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I. INTRODUCTION

Spring is the air, and this can mean only one glorious thing: the start of baseball season is near. Baseball should have a slightly different feel in 2014. We should expect fewer chest-bumping, dirt-kicking, irate managers storming out of dugouts to chastise umpires for perceived blown calls. Why? Instant replay. In 2014, Major League Baseball will implement the expanded use of instant replay. Managers can now calmly request that umpires take a second look at available evidence to avoid a blown call. Although a game may take a little longer, all parties involved (except maybe the losing team's fans) can take comfort in the outcome because theoretically all available evidence was used. Unfortunately, in the recent case of *United States v. Bazaarvoice*, the merged parties lack the ability to call for a review of all the available evidence, and instead will have to deal with a narrowly circumscribed view of the evidence that may have resulted in what is colloquially termed in baseball parlance a "blown call."

In *Bazaarvoice*, the Department of Justice successfully challenged the consummated merger of Bazaarvoice and PowerReviews.[2] U.S. antitrust authorities have, in recent years, shown a keen interest in challenging consummated mergers.[3] Consummated merger cases pose a unique set of challenges for both antitrust authorities and the courts. Of course, it is technically feasible—and even at times necessary—to disintegrate merging parties in extreme cases, but such instances should be rare. Courts and regulators should exercise extreme caution to avoid results that ultimately are antithetical to the primary purposes of the antitrust law—protecting competition and consumers.

Like many commentators, we believe that the decision in *Bazaarvoice* was wrong. In our view, the court was overly dismissive of post-merger evidence, effectively creating a new evidentiary rule insensitive to context and reflective of an older, classical jurisprudence ill-suited to the complexities of modern antitrust jurisprudence and, specifically, this case.

We do not mean to suggest that this was an "easy case"—indeed, there was a large body of conflicting evidence presented by the parties. But, it is less clear that this was a "hard case" that required the court to create a rule excluding whole chunks of evidence. Admittedly, the court did

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[2] *United States v. Bazaarvoice, Inc.*, 13-CV-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

[3] *See generally* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Consummated Merger Challenges—The Past Is Never Dead*, Remarks Before ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2012), *available at*: http://www.ftc.gov/sites/default/files/documents/public_statements/consummated-merger-challenges-past-never-dead/120329springmeetingspeech.pdf.

face the difficult scenario of weighing "noisy" real-world data showing no anticompetitive effects against structural evidence and economic modeling suggesting the merger was illegal. And, there is an undeniable paucity of binding judicial precedent related to judicial intervention in consummated mergers.

But, there does exist a body of relevant case law that would suggest that the court should have taken a more holistic—and pragmatic—view of the evidence, and if *Bazaarvoice* is seen as a new lighthouse in the fog of antitrust jurisprudence, the ironic result may be to obfuscate the path to clarity for merging parties in sub-HSR transactions. Indeed, the case suggests that parties can take no comfort in real-world post-merger experiences; rather, even the possibility of manipulation by the post-merger entity may be sufficient to unwind a challenged transaction.

II. IGNORING EVIDENCE: TIPPING THE SCALES

As noted, the court's treatment of post-merger evidence reflects a conscious decision to simply ignore real-world experience in favor of "might-have-beens." The court made important judgments determinative of the ultimate outcome based on the perceived lack of probative value of post-merger evidence.[4] The court found "post-merger customer testimony regarding the effect of the merger upon competition is . . . entitled to limited weight given the customers' narrow perspective . . . ."[5] The court also gave limited weight to post-merger evidence more generally because "such evidence *could arguably* be subject to manipulation."[6]

Perhaps ultimately the court may have been right in discounting the weight of such evidence and giving more credence to other evidence while still assigning some weight to the real-world post-merger experiences of the parties. But, the court instead elected to almost completely ignore this evidence in favor of (very) bad pre-merger documents supporting the government's case.

The court's failure to look at the evidence pragmatically is likely a function of how it sees its role. Speaking on the relevance of innovation towards its ruling, the court opined that its "mission is to assess the alleged antitrust violations presented, irrespective of the dynamism of the market at issue."[7] The court seemingly ignored the inherent complexities associated with a consummated merger in a high-tech market in favor of creating a rule that simply dismissed large swatches of relevant, potentially determinative evidence. In short, the court failed to take a pragmatic view of the evidence before it; instead, it used its discretion to create a rule that obviated its need to undertake such a rigorous examination.

In dismissing post-merger evidence on pricing and the effects of the merger, the court relied on recent Fifth Circuit dictum arguing that post-merger evidence has limited probative value "whenever such evidence *could arguably* be subject to manipulation."[8] Both the court here and the Fifth Circuit in *Chicago Bridge* premised the use of the "arguably manipulable" standard

[4] *United States v. Bazaarvoice, Inc.* 2014 WL 203966, at *73–74.
[5] *Id.* at *74.
[6] *Id.* at *73 (quoting *Chi. Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 435 (5th Cir. 2008)).
[7] *Id.* at *76 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 49–50 (D.C.Cir. 2001)).
[8] *Chi. Bridge,* 534 F.3d at 435.

on the Supreme Court's ruling in *United States v. General Dynamics*.[9] While *General Dynamics* did raise questions about the value of some post-merger evidence, the Court still analyzed whether the post-merger evidence at issue was actually subject to manipulation.[10]

Notwithstanding its understanding of *Chicago Bridge* and *General Dynamics*, the court's decision on post-merger evidence is, nevertheless, problematic for at least two reasons:

First, the "arguably manipulable" rule does not seem like an effective rule. Antitrust law is no stranger historically to bright-line rules for the sake of efficiency, although more modern jurisprudence and scholarly commentary take a more sophisticated view.[11] But even where bright-line rules are appropriate, a bright-line rule related to an amorphous "arguably manipulable" standard seems impossible to enforce.

Any post-consummated transaction is "arguably manipulable," so if this standard is to apply, then post-merger evidence is, for all practical purposes, excluded, with the only cognizable benefit being an easier prosecution for the government. If there is evidence suggesting actual manipulation, or even the likelihood of manipulation, then it seems that the court may, compatible with existing precedent, weigh post-merger evidence accordingly, but simply creating a *de facto* exclusionary rule goes far beyond the existing case law and creates unnecessary and overly restrictive new law.

Second, while the *Bazaarvoice* court drew inspiration for the "arguably manipulable" standard from *Chicago Bridge*, the court's application of the "arguably manipulable" test—the flawed application of a superfluous rule—was even more troubling in context. In ignoring post-merger pricing evidence for fear of manipulation by the merged parties, the court failed to recognize basic economic theory connecting price and entry. In *Chicago Bridge*, the Fifth Circuit declared that because Chicago Bridge & Iron could manipulate pricing, it could manipulate entry into the market.[12] Accordingly, the Fifth Circuit devalued post-merger evidence of *entry*.

Underpinning the Fifth Circuit's logic is the economic theory that, all else being equal, high prices will lead to more entry (because of higher profits) and, by the same token, low prices will lead to less entry (because of lower profits). So if a firm has the power to manipulate prices, it also has the power to manipulate entry. In fact, the connection is invariably linked—a firm cannot manipulate prices without also manipulating incentives for entry for competing firms. So if a court downgrades the value of post-merger pricing evidence on account of possible manipulation, it should also, in the interest of consistency, downgrade the value of post-merger evidence of entry.

The court in *Bazaarvoice* failed to take this second step, and, by so doing, the court tipped the evidentiary scales further in the government's favor.[13] Thus, even if one accepts that there is a

[9] *United States. v. Gen. Dynamics Corp*., 415 U.S. 486, 504-05 (1974).

[10] *Id.* at 504-06.

[11] *See e.g.,* the abandonment of the long held *Dr. Miles* doctrine regarding resale price maintenance in favor of the considerably more nuanced approach advocated in *Leegin*.

[12] *Chi. Bridge*, 534 F.3d at 435.

[13] *See United States v. Bazaarvoice, Inc.*, 13-CV-00133-WHO, 2014 WL 203966, at *72 (N.D. Cal. Jan. 8, 2014).

basis for application of the court's test, the court further used unwarranted discretion in selectively fitting the rule to the evidence.

III. DOJ'S PROPOSED REMEDY

Much has been written about the decision itself, but the pending decision on the appropriate remedy is also worthy of some commentary. In addition to seeking a divestiture remedy, the government is also seeking, under certain conditions, "a perpetual, irrevocable license to the latest version of [Bazaarvoice's technology]."[14] The government argues that this remedy may be required because Bazaarvoice "stopped investing in R&D for the PowerReviews platform."[15]

Consider the unstated assumption underlying this request: in order for the two platforms to now be unequal, Bazaarvoice must have continued to innovate its own technology after the merger was consummated. Innovation is paradigmatic of procompetitive effects. Here, given that Bazaarvoice will hardly be inclined to innovate on its platform with the incipient threat of a free license hanging over its head like a Damoclean sword, both post-merger real-world evidence and economic theory is turned on its head with a concomitant disincentive to future innovation. Moreover, at least on the current record, there does not appear to be evidentiary support for such a remedy.

What may be most puzzling for parties engaging in post-merger activities is the Catch-22 approach that the government's motion suggests. The court has already held that post-merger experiences should be excluded if arguably manipulable. But, under the government's theory here, even innovation decisions can be given a nefarious twist. If a company chooses to innovate, one could imagine that any potentially positive inferences that could redound to its benefit would be dismissed by the government as nothing more than attempt to curry favor, a mere sham to show a competitive marketplace. On the other hand, where a company does not innovate, even where there may be legitimate reasons for doing so, the government would suggest that the failure to do so is cause for harsh remedial measures.

The best approach would be for the court to weigh the countervailing considerations, consider all the available facts and evidence (including economic evidence), and make a judicial decision based on the record. But, it would be inconsistent for the court to weigh different types of post-merger evidence based on different standards, and the judicial theory undergirding the liability decision is at odds with the approach apparently advocated by the government at the remedy phase. This places the court in a difficult conundrum, but one hopes that it will find a way to develop the rules propounded at the liability phase into a cohesive framework that allows for a more holistic approach here.

IV. CONCLUSION

Was (and is) *Bazaarvoice* a "hard case"? If by that one means a case where primary recourse to rules, cases, and texts reveals no clear answers, we think not. Indeed, assessing the

[14] Plaintiff's Motion for Entry of Final Judgment and Memorandum in Support of Plaintiff's Motion for Entry of Final Judgment at 12, *United States v. Bazaarvoice, Inc.*, 13-CV-00133-WHO (Dkt. 249-3) (N.D. Cal. Feb. 12, 2014).

[15] *Id.* at 13.

evidence consistent with well-established precedent suggests to us that the court should have given much more attention to the post-merger evidence. At the liability phase, the court exercised unneeded discretion in stating a formalistic rule serving to functionally exclude important, perhaps even determinative, evidence from its consideration. In doing so, the court ignored the contextual aspects of the legal issues at hand; the unique posture of this case, with its real world experiential aspect, is shunted to the side. However, despite not doing so at the liabilities phase, the court has an opportunity to reverse this exclusion in considering the appropriate remedy.

In sum, a pragmatic ruling on this case would have taken a contextualist approach, considering a broad perspective of the available evidence—theoretical, economic, empirical—and provided appropriate weight to each. Instead, a too-strict reliance on this new rule led to a curiously narrow decision that may have the ironic effect of causing widespread confusion.

In the 2014 MLB season, umpires will take the time to review various angles on the play, even those it would not have seen with the naked eye. This overarching ability to consider all the evidence is likely to lead to better outcomes; an umpire only having one angle on the play is less likely to call it right than one who can consider every angle after the play is over. We hope that courts and regulators will agree that there will be a far better chance of getting the calls right if all the evidence is considered and given appropriate weight. There will be a lot less dirt-kicking (and article-writing) if this is the case. Let's hope that umpiring decisions result in a few more wins for the Nationals, and judicial and regulator decisions prove similarly helpful for the consumer.