) there were no substitutes for PRR in customer demand, the relevant market would still have to include considerations of supply. The law of this circuit could not be clearer that "defining a market on the basis of demand considerations alone is erroneous. . . . A reasonable market definition must also be based on 'supply elasticity.'" *Rebel Oil*, 51 F.3d at 1436; *Twin City Sportserv., Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1271 (9th Cir. 1975) ("Where the degree of substitutability in production is high, cross-elasticities of supply will also be high, and again the two commodities in question should be treated as part of the same market."); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 691 (9th Cir. 1976) (clear error where court refused to consider supply elasticity in merger case). In this case, that means that both social commerce providers and powerful adjacent firms (such as Amazon, IBM, and Oracle) are necessarily included. Dr. Shapiro's refusal to include them is flatly contrary to controlling law.

b. The Government's Geographic Market Is Invalid

The geographic market defines the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The relevant geographic market is the geographic area "to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *Sutter Health*, 130 F. Supp. 2d at 1120. It "includes potential suppliers who can readily offer consumers a suitable alternative to the defendant's services." *Id.*

In this case, Dr. Shapiro contends that the relevant market is limited to the United States because, in his view, a hypothetical monopolist could target all websites "focused" on selling goods in the United States and impose a "small but significant and non-transitory increase in price" ("SSNIP") on the cost of ratings and reviews for such websites. In his rebuttal report, Dr. Shapiro agrees with Dr. Shehadeh that "Bazaarvoice serves both U.S. and foreign customers; foreign providers serve both U.S. and foreign customers, and entry can come from both inside and outside

the United States.'" GX0984 at 4 (quoting DX-1433 ¶ 263). Dr. Shapiro's only basis for limiting his analysis to U.S.-based ratings and reviews customers is his bare assertion that Bazaarvoice could price discriminate against them. Without this artificial restraint, the foreign sales of firms like Reevoo, Yotpo, Feefo, and others would be included in the relevant market.

There are several reasons why the Court should reject Dr. Shapiro's approach. First, the evidence gathered in this case underscores that customers of PRR platforms operate worldwide, and competition from worldwide competitors does and would serve as a competitive constraint. Customers have single websites that are focused on customers in multiple jurisdictions, and customers also have single contracts that cover websites used in multiple jurisdictions. Dr. Shapiro never examines how many websites could engage in the tactics described above to avoid the kind of price discrimination he describes. He cannot rely on price discrimination as a basis to exclude foreign revenues of competitors that he concedes can sell in the United States.

Second, Dr. Shapiro's methodology does not comport with what the law in this Circuit requires. For example, in *Oracle*, the government alleged a market for high-functioning enterprise resource planning software limited to the United States and sold by Oracle (the acquirer), Peoplesoft (the target), and a German firm, SAP. 331 F. Supp. 2d at 1164. The government's economist made allegations similar to Dr. Shapiro's and sought exclude SAP's foreign revenues (primarily in Europe) and include only the sales of its U.S. arm, SAP America. *Id.* The court rejected the government's contentions and held that the market was world-wide and included all SAP's revenue. *Id.* at 1164-65. The court noted that many world-wide industries such as computer sales, copier sales, and motor vehicles "involve marketing and negotiation as well as installation and maintenance 'relationships.'" *Id.* There is therefore no basis to exclude the foreign sales of competitors such as Reevoo, Feefo, eKomi, and Yotpo when the evidence shows (and Dr. Shapiro concedes) that they all can sell in the United States.

Third, Dr. Shapiro's geographic market analysis, like his product market analysis, completely ignores the possibility of supply-side substitution in response to a hypothetical monopolist's price increase. Dr. Shapiro's analysis treats foreign firms as if they could not exert any competitive constraint in the U.S. because they have not, to date, substantially shifted their

resources to the U.S. Dr. Shapiro testified, notwithstanding Ninth Circuit law to the contrary, that he did not believe it was appropriate to consider supply side substitution in drawing the boundaries around the relevant market. But if foreign firms easily can repurpose their capacity to the United States, then that capacity must be included in the market. *See Rebel Oil*, 51 F.3d at 1436. Dr. Shapiro offers no reason why successful firms like Reevoo, Feefo, eKomi or Yotpo could not repurpose their capacity being used in Europe to the U.S. if a monopolist were to try to raise price. *Rebel Oil*, 51 F.3d at 1443 ("competitors *could* increase their output if ARCO raised prices").

Fourth, the law requires the court to consider "that geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition" and "must involve a dynamic as opposed to static analysis of where consumers could practicably go, not on where they actually go." *Sutter Health*, 130 F. Supp. 2d at 1120 (citation omitted). Dr. Shapiro looks at where IR500 customers "actually went" without taking into account where they "can practically turn" or "could go" in the event of a price increase.

Finally, in his rebuttal report, Dr. Shapiro concludes that geographic targeting is possible, but he does not explain why this counsels a US-only market rather than (as an example) a South San Francisco market – since the same sort of discrimination would be equally possible there. If there are no reasonable substitutes for R&R as Dr. Shapiro claims, then a hypothetical R&R monopolist could increase prices to anyone, *anywhere*. The choice of a US-only market versus a South San Francisco market versus a global market is thus entirely arbitrary – providing no basis to support the government's claim.

2. The Government Cannot Establish a Prima Facie Case Because It Cannot Establish High Market Share in a Cognizable Market

After defining the relevant market, the government may establish a presumption that the merger will substantially lessen competition by making an initial statistical showing that the transaction will lead to undue concentration in the market. *Baker Hughes*, 908 F.2d at 982. Without such an initial statistical showing of undue market concentration, the government is not entitled to the presumption of anticompetitive effects. *See id.* Instead, it must present evidence of actual lessening of competition. And in this district, even a 35% combined market share has been

found insufficient for the government to establish a presumption of anticompetitive effects in a unilateral effects case involving differentiated products. *See Oracle*, 331 F. Supp. 2d at 1123.

Although the government made no allegations as to market share in its initial Complaint, its expert, Dr. Shapiro, refers to a 56% post-merger "PRR market" share for Bazaarvoice and PowerReviews. But a closer look at Dr. Shapiro's calculations in arriving at that this market share shows that the government and its expert are relying on a faulty set of assumptions and data that render such market shares irrelevant, erroneous, and unreliable.

In his opening report, Dr. Shapiro concedes that there are no market share statistics covering the sales of PRR vendors. *See* GX0983 at 5 & 51. Bazaarvoice agrees with this conclusion. There are several reasons why this is true. *First*, neither Bazaarvoice nor PowerReviews maintains data as to their revenues for just R&R. Because they both compete in a larger social marketing market, their data reflect sales of social marketing solutions, rather than solely focusing on R&R. *Second*, R&R cannot be considered in a distinct market by itself. As noted above, many other social commerce tools affect the purchase of ratings and reviews, and many different options are available for PRR platforms. *Third*, there are thousands of businesses considering deploying PRR in the future. *Fourth*, PRR platforms are used by various different types of businesses: internet-only retailers, internet-only brands, automotive; brick-and-mortar retailers and brands, travel services, and digital goods. *Finally*, R&R can affect offline purchasing decisions. PRR on one site can affect purchasing decisions made on another site.

Instead of conceding that, given these facts, the calculation of PRR-only market shares would be difficult (if not impossible) and would certainly establish that Bazaarvoice has no market power, Dr. Shapiro instead calculates post-merger shares based on the sales of companies that are listed in the IR500 magazine. Dr. Shapiro could cite no prior case or investigation in which shares were calculated based on customer revenues – rather than the normal method, based on sellers' revenues – and the government has identified none. Dr. Shapiro's method would have the Court believe that Bazaarvoice's and PowerReviews' market shares – and therefore their assumed market power – increase with the size of their customers. This makes no economic (or common) sense, since the larger the customer, the greater its bargaining power in dealing with plug-in

vendors like Bazaarvoice and PowerReviews. If anything, the relationship between customer size and vendor market power is just the opposite of what Dr. Shapiro's analysis assumes. But wholly apart from that basic problem, the government's source, the IR500, provides no reasonable basis to calculate anything. This is a fatal flaw in Dr. Shapiro's analysis, and renders his opinions on market shares and market power irrelevant and unreliable. *See Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986) (assigning "little probative value" to study based on assumptions rather than actual data); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 995-97 (C.D. Cal. 2012) (rejecting market population based on trade publications). Even Dr. Shapiro admits that "the IR500 does not perfectly measure shares in the relevant market."

The IR500 has no relevance to the government's alleged relevant product market, Bazaarvoice, R&R or anything else in this case. It simply cannot be the basis for measuring market shares or market power for at least the following reasons:

- The IR500 ranks the top *retailers by online revenue for physical goods* in the last fiscal year. It does not look at brands, manufacturers, or ticket sales. *See* DX-1778. [redacted]
- The IR500 is inconsistent with the government's relevant product market (PRR platforms used by retailers *and manufacturers*) and has no correlation to the demand for PRR platforms. There is no relationship between demand for PRR and the value of online retail sales. Some of the companies that spend the most on ratings and reviews do not appear anywhere on the IR500 list.
- Because the IR500 excludes online revenue from the sale of services and travel, it systematically excludes whole classes of customers that are in the putative relevant market. For example, Expedia, a prominent online travel service, is one of Bazaarvoice's largest clients but is excluded from the IR500. The IR500 also excludes smaller retailers who also use PRR platforms. It even excludes eBay.
- Bazaarvoice and its competitors look at all available market opportunities to sell PRR. They do not limit themselves to the IR500. Instead, Bazaarvoice and its competitors

look at the more than eight thousand websites in the United States and twenty-thousand websites globally, in determining whom to target.

- Confining the focus of ratings and reviews to online sales also ignores the wealth of testimony, and admitted by the government's own expert, that sites use ratings and reviews to *drive in-store sales*. Thus, any calculation of market power must look beyond online retail sales, and clearly beyond the IR500.

Dr. Shapiro's reliance on the IR500 to calculate market shares for PRR platforms is akin to calculating Lamborghini's share of the market for cars by looking at how many individuals in the Forbes 400 list of most wealthy individuals own a Lamborghini simply because those on the Forbes 400 collectively own a material portion of the wealth in the world. Using the Internet Retailer 500 as a proxy for market shares for PRR platform providers will necessarily yield irrelevant, unsubstantiated, and unreliable results. Dr. Shapiro's estimates simply have no probative value in this case. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242-43 (1993) (expert opinion has "little probative value" when compared with economic factors that "dictate a particular conclusion") (*citing Matsushita*, 475 U.S. at 594 n.19).

Just as problematic, the data published by IR500 are unreliable and unverified. To collect data for its listing, the publisher mails a simple, unverified form survey to an unspecified list of retailers. It relies upon the survey participants to report their online revenues accurately and provides them no guidelines for what to include in their online revenue reporting. They can include or exclude international sales, include or exclude sales of digital goods, and include or exclude sales made through the online marketplaces, with no means to correct their reporting. Moreover, of those firms that receive surveys, only 40% respond; the authors of IR500 then make educated guesses of the on-line sales of the *remaining 60%*. Though no fault of the publisher (which never intended for its publication to be used for the purposes Dr. Shapiro puts it to), the IR500 is often wrong, and customers readily admit that their reported figures are incorrect.

And while Dr. Shapiro uses the IR500 because, as he believes, it accounts for "approximately 90% of all *online retail commerce in the US and Canada*" (GX0983 at 52), the IR500 figures actually include *foreign revenues and non-retail sales*. For example, the IR500

reported Amazon's 2012 revenues as $48 billion. But Amazon's 2012 10-K states that $21.37 billion of that $48 billion derives from "international" operations. Reducing the total revenues of the IR500 by Amazon's international operations alone takes the IR500's share of North American retail commerce down *almost 12%*. Dr. Shapiro's 90% number has no basis whatsoever.

The problems with Dr. Shapiro's analysis go beyond the irrelevance of the IR500 to this case and the issues inherent in its data. Dr. Shapiro also makes errors in improperly assigning large IR500 clients to PowerReviews or Bazaarvoice, resulting in a gross overestimation of their "market share" by his calculations. Dr. Shapiro admitted that his methodology may have flaws that may substantially overstate or understate market shares, but that he would not correct even major factual errors in his methodology because he believes that consistency is better than accuracy. Dr. Shapiro has not revised his over-stated share for Bazaarvoice where he inappropriately assigns Apple's revenues to Bazaarvoice – an error that results in a significant overstatement of Bazaarvoice's attributed market share. These errors are another reason this Court should reject Dr. Shapiro's conclusions.

Finally, Dr. Shapiro's failure to include sites that could implement ratings and reviews is directly contrary to precedent. Recently, in *Stewart v. GoGo, Inc*., plaintiffs alleged that defendant GoGo had foreclosed competitors from 85% of the market for "inflight internet access services on domestic commercial airline flights" through long-term exclusive contracts. 2013 WL 1501484, at *4. The plaintiffs alleged a market comprised of airlines *that already had adopted inflight internet access*. This Court rejected the plaintiffs' market share calculations because "[w]hile Plaintiffs claim that the Court should consider only those airplanes that the airlines have actually equipped with internet access, they have not made any allegations as to why airplanes that *could* be equipped should not be included in the full range of selling opportunities reasonably open to a competitor." *Id.* (emphasis in original). Because Dr. Shapiro failed to account for the "full range of selling opportunities reasonably open to [competitors]…" his market share calculations cannot be relied upon. *Id.* (citation omitted)*; see also United States v. Engelhard Corp.*, 126 F.3d 1302,

1306 (11th Cir. 1997) (government failure to quantify size of the market cast doubt on government's allegations).[4]

Dr. Shapiro's failure to allocate *any* market share to supply substitutes is also contrary to his primary resource, the 2010 *Horizontal Merger Guidelines*. Under the *Guidelines*, "rapid entrants" that can enter the market with minimal effort are "market participants" who must be allocated market shares to "reflect their competitive significance." *Guidelines* §§ 5.1-5.2. Dr. Shehadeh accomplishes this by measuring share across UGC platform customers, which captures both actual and potential PRR vendors. Dr. Shapiro's analysis only allocates market share to existing PRR providers, meaning he has not adequately accounted for rapid entrants.

The failure to address rapid entry renders Dr. Shapiro's alternate market share calculation, based on customer count within the IR500, entirely meaningless. In attempting to calculate a "market share," Dr. Shapiro assesses the share of IR500 customers who self-reported a R&R functionality and takes the number of customers who use Bazaarvoice and PowerReviews as an indicator of market share. The critical omission in his analysis occurs when he assigns zero share to powerful firms such as Amazon, and gives only the most trivial weight to firms like Pluck, Gigya, and Reevoo, who have significant customers and could expand easily if prices were to rise. By failing to accept that all the vendors of social commerce tools could rapidly provide R&R functionality, Dr. Shapiro calculates a number that fails to reflect the "competitive significance" of all players, is contrary to the government's own *Guidelines* (§ 5.1), and thus is probative of nothing.

The market shares calculated by the government are not reliable for any purpose. Because the government provides no other basis to derive market share, it fails to meet its *prima facie* burden. *Oracle Corp.*, 331 F. Supp. 2d at 1175 (a plaintiff failing to establish the relevant market is not entitled to a presumption of illegality). That should end the analysis and this case.

---

4 [redacted]

3. No Actual or Probable Anticompetitive Effects From the Acquisition

Even if the government had established a *prima facie* presumption of illegality, its case remains flawed because it cannot "come forward with evidence of actual anticompetitive effects" in light of the evidence Bazaarvoice will present. *Baker Hughes*, 908 F.2d at 991; *Oracle*, 331 F. Supp. 2d at 1165. It cannot do so for multiple reasons, including the powerful competitive constraint provided by in-house solutions, the lack of any evidence of market-wide harm, and the post-merger evidence and customer testimony that conclusively show the market remains competitive. Unsurprisingly, the government has had to revise its theory of harm significantly from the theory advanced in the Complaint, which only serves to show that the government's case, to the extent it ever had one, has fallen apart in discovery.

a. The Constraint of In-House PRR Platforms Precludes Any Post-Merger Exercise of Market Power

"As a matter of law, '[c]ourts have generally recognized that when a customer can replace the services of [an external product] with an internally-created [ ] system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market.'" *SunGard*, 172 F. Supp. 2d at 186 (citations omitted). The government concedes that in-house solutions are part of the relevant product market, but strives mightily to downplay their significance. Despite the government's claims, in-house solutions in this case are at least as available to customers as they were in *SunGard*, if not more so, and preclude any finding that Bazaarvoice will exercise enhanced market power following the merger.

To discard the evidence of substitution from in-house solutions, the government has the burden of demonstrating, by a preponderance of the evidence, that there is not a sufficient number of customers for which internally-developed solutions are a reasonable substitute. *Id.* This is a heavy burden. It requires that the government be able to identify *the characteristics* that would render those customers unable to implement an in-house solution, and then *quantify* the number of customers that actually lack the ability. *See Pay 'N Pak*, 875 F.2d at 1376 (rejecting market based on customer distinctions); *Engelhard*, 126 F.3d at 1306 (11th Cir. 1997); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107 (2d Cir. 2002) (plaintiff must identify a "discrete class of customers that has such a strong preference . . . that it would not consider substitutes if other factors

REDACTED

(especially price) changed"). *Accord AD/SAT v. Ass'n Press*, 181 F.3d 216, 228 (2d Cir. 1999) ("[W]here a 'market' itself is insubstantial, made up of only a few buyers with extremely strong preferences, antitrust law is not implicated.").

The parties deposed over 100 current, former, or potential R&R customers including brands, retailers, and manufacturers. Their testimony along with other evidence demonstrates conclusively that internal solutions provide an overwhelming competitive constraint. Over 20 of these customers testified that they have implemented their own internal solutions for ratings and reviews. These customers further testified that their respective in-house solutions adequately meet their needs and were not difficult to develop. In fact, several customers testified that the internal solutions were better suited to meet their needs than a commercial PRR platform for a variety of reasons. Even the government concedes that many companies *prefer* an in-house solution and are unlikely to turn to a commercial solution in the future. Bazaarvoice has lost more IR500 customers (the government's chosen set) to internal solutions than to all competitors combined. More than 20 additional current customers of commercial PRR platforms testified that they have considered developing ratings and reviews solutions in-house, and many of them also testified that they have the wherewithal to do so.

Indeed, *nearly half* of the customers deposed testified that they either: (1) already utilize an in-house R&R solution; or (2) have considered implementing one in lieu of using a commercial provider. Customers turning to in-house solutions run the gamut from small outfits to leading retailers, and no distinguishing factor would permit Bazaarvoice to identify customers that will or will not go in-house. That evidence demonstrates conclusively the competitive restraint provided by in-house solutions. The government's assertions to the contrary should be rejected.

Moreover, the evidence demonstrates that Bazaarvoice, PowerReviews, and other PRR platform providers view themselves as competing vigorously with internally developed solutions. Indeed, potential customers have used the existence of an in-house solution, or the possibility of building an in-house solution as leverage in negotiations with PRR platform providers. [redacted]

[redacted]

[redacted]

Importantly, the government cannot meet its burden of identifying objective characteristics of companies that are supposedly unable to implement an in-house solution. As conceded by the government in its interrogatory responses, "[t]he cost of ownership can vary significantly from customer to customer, not only because of different preferences for different features, but also based on competency of the firm at performing these functions." Pl.'s Resp. to Def.'s Interrog. No. 23. The government is correct that companies who use R&R or are considering using R&R vary widely in their preferences, needs, products, resources and strategies. The fact that so many different types of R&R customers view in-house solutions as a robust alternative underscores their importance as a competitive constraint. *SunGard*, 172 F. Supp. 2d at 188-89.

In the face of this overwhelming evidence, the government persists in minimizing internal solutions because a small number of customers have asserted that it would be "prohibitively expensive" to build a PRR platform and "very complex and expensive" to moderate reviews. Compl. ¶ 38. But these allegations do not identify the customer characteristics that would make an in-house solution "prohibitively expensive" or "complex." *See PepsiCo*, 315 F.3d at 107. Many identically-situated customers have testified that PRR platforms are technically simple, not complex, and require little time to set up. The software tools necessary to develop an internal solution are more available today than they were in the past, and the business reasons for an in-house solution (better site performance and customization options) are growing in importance.

The government claims that in-house moderation is "less desirable" than outsourcing moderation because it "often" requires significant resources and opportunity costs. Again, the question is not what is "less desirable" but rather what is a reasonable alternative. *See Oracle*, 331 F. Supp. 2d at 1131 ("the issue is not what solutions the customers would like or prefer for their data processing needs; the issue is what they could do in the event of an anticompetitive price increase"). On this point, the government has provided no evidence. Many of the customers deposed testified that they perform moderation internally with little effort, and some actually prefer to handle moderation in-house. Others said they do not even use moderation. Several retailers who implement an in-house solution [redacted] testified that their moderation needs are met by an automated solution. In addition, moderation costs are going down

REDACTED

over time as technology improves and supplants manual checks of reviews. Finally, moderation can be outsourced to non-R&R commercial vendors, including Live World and Inversoft.

Dr. Shapiro minimizes the import of internally developed solutions and concludes that they are generally inferior to ratings and reviews solutions offered by third parties. He relies on a limited number of interviews with a small handful of cherry-picked customers. Indeed, some of the customers Dr. Shapiro interviewed gave deposition testimony contrary to Dr. Shapiro's interview notes. In any case, relying on a limited number of customers who believe that internally developed solutions are not sufficiently competitive with merchant-supplied solutions does not satisfy the government's burden. *See Engelhard*, 126 F.3d at 1306; *PepsiCo*, 315 F.3d at 107. To be considered a viable alternative, internal solutions need not be an option for *every* existing or potential customer; rather, internal solutions need only be *available* for a sufficient number of clients such that the hypothetical monopolist would not be able to raise market prices significantly. *SunGard*, 172 F. Supp. 2d at 188-89. The evidence will show that they are.

b. No Actual or Probable Harm to Competition

In order to prevail, the government, like any antitrust plaintiff, must show that the challenged conduct (here, a merger) harms the competitive process. *Oracle*, 331 F. Supp. 2d at 1112. This means harm to the "market *as a whole*," not to individual market participants. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 US 2, 31 (1984) (emphasis added); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998). *See generally Syufy*, 903 F.2d at 668 ("It can't be said often enough that the antitrust laws protect competition, *not* competitors."). The government cannot meet this burden.

The Complaint's principal theory of harm was that the acquisition will permit Bazaarvoice to engage in "targeted price increases." Compl. ¶ 39. But the government has not identified any systematic means by which Bazaarvoice could do so, and Dr. Shehadeh's systematic review of the customers identified by the government as susceptible to price discrimination shows such a theory has no basis in factual or economic evidence in this case. See DX-1433 ¶¶ 30-97. The government's theory thus devolved into an attempt to protect a small number of heterogeneous customers with extremely strong preferences, a project the courts have repeatedly declined to take

up. *See AD/SAT*, 181 F.3d at 228 ("[W]here a 'market' itself is insubstantial, made up of only a few buyers with extremely strong preferences, antitrust law is not implicated."); *Pay 'N Pak*, 875 F.2d at 1376; *Engelhard*, 126 F.3d at 1306-07; *PepsiCo*, 315 F.3d at 107; *Oracle*, 331 F. Supp. 2d at 1131 & 1172-73. In some cases, a plaintiff *may* be able to demonstrate competitive harm by identifying a group of customers who would absorb a substantial price increase, but merely asserting that customers can be targeted is insufficient, as it is the government's burden to prove that a discernible group exists and can be identified in advance. *See Pay 'N Pak*, 875 F.2d at 1376; *PepsiCo*, 315 F.3d at 107. Here, the Complaint does not allege, nor does Dr. Shapiro's report identify, *any* objective characteristics for customers that allegedly consider Reevoo, Pluck, Gigya, other rivals, or in-house solutions to be distant substitutes for PowerReviews. Without doing so, even the government's own *Merger Guidelines* caution against reliance on this kind of "price discrimination" theory. *See Guidelines* § 4.1.4. *See generally* Jerry A. Hausman *et al.*, *Market Definition Under Price Discrimination*, 64 ANTITRUST L.J. 367, 373 (1996) (describing difficulty of identifying customers for price discrimination).

Dr. Shapiro's rebuttal report advances a new claim that Bazaarvoice will be able to price discriminate against two identified groups of customers: renewal customers and legacy PowerReviews customers. GX0984 at 8-9. But this theory fails for several reasons. In the first place, the government has no evidence that would substantiate its claims. Neither the government nor its expert undertook a systematic review of customers in the market or collected any data or evidence that would prove that Bazaarvoice in fact priced or could price its PRR product differently for renewal or legacy PowerReviews customers. Dr. Shapiro has acknowledged that he could not and did not conduct such an analysis. Without such data or evidence, the government's claim of price discrimination must fail. *See Oracle*, 331 F. Supp. 2d at 1173 (dismissing identical claims of price discrimination as "inarticulable contentions").

Moreover, the factual record shows the government is simply wrong. Undisputed evidence shows that PowerReviews persuaded precious few customers to switch even before the merger, just three in the past four years. The combination of in-house solutions, rivals such as Pluck, Gigya, and Reevoo, and powerful firms such as Amazon could easily replace that tiny number. In

fact, Bazaarvoice has repeatedly made price concessions to renewal customers after the merger as customers threaten to switch to another PRR platform or internal solution. Similarly, legacy PowerReviews customers have testified that they have a myriad of competitive alternatives available to them. The government presents no contrary evidence and points to no common characteristics of these customers, which vary in size, industry focus, and business strategy. It therefore cannot show a likelihood of price discrimination against these categories of customers.

Both *FTC v. CCC Holdings* and *Oracle* illustrate the hopelessness of the government's price discrimination theory for a differentiated product unilateral effects case like this. In *CCC Holdings*, the court considered a merger of manufacturers of software used to estimate repair costs for damaged vehicles. 605 F. Supp. 2d at 31-33. The FTC's economist presented *three* economic models to predict post-merger price increases due to unilateral effects, and the court rejected all of them. The court found that the FTC's expert "could not identify any characteristics of [the relevant] products that might make [a non-merging competitor] a more distant third choice for certain insurers. Nor could he identify any characteristics of a particular class of insurers that might cause them to view [the non-merging competitor] as a more distant third – with the possible exception of lack of familiarity." *Id.* As a result, the court concluded, "[w]ithout credible evidence that [the non-merging competitor] is a more distant third choice for a significant share of the market to support the predictions of [the economist's] models, the Court cannot conclude that the merger is likely to result in unilateral price elevations." *Id.* at 72. The *Oracle* court similarly rejected a claim that Oracle and PeopleSoft were uniquely close bidding competitors, finding ample instances of another competitor being among the final two options. *See* 331 F. Supp. 2d at 1166-67.

In this case, Dr. Shapiro did not even attempt the type of modeling done in *CCC Holdings*, acknowledging he has insufficient data to do so. As explained in Dr. Shehadeh's report, the bid data from Salesforce and "How the Deal Was Done" emails relied upon by Dr. Shapiro are unreliable because they report incorrect information. Dr. Shapiro also failed to consider at all more than 90% of the Salesforce bid opportunity data. In addition, Dr. Shapiro has identified no characteristics of PowerReviews' customers that make Reevoo, Pluck, or Gigya

"more distant third" options. Instead, Dr. Shapiro simply presumes that such rivals are "more distant" third options based on an unreliable and small data sample combined with unreliable market shares. This analysis is even less persuasive than the models rejected in *CCC Holdings*. Further, the bidding information here shows even more viable competitors bid against Bazaarvoice and constrained its pricing than in *Oracle*.

Nor can Dr. Shapiro's "recapture analysis" assist the Court in its review. In this analysis, Dr. Shapiro attempts to show that a sufficient number of legacy PowerReviews and Bazaarvoice customers would remain with Bazaarvoice after a price increase to make that increase profitable. His analysis depends on calculating a "recapture rate," that is, the percent of customers who would turn to PowerReviews or Bazaarvoice in the event of a price increase by either (and would thus be "recaptured" by the merged entity). But he never establishes this rate as he 1) limits his review to the unrepresentative IR500 list, 2) does not examine responses to price changes but instead uses all changes for any reason, and 3) refuses to accept that his own analysis shows in-house development poses a far greater competitive constraint than PowerReviews ever did. His analysis also depends on calculating a "diversion ratio," meaning the percentage of customers that would have to be retained by the merged entity to make a price increase profitable. However, that calculation relies on the profit margins earned by the companies on the product at issue (PRR platforms), and he cannot establish such a margin because no data exist to do so. He instead uses overall margins for each company for all products, meaning he has not done the calculation his own proposed method requires. Dr. Shapiro's gerrymandered recapture analysis thus cannot show that a price increase would be profitable to the companies post-merger.

c. The Government's Ever-Changing Theories of Harm All Fail

The government's case has shifted substantially from the theory advanced in the Complaint. After several months of reviewing submissions in response to civil investigative demands (CID), the government brought a Complaint that relied on a theory of "targeted price increases" to Bazaarvoice customers who used the threat of switching to PowerReviews to get better prices from Bazaarvoice and who "do not consider in-house solutions to be a viable alternative." Compl. ¶ 39. After discovery, Dr. Shapiro advanced an entirely different theory of

undue concentration in PRR platforms. GX0983 at 6. Then, in his rebuttal report, after disclaiming any reliance on the targeted price discrimination theory advanced in the Complaint, Dr. Shapiro advanced yet another new theory that legacy PowerReviews customers and renewal customers would face a price increase – a conjecture with no support in the record. GX0984 at 8-9. These shifts have come even though Dr. Shapiro was retained over a month before the Complaint was filed, and both Dr. Shapiro and the government had access to voluminous CID material before they brought this suit.

The Ninth Circuit has disapproved attempts to proceed on entirely new theories after discovery. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) ("A complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations."). The Court would thus be justified in refusing to entertain any theory other than the untenable "targeted price increases" theory advanced in the Complaint. *See id*. (affirming refusal to consider liability theory not articulated in the complaint). *See also Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011); *Wasco Products, Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 969 (9th Cir. 2006).

Even if the Court chooses to indulge the government's new theories, it should recognize that the repeated shifts reflect the fundamental groundlessness of the government's case. The original "targeted price increases" theory failed because no criteria exist to distinguish customers Bazaarvoice could supposedly target from those it admittedly could not. Dr. Shapiro's undue concentration theory founders because his market share calculations are baseless, and in any event the evidence clearly shows that his statistics do not reflect competitive realities. His final theory fails since prices to the customers he identifies have not increased post-merger, the same pattern of switching and discounting appears post-merger as pre-merger, and most PowerReviews customers purchased its low-end Express product, which is indistinguishable from numerous other offerings by numerous other firms.

4. There are Substantial Merger-Specific Efficiencies

The government's narrow focus on PRR platforms has caused it to disregard the pro-competitive benefits of Bazaarvoice's acquisition of PowerReviews. Bazaarvoice seeks to provide digital marketing solutions for brands, including more sophisticated products and services than just PRR. As part of its effort to implement this strategy, Bazaarvoice believed that acquiring PowerReviews and its retail customer base was the most efficient way to obtain the consumer audience needed to make its digital marketing strategy work. Contrary to the government's allegations, the success of this strategy does not depend on dominating a "market" for PRR platforms. Rather, Bazaarvoice's seeks to leverage the acquisition to develop new products beyond its core PRR competency. This reflects the dynamic nature of the market, as Professor Dellarocca acknowledged in his deposition. Furthermore, Bazaarvoice has implemented many product improvements made possible by the merger, and has been able to offer broader syndication networks to customer who value syndication than would have been possible in the absence of the merger. The government's failure to consider the pro-competitive benefits of the acquisition is yet another fatal flaw in its competitive effects analysis. *See FTC v. Tenet Health Care Corp*., 186 F.3d 1045, 1054-55 (8th Cir. 1999) (reversing because, *inter alia*, "the district court should . . . have considered evidence of enhanced efficiency in the context of the competitive effects of the merger"). Such efficiencies further justify entry of judgment in favor of Bazaarvoice, as undoing the merger would harm consumers.

IV. MOTIONS *IN LIMINE*

In accordance with the Court's August 1, 2013 order, Dkt. 99, Bazaarvoice respectfully moves *in limine* for an order excluding the following categories of evidence:

Dr. Shapiro's Market Definition Opinions: As discussed above at 32-33, Dr. Shapiro proposes to define the relevant market based solely on demand considerations, but Ninth Circuit precedent requires that supply considerations factor into market definition. His opinion should thus be excluded under Federal Rules of Evidence 104 and 702 as not relevant or helpful in determining whether the government can meet its burden under applicable legal standards.

Dr. Shapiro's Market Concentration Opinions: As discussed above at 36-38, the IR500 data Dr. Shapiro relies upon are utterly insufficient to inform a serious analysis of this market. *See also* DX-1736 ¶¶ 21-46. Since his market share calculations depend entirely on these data, they should be excluded under Rule 702 as being based upon insufficient facts and data.

Dr. Shapiro's Recapture Analysis: As discussed above at 46-47, Dr. Shapiro's recapture analysis, in addition to being based on the IR500 data that render his market concentration opinions inadmissible, is based on an analysis of profit margins that uses the wrong margins. His analysis should thus be excluded under Rule 702 as being based upon insufficient facts and data and an unreliable application of his method to the facts of this case.

Dr. Shapiro's Opinion That Reputation is a Barrier to Entry: As discussed above at 24-25, Dr. Shapiro believes Bazaarvoice's reputation for quality services is a barrier to entry. The Ninth Circuit has rejected this position as a matter of law, so his opinion should be excluded under Rules 104 and 702 as not relevant or helpful to the trier of fact in determining whether the government can meet its burden under applicable legal standards.

V. CONCLUSION

For the foregoing reasons, the Court should enter judgment against the government and in favor of Bazaarvoice, deny all relief requested in the Complaint, and dismiss the Complaint with prejudice. The Court should also enter an order precluding the government from presenting Dr. Shapiro's market definition and market concentration opinions, his recapture analysis, and his opinion that reputation is a barrier to entry at trial.

REDACTED

Respectfully submitted,

Dated: August 26, 2013

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

/s/ Boris Feldman
Boris Feldman
Dylan J. Liddiard
Dominique-Chantale Alepin
650 Page Mill Rd
Palo Alto, CA 94304
Telephone: (650) 493-9300
Facsimile: (650) 849-6811
E-mail: bfeldman@wsgr.com

Scott A. Sher
Franklin M. Rubinstein
Andrea Agathoklis Murino
George C. Karamanos
Kellie M. Kemp
1700 K St., NW
Fifth Floor
Washington, DC 20006
Telephone: (202) 973-8800
Facsimile: (202) 973-8899
E-mail: ssher@wsgr.com

Jonathan M. Jacobson
Chul Pak
Daniel P. Weick
Robert Corp
1301 Ave. of the Americas
40th Floor
New York, NY 10019
Telephone: (212) 999-5800
Facsimile: (212) 999-5899
E-mail: jjacobson@wsgr.com

Attorneys for Defendant
Bazaarvoice, Inc.

BORIS FELDMAN, State Bar No. 128838
DYLAN LIDDIARD, State Bar No. 203055
DOMINIQUE-CHANTALE ALEPIN, State Bar No. 241648
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100
Email: boris.feldman@wsgr.com
dliddiard@wsgr.com; dalepin@wsgr.com

Attorneys for Defendant Bazaarvoice, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BAZAARVOICE, INC.,, Defendant.	CASE NO.: 13-cv-0133 WHO **BAZAARVOICE'S WITHDRAWAL OF *MOTIONS IN LIMINE*** Complaint Filed: January 10, 2013 Judge: Hon. William Orrick Trial Date: September 23, 2013

Bazaarvoice hereby withdraws each of the motions *in limine* made at pages 49-50 of Defendant's Pre-Trial Brief. Bazaarvoice will instead demonstrate the flaws in the underlying analyses of Plaintiff's expert at trial.

Dated: August 28, 2013

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Dominique-Chantale Alepin
Dominique-Chantale Alepin

Attorneys for Defendant Bazaarvoice, Inc.

REDACTED