Peter K. Huston (CA Bar No. 150058)
United States Department of Justice, Antitrust Division
450 Golden Gate Avenue
San Francisco, CA 94102
Telephone: (415) 436-6660
Facsimile: (415) 436-6687
E-mail: peter.huston@usdoj.gov

Michael D. Bonanno (DC Bar No. 998208)
United States Department of Justice, Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530
Telephone: (202) 532-4791
Facsimile: (202) 616-8544
E-mail: michael.bonanno@usdoj.gov

Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. BAZAARVOICE, INC. *Defendant*.	Case No. 13-cv-00133 WHO **PLAINTIFF'S TRIAL BRIEF AND MOTION IN LIMINE** Judge: Hon. William H. Orrick Trial Date: September 23, 2013 Time: 8:30 a.m. Pretrial Conf.: September 9, 2013

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

II. STATEMENT OF FACTS

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

PRR platforms combine specialized software and services[1] to enable retailers and manufacturers to collect and display product ratings and reviews on their websites. *See* PFOF ¶¶ 34-47 (describing PRR platform features). Retailers and manufacturers either (1) license a PRR platform from a commercial supplier; or (2) build a PRR platform "in house" with internal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

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

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

One way of analyzing a merger between two competitors is through a burden-shifting approach. *See United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004). Under this approach, the government first establishes that a transaction is presumptively unlawful by showing it would significantly increase market concentration and create a firm with a large market share. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). To rebut this presumption, the defendant "must produce evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Id.* (quoting *United States v. Citizens & S. Nat'l Bank*¸ 422 U.S. 86, 120 (1975)). "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.* (citation and internal quotation marks omitted).

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

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

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

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

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

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

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

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

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

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

Most significantly, Bazaarvoice's and PowerReviews' business documents show that the two firms intensely competed to license their PRR platforms to retailers and manufacturers. Both firms routinely offered substantial discounts when competing against each other. *See, e.g.*, GX-422 (at -469) ([redacted] discount); GX-497 (discount in excess of [redacted]); GX-1096 ([redacted] discount); GX-1116 (at -652) ("BV offered to undercut PR by [redacted]"). These examples of price

[4] Courts have adopted the same standards for defining a relevant product market in cases brought under the Clayton Act and cases brought under the Sherman Act. *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 292 n.2 (9th Cir. 1979); IV Areeda & Hovenkamp ¶ 929a, at 159.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dr. Shapiro also sought to determine whether it would be profitable for a hypothetical monopolist to impose a price increase on PRR platforms by conducting a "recapture" analysis. Recapture analysis seeks to determine the percentage of sales that would be retained by a hypothetical monopolist if it were to raise prices. If the additional sales from a price increase will outweigh the expected losses, the price increase will be profitable. And if a small, but significant price increase by a hypothetical monopolist would be profitable, the group of products under consideration is a relevant product market. Dr. Shapiro determined that PRR platforms would form a relevant product market if a hypothetical PRR platform monopolist would retain at least l7 percent of all sales following a five percent price increase. He then calculated an estimated recapture rate of 57 percent, which far exceeds the 17 percent threshold for such a price increase to be profitable. Considering all of these factors, Dr. Shapiro concluded that PRR platforms are a relevant market.

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

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

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

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

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

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

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

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

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

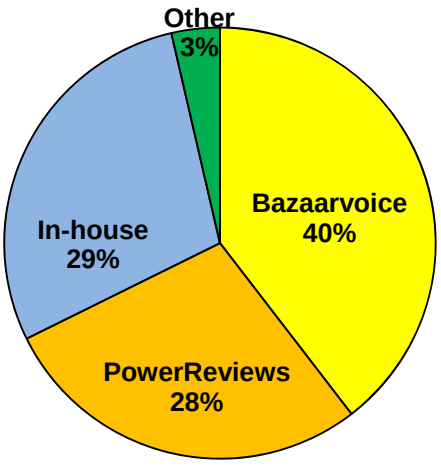
B. Bazaarvoice's Acquisition of PowerReviews is Presumptively Unlawful.

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

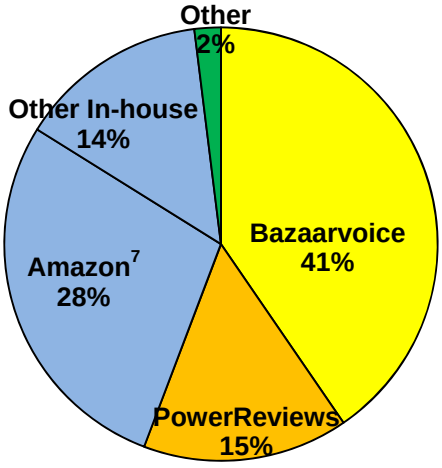
Market shares derived from the IR 500 are consistent with the way in which Bazaarvoice, PowerReviews, and other industry observers evaluated competition in the market for PRR platforms prior to the transaction. *See* GX-1126 (at -861); GX-82 (Barton Dep. 53:4-8, 11-54:12). Indeed, Bazaarvoice and PowerReviews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

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

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



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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] Even in the absence of price discrimination, Section 7 does not require competitive harm arising from a transaction to be borne equally by all purchasers. A violation of Section 7 may occur even when the competitive impact of the transaction will fall primarily on customers that placed the greatest value on the merging firms' products. *See H&R Block*, 833 F. Supp. 2d at 81-89; *Swedish Match*, 131 F. Supp. 2d at 169; *cf. Staples*, 970 F. Supp. at 1082-83.

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

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

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

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

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

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

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

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

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

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

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

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

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

Company	U.S. Clients
Bazaarvoice	**463**
PowerReviews	**1205**
Enterprise	*354*
Express	*851*
Bazaarvoice (post-merger)	**1668**
Gigya	[redacted]
Pluck	
Lithium	
Rating-System	
Reevoo	
Practical Data	

Table 1: Enterprise PRR Clients of Commercial Suppliers[10]

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

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

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

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

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

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

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

a. Bazaarvoice's Syndication Network is a Barrier to Entry.

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

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

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

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

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

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

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

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

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

[redacted]

b. Switching Costs and Reputation are Barriers to Entry.

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

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

As courts have recognized, high switching costs insulate incumbent suppliers from competition and impede expansion by fringe players. *CCC Holdings*, 605 F. Supp. 2d at 49; *cf. Eastman Kodak*, 504 U.S. at 476 (high switching costs may cause locked-in consumers to tolerate price increases rather than switch suppliers); GX-62 [redacted] The switching costs in the PRR platform market protect a supplier's installed customer base. Before the merger, even Bazaarvoice executives lamented that "[PowerReviews was] REALLY hard to unseat because of switching costs," GX-223 (at -634), and they acknowledged Bazaarvoice had been unsuccessful in taking clients like REI and Staples away from PowerReviews because "switching costs are high," GX-1093 (at -864).

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

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

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

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

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

Within the past few years, there have been two notable (and unsuccessful) attempts to enter the PRR platform in the United States. *See* PFOF ¶¶ 218-26. One entrant, Viewpoints, has exited the market entirely. GX-75 (Moog Dep. 67:23-24; 68:3-17, 20). The other, [redacted] The experience of these two firms confirms that there are high barriers to entry in the U.S. market for PRR platforms. *See, e.g., FTC v. Cardinal Health, Inc*, 12 F. Supp. 34 at 56 (D.D.C. 1998) ("The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Bazaarvoice's Other Defenses Are Deficient.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Q. Have you given any thought to the acquisition of PowerReviews by Bazaarvoice?
> A. I have not.
> Q. Would it be fair to say that you're not concerned about the merger?
> MS. BRODY: Objection. Leading.
> A. It would be fair to say that I'm not concerned about the merger.

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

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

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

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

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

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

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

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

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

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

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

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

[14] Mr. Goldberg's expert report ("Report"), rebuttal report, and the transcript of his deposition are attached.

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

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

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

As to PRR platforms, the subject of this case, Mr. Goldberg has scant experience. He appears to draw on his three years of digital media work experience at Razorfish[15] and his previous employer CrossView as his primary qualification.[16] Indeed, Mr. Goldberg has only been involved in recommending a particular PRR platform twice ([redacted]). *See* Goldberg Dep. 235:4-12, 236:23-238:5. Thus, he is not qualified to offer expert testimony on the procurement of PRR platforms. *See Ralston*, 2011 WL 6002640, at *6 (expert's 30 years of experience training and consulting mortgage brokers provided a sufficient

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

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

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

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

B. The Court Should Exclude Mr. Goldberg's Testimony For Failure to Disclose Materials.

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

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

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

C. Mr. Goldberg's Expert Opinions Are Not Reliable.

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

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

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

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

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

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

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

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

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

D. Mr. Goldberg's Testimony Is Not Relevant.

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

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

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

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

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

* *

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

V. CONCLUSION

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

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Respectfully submitted by:

/s/ Peter K. Huston

Peter K. Huston (CA Bar No. 150058)
United States Department of Justice
Antitrust Division
450 Golden Gate Avenue
San Francisco, CA 94102
Telephone: (415) 436-6660
Facsimile: (415) 436-6687
E-mail: peter.huston@usdoj.gov

Michael D. Bonanno (DC Bar No. 998208)
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530
Telephone: (202) 532-4791
Facsimile: (202) 616-8544
E-mail: michael.bonanno@usdoj.gov

Attorneys for Plaintiff United States of America