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

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAZAARVOICE, INC.

Defendant.

Case No. 13-cv-00133 EMC

**MOTION TO MODIFY
CASE MANAGEMENT
ORDER TO SET NUMBER
OF FACT WITNESSES AT TRIAL**

Date: July 11, 2013

Time: 10:00 am

The United States' Motion to Modify the Case Management Order to Set Number of Fact Witnesses at Trial is scheduled for July 11, 2013, at 10:00 am, or as soon thereafter as is convenient for the Court.

In order to avoid massive waste and promote judicial efficiency, the United States seeks to modify the Case Management Order to place a reasonable limit on the number of fact witnesses that may be called by either party and require the parties to identify those witnesses now. The United States has already done so.

Ignoring the clear direction of the Court and the practical limits imposed by the expedited schedule and amount of time set aside for trial in this matter, Bazaarvoice, Inc. (Bazaarvoice) has provided a padded list of more than 100 possible fact witnesses with the option to add even more.¹ This excessive number of potential fact witnesses appears to be driven by hide-the-ball

¹ Pursuant to the "Stipulation and Order Regarding the Exchange of Preliminary and Final Witness Lists" (ECF 68, 69) ("the Witness Stipulation"), the parties exchanged a preliminary list of "fact witnesses that may be called at trial" on June 10, 2013. On or before June 28, 2013, the parties may supplement their Preliminary Lists by "adding no more than ten (10) fact witnesses. Final witness lists are to be exchanged on August 6, 2013.

1 gamesmanship and the Court should exercise its discretion and order Bazaarvoice to pare down
2 its list. Therefore, the United States requests that the Court limit each party to 25 potential fact
3 witnesses and order Bazaarvoice to amend its list of potential witnesses to those that are truly
4 likely to be called. Fact discovery is now closed and virtually all of the witnesses on
5 Bazaarvoice's list have been deposed or are within defendant's control. There is no reason that
6 Bazaarvoice cannot now narrow its list to 25 witnesses. Bazaarvoice knows what the witnesses
7 are likely to testify if called and knows what its defenses are.

8 In the initial Joint Case Management Conference statement the parties estimated that trial
9 would last twenty trial days (approximately 80 to 90 trial hours given the Court's trial schedule).
10 (ECF 26 at 22). (While the Court has not yet allocated the trial hours, the United States, as the
11 party bearing the burden of proof, believes it is entitled to a majority of them.) The Court
12 adopted the parties' estimate and scheduled a twenty day trial starting on September 10, 2013.
13 (ECF # 29 at 1). After subtracting the time for opening statements, economic and industry expert
14 testimony and closing arguments there is only limited time left for fact witness testimony. Prior
15 to the initial case management conference the United States, in an effort to conserve resources
16 and proceed in a logical and efficient manner, suggested a limit of 15 fact witnesses and three
17 expert witnesses per side and the exchange of preliminary lists of witnesses. (ECF 26 at 19).
18 Defendant rejected those suggestions. (Id.) The Court ordered the parties to meet and confer to
19 establish a deadline to exchange witness lists. (Minute Order, ECF 28). The United States made
20 several proposals regarding the exchange of preliminary witness lists. At one point Bazaarvoice
21 refused to agree unless the United States agreed that Bazaarvoice could have additional time to
22 conduct third party discovery.

23 Bazaarvoice did not agree to the exchange of witness lists until June 6, 2013. The
24 "Witness Stipulation" was entered by the Court on June 7, 2013.² It did not cap the number of
25 witnesses but called for each party to submit its preliminary witness list by June 10, 2013, and
26

27 ² Due to Bazaarvoice's refusal to an earlier exchange, much of the benefit of narrowing the scope of
28 discovery recognized by the Court was not achieved. (CMC Transcript, ECF 38).

1 provides that the parties could supplement the witness list to add an additional 10 fact witnesses
2 on June 28, 2013. The parties are to exchange final witness lists on August 6, 2013. Under the
3 stipulated order, the parties are entitled to take discovery from parties appearing on the other
4 side's witness list even after the close of fact discovery.

5 Pursuant to the Witness Stipulation, the parties exchanged preliminary witness lists on
6 June 10, 2013. The United States provided a list of 15 potential live fact witnesses. Bazaarvoice
7 provided a list of 130 potential live fact witnesses that included over 100 third parties.

8 During a discovery hearing on June 11, 2013, with Magistrate Judge Beeler, the United
9 States referenced Bazaarvoice's list of 130 potential live fact witnesses. Noting that Bazaarvoice
10 could not possibly call any number close to the 130 listed witnesses in the time it will have to put
11 on fact witnesses, the United States argued that it would be prejudiced by being forced to
12 conduct discovery and prepare trial examination outlines of witnesses that would obviously not
13 testify. Further, the United States would be hindered in trial preparation if it were forced to
14 prepare for trial presentations of a large number of witnesses that could not possibly all testify.
15 In response, the Court ordered both parties to provide factual descriptions of each witness'
16 expected testimony and to identify their top fifteen witnesses. (ECF 71). The United States and
17 Bazaarvoice exchanged amended witness lists on June 13, 2013. However, Bazaarvoice only
18 provided descriptions of its tentative top 15 witnesses rather than all listed witnesses as ordered.
19 Bazaarvoice further noted in the filing that the list "undoubtedly will change by the time of the
20 stipulated exchange of final trial witness lists on August 6, 2013" and that "the parties are not
21 required to limit their final trial witness list to 15 witnesses each."

22 After the United States challenged Bazaarvoice's compliance with the Court's order,
23 Bazaarvoice, on June 14, 2013, served "DEFENDANT'S AMENDED NOTICE OF TRIAL
24 WITNESS LIST" ("Amended List"). The Amended List contains 119 potential fact witnesses.³
25 The descriptions of the expected testimony do little to alert the United States as to the testimony

26 ³ As of June 20, 88 of the 119 listed witnesses had been deposed with an additional 21 having been
27 scheduled to be deposed. Documents have been produced by 12 of the 119 listed witnesses. Document productions
28 are anticipated from 2 additional witnesses.

1 that may be proffered. For the approximately 70 potential customer witnesses that have been
 2 deposited, Bazaarvoice states that the witness will testify that the acquisition is not “likely to lead
 3 to a lessening of competition because competition in the relevant market remains vigorous and
 4 robust for the reasons described in the deposition.” For an additional 16 current and former
 5 employees of the merged companies, the expected testimony is described as the “competition
 6 faced by BV/PR, and why the transaction is not anticompetitive.” And for 33 potential live
 7 witnesses, Bazaarvoice discloses that their anticipated testimony is “TO BE DETERMINED”.⁴

8 The United States made one last effort to reach an agreement with Bazaarvoice to place a
 9 reasonable limit on the number of fact witnesses it may call at trial. These efforts were
 10 unsuccessful. Bazaarvoice would only agree to make a “non-binding” effort to provide a list of
 11 25 fact witness by the end of July. With no assurance that Bazaarvoice would not identify
 12 different witnesses on its final fact witness list, this “non-binding” offer would do little to limit
 13 the extremely wasteful and counterproductive burden on the United States to prepare for the trial
 14 testimony of a large number of fact witnesses who will not appear at trial.

15 A court has broad discretion to manage cases before it with respect to the interrogation of
 16 witnesses and the presentation of evidence. *See Unites States v. Claiborne*, 765 F.2d 784, 804
 17 (9th Cir. 1985). Further, the Supreme Court has noted “if truth and fairness are not to be
 18 sacrificed, the judge must exert substantial control over the proceedings.” *Geders v. United*

19
 20 ⁴ In addition, many of the “potential witnesses” are customers of PowerReviews and Bazaarvoice. If
 appearing live in the numbers indicated in Bazaarvoice’s witness list, their testimony is sure to be cumulative-a
 concern earlier raised by the court.

21 **MR. HUSTON:** FOR THE MOST PART, YOUR HONOR, THEY ARE
 22 CUSTOMERS OF THESE SORTS OF SERVICES THAT WE'RE TALKING ABOUT,
 EITHER CUSTOMERS OF BAZAARVOICE OR FORMER CUSTOMERS OF
 23 POWERREVIEWS, OR CUSTOMERS WHO USE THE SERVICES OF SOME OTHER
 PROVIDER OF THE SAME SORT OF SERVICES.

24 THERE HAVE BEEN A FEW OTHER DEPOSITIONS IN THERE OF
 OTHER PROVIDERS AND THINGS LIKE THAT, BUT, PRIMARILY, IT'S
 CUSTOMERS.

25 **THE COURT:** ONE QUESTION RAISED IN MY MIND, I'M NOT
 SURE WHAT YOU ARE PLANNING ON AT TRIAL, BUT I WANT TO MAKE SURE
 26 WE DON'T GET INTO A CUMULATIVE SITUATION. I ASSUME A LOT OF
 THIS WILL BE ABSORBED AND ANALYZED THROUGH THE LENS OF EXPERT
 TESTIMONY AND THIS SORT OF THING. I MEAN, WE ARE NOT GOING TO
 27 HAVE 35 WITNESSES ON THE STAND.

(Case Management Conf., ECF 65).

1 *States*, 425 U.S. 80, 87, 87 S. Ct. 1330, 47 L. Ed.2d 592 (1976). The court’s broad discretion
2 over the mechanics of a trial has been codified in Federal Rules of Evidence 611(a) and 403.
3 Fed R. Evid. 611(a) provides:
4

5 The court should exercise reasonable control over the mode and order of examining
6 witnesses and presenting evidence as to (1) make those procedures effective for
7 determining the truth, (2) *avoid wasting time*, and (3) protect witnesses from harassment
8 or undue embarrassment.

9
10 (emphasis added). Similarly, Fed. R. Evid. 403 permits the exclusion of relevant evidence where
11 its “probative value is substantially outweighed by a danger of . . . wasting time, or needlessly
12 presenting cumulative evidence.” In the exercise of their discretion, courts have imposed various
13 limits on the presentation of evidence, including limits on the number of witnesses to be called at
14 trial. *See Unites States v. Holmes*, 44 F.3d 1150, 1156-57 (2d Cir. 1995) (holding that limitation
15 on the number of defense witnesses was not an abuse of discretion).

16 Bazaarvoice’s insistence on hiding its case in a crowd is unfair and unworkable.
17 Bazaarvoice has announced its intent to potentially call at least 70 customer witnesses.
18 According to the summaries provided by Bazaarvoice it appears that much of this testimony will
19 be cumulative. Each of these 70 customer witnesses will testify that the acquisition is not “likely
20 to lead to a lessening of competition because competition in the relevant market remains
21 vigorous and robust.” Further, Bazaarvoice may call live at trial 16 current and former
22 employees who are expected to testify regarding “competition faced by BV/PR, and why the
23 transaction is not anticompetitive.” While testimony from customers and current and former
24 employees can be important, piling on similar testimony from 70 customers and 16 company
25 executives is cumulative and unnecessary.

26 Bazaarvoice’s identification of more than 100 potential fact witnesses will also place an
27 unfair burden on the United States. The United States will be forced to seek documents from and
28

Respectfully submitted,

By: _____/s/
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⁶ This outcome is foreshadowed by “DEFENDANT BAZAARVOICE, INC.’S PRELIMINARY AND TENTATIVE TOP 15 WITNESS DISCLOSURES” provided in response to Judge Magistrate Beeler’s attempt to narrow the focus of the witness disclosures. Bazaarvoice notes that while it is providing the list of the “most important witnesses” for trial that it is “not required to limit [its] final trial list to 15 witnesses...”

1 **UNITED STATES DISTRICT COURT**
2 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
3 **SAN FRANCISCO DIVISION**

4 UNITED STATES OF AMERICA,

Case No. 13-cv-00133 EMC

5 *Plaintiff,*

6 v.

7 BAZAARVOICE, INC.

8 *Defendant.*

9 [PROPOSED] ORDER

10 UPON CONSIDERATION of the United States' Motion to Modify the Case
11 Management Order and for good cause shown, it is hereby ORDERED that the Motion is
12 GRANTED. It is hereby further

13
14 ORDERED that the Case Management Order is modified to limit the number of
15 witnesses that each party may call to testify at trial to twenty-five (25). It is further ordered that
16 Defendant must revise its Supplemental Preliminary Witness List to no more than twenty-five
17 (25) names and submit the revised list no later than five (5) business days of the execution of this
18 Order. For good cause shown, either party may call additional fact witnesses at trial.

19
20 SIGNED this _____ day of June, 2013.

21
22 _____
23 EDWARD M. CHEN
24 UNITED STATES DISTRICT JUDGE
25
26
27
28