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I. INTRODUCTION: *BAZAARVOICE* LESSONS

Two days after Bazaarvoice acquired its rival, PowerReviews, for $168.2 million, the Department of Justice ("DOJ") initiated an investigation into the acquisition's competitive effects. Eighteen months later, Judge William Orrick of the Northern District of California held that the acquisition was unlawful because it eliminated Bazaarvoice's "only credible competitor."[2] Judge Orrick found that within the "highly concentrated" ratings and reviews ("R&R") market, the two-to-one merger would have anticompetitive effects, including higher prices and diminished innovation.

What lessons should we take from *Bazaarvoice*? First, the antitrust agencies continue aggressively to enforce Section 7 of the Clayton Act against mergers of all sizes, including consummated mergers not reportable under the Hart-Scott-Rodino ("HSR") Act. Second, the role of customer opinions, at least in court, is not outcome determinative. Third, even in high-technology markets, when there is evidence of anticompetitive effects in one market, courts are reluctant to ignore those effects in favor of offsetting pro-competitive benefits in a separate market. Finally, "hot" documents, especially when supported by economic experts, continue to rule the day.

II. BACKGROUND: BAZAARVOICE'S ACQUISITION OF POWERREVIEWS

Bazaarvoice provides manufacturers and retailers with software and services to collect, organize, and display online consumer reviews and ratings of their products. Purchasers rely on R&R for its authentic consumer reports, while companies rely on R&R to increase product web sales and reduce product returns. R&R software and service designs, such as the familiar five-star rating system, vary from company to company.

After beginning as a classic R&R company, Bazaarvoice had begun using its access to customer interests, ratings, and purchasing patterns to enter the "big data" market, a much larger and more profitable market. As a result, Bazaarvoice claimed during the trial its greatest asset was not its product review platform, but its inventory of customer data. Bazaarvoice argued that its business was rapidly evolving and insisted that its acquisition of PowerReviews occurred within a highly competitive market that included firms such as Amazon, Google, and Facebook, among others.

Before its acquisition of PowerReviews, Bazaarvoice was still a significant R&R provider, often winning business from large manufacturers and brands. Although PowerReviews had a bigger customer base, its customers comprised primarily small- to medium-sized businesses.

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[2] *United States v. Bazaarvoice*, No. 13-cv-00133-WHO, slip op. at 8 (N.D. Cal. Jan. 8, 2014).

Despite Bazaarvoice's focus on the larger customers, PowerReviews regularly competed with Bazaarvoice for sales, leading Bazaarvoice to characterize PowerReviews as "ankle-biters."[3] These pricing challenges sometimes forced Bazaarvoice to lower its rates, although Bazaarvoice's customers tended to pay significantly higher prices than PowerReviews' customers did.

Starting in 2011, PowerReviews aggressively pursued Bazaarvoice's clients by offering a less expensive R&R alternative. Bazaarvoice dubbed its response to PowerReviews assault "Project Menlogeddon" in recognition of PowerReviews' primary financial supporter, Menlo Ventures.[4] While many clients remained with Bazaarvoice notwithstanding PowerReviews' efforts, larger customers like Best Buy and Wal-Mart purportedly gained negotiating leverage from the competitive pressure applied by PowerReviews.

According to contemporaneous business documents, Bazaarvoice saw an opportunity to end its "10-20 percent price erosion" by acquiring PowerReviews.[5] Both companies envisioned "margin expansion" by "eliminating competitive risk" and "reduc[ing] comparative pricing pressure" with the acquisition of each other's "only meaningful competitor."[6] On the other hand, the testimony of more than 100 customers, who reported no change in price during the 18 months since the acquisition, belied the documents.

III. NO MARKET TOO SMALL: BAZAARVOICE PROVES AGAIN THAT THE ANTITRUST AGENCIES WILL LITIGATE

Although the size of the Bazaarvoice deal was below the HSR Act reporting thresholds, the antitrust agencies showed, once again, that they will challenge consummated and non-reportable transactions. The relatively small size of the deal—PowerReviews generated just $11.5 million in profits in 2011, only a portion of which overlapped with Bazaarvoice[7]—did not discourage DOJ from litigating to unwind the transaction. Indeed, within the past several years, the antitrust enforcement agencies have challenged 17 consummated deals, including deals involving very small markets such as George's Inc.'s $3 million acquisition of a Tyson Foods chicken processing plant and Election Systems & Software's $5 million acquisition of Premier Election Services.

As a result, like buyers engaged in larger, HSR-reportable mergers, buyers involved in smaller, non-reportable deals should evaluate whether and how to manage the antitrust risk. The courthouse steps are littered with examples of transactions in which the antitrust agencies litigated to enjoin or unwind a merger.[8] With no time bar on investigations and no special burden dissuading the government from challenging a consummated deal, the antitrust agencies will continue to scrutinize non-reportable transactions. No transaction or market is too small to investigate or challenge.

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[3] *Id.* at 22.

[4] *Id.* at 27.

[5] *Id.* at 31.

[6] *Id.* at 31–32.

[7] A segment of PowerReviews' profits came from turnkey R&R products that did not compete with Bazaarvoice's offerings.

[8] *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *FTC v. St. Luke's*, No. 1:12-CV-00560-BLW, slip op. at 1 (D. Idaho Jan. 24, 2014).

IV. WHO CARES WHAT CUSTOMERS THINK?

The first question antitrust practitioners typically ask when advising a client on a transaction is: Will customers support or oppose the deal? Customers are at the top of the list of fact witnesses the antitrust agencies call to learn about the market and understand the likely competitive effects of the transaction. In most markets, it is the customers of the merging firms that are harmed most by an increase in price, or diminished quality or investment in innovation.

This emphasis on customer opinion is not necessarily true in court. *Bazaarvoice* is an additional example in which a court was dismissive of the customer testimony. At trial, Bazaarvoice presented more than 100 customer witnesses who testified that the acquisition was harmless. Although the customers are on the front lines of the market, the court in *Bazaarvoice* discounted their opinions.

As Judge Orrick put it, "[i]t is difficult for those customers to discern what is actually happening in the market."[9] Judge Orrick's view is consistent with how the courts viewed the customer testimony in *Arch Coal*[10] and *Oracle*.[11] According to Judge Orrick, the customers' testimony merited little weight because: (i) Bazaarvoice likely tempered its actions during the investigation; (ii) customers were not privy to the persuasive economic evidence and internal documents presented at trial; (iii) customers generally pay little attention to mergers; (iv) every customer has its own level of R&R knowledge; and (v) customers received personalized price offerings based on its individualized needs.

While the value of customer testimony in litigated matters is uneven, customers remain critical to the antitrust enforcement agency's initial decision whether to investigate and challenge a deal. Customers' opinions are important to discovering and understanding the competitive effects story. Once the agency decides to challenge a transaction, however, customers' opinions tend to play a supporting role. That does not mean their views are unimportant. Customer testimony can be valuable in bolstering the other evidence, including the evidence derived from the contemporaneous business documents, as well as the expert opinions of the economists.

V. HIGH-TECH MARKETS DO NOT MERIT SPECIAL TREATMENT

Some antitrust experts argue that high-tech markets are different from other markets and merit special treatment or, at least, deference to take account of ease of entry and the rapid pace of innovation. However, *Bazaarvoice* "confirms that merger analysis in high-tech markets, as in other markets, is highly fact specific. The antitrust agencies have made clear that high tech-mergers do not get a free pass, and their impact on competition must be evaluated on a case-by-case basis."[12] This sentiment is reflected in Judge Orrick's opinion:

> The marketplace may be filled with many strong and able companies in adjacent spaces. But that does not mean that entry barriers become irrelevant or are

[9] *Bazaarvoice*, slip op. at 8.

[10] *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

[11] *United States v. Oracle Corp.*, 331 F. Supp. 2d. 1098 (N.D. Cal. 2004). *But see FTC v. Lundbeck*, 650 F.3d 1236 (8th Cir. 2011) (the Eighth Circuit's decision focused primarily on market definition and credited customer opinions in support of its holding).

[12] Deputy Assistant Attorney General Renata B. Hesse, U.S Dep't of Justice, *At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement*, U.S. Dep't of Justice (Jan. 22, 2014).

> somehow more easily overcome. To conclude otherwise would give ecommerce companies carte blanche to violate the antitrust laws with impunity with the excuse that Google, Amazon, Facebook, or any other successful technology company stands ready to restore competition to any highly concentrated market.[13]

Market definition is a critical aspect in any Section 7 case. In the context of high-tech markets, however, defining markets in a highly dynamic environment is a challenge. Bazaarvoice argued that its acquisition of PowerReviews was an effort to promote competition and enter the more expansive "big data" market. Bazaarvoice claimed it was simply looking ahead—it viewed its business as vulnerable if it did not expand and innovate, and believed the acquisition of PowerReviews was a step toward improving its ability to compete with larger firms. At trial, Bazaarvoice pointed to companies like Google and Amazon as competitors lurking on the edges of the R&R market.

Judge Orrick, however, rejected this argument, citing the absence of actual entry by the larger high-tech firms or evidence that they would do so in the next two years. Arguing that an entity that is capable of entering a market is different from showing potential entrants are taking concrete steps to enter the market.

The antitrust agencies and the courts will credit arguments for broader markets if there is tangible and (mostly) uncontradicted evidence supporting the proposition. But, as in *Bazaarvoice*, arguments that firms are capable of entering a market or capable of providing similar services are unlikely to overcome an anticompetitive presumption based on "hot" documents.

In addition, there is a risk that courts will be dismissive of evidence that other firms provide the same services, unless those firms are marketing the services in direct competition with the merging parties. In *Bazaarvoice*, the court was unimpressed by the evidence that Amazon accounted for 27 percent of the R&R market because Amazon did not offer its services to third parties. Even testimony that Amazon considered entering the broader R&R market "almost daily," was insufficient to overcome the presumption the court found based on the documents.[14]

The fact that a transaction may be critical to entering or increasing competition in one market (big data), however, does not mean that the antitrust agencies or the courts will ignore anticompetitive harm in adjacent or historic markets (R&R). Yes, the Merger Guidelines take specific note of "inextricably intertwined" markets, but they also concentrate on the current market.

VI. HOT DOCUMENTS ARE (REALLY) HARD TO OVERCOME

As referred to above, and like *Whole Foods* before it, *Bazaarvoice* shows how too many hot documents can be damning.[15] In both cases, top executives made pre-merger statements, as reflected in contemporaneous business documents, suggesting that a purpose of the merger was to eliminate a significant competitor. The court in *Bazaarvoice* cited several pre-merger

[13] *Bazaarvoice*, slip op. at 133.
[14] *Id*. at 89.
[15] *FTC v. Whole Foods, Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

statements suggesting that Bazaarvoice sought to (i) eliminate a significant competitor, (ii) gain relief from price erosion due to competition, (iii) discourage entry by competitors, (iv) ensure Bazaarvoice's retail business was insulated from direct competition, and (v) expand margins.

Hot documents remain a critical factor in assessing whether the antitrust agencies are likely to challenge a transaction. From 1996 to 2011, the Federal Trade Commission brought enforcement actions in 90 percent of the cases in which it identified hot documents. Courts, too, are reluctant to brush aside hot documents. While not dispositive, there is a correlation between bad documents and negative outcomes in merger challenges. Courts are hesitant to credit parties' efforts to "explain away" or impeach their prior statements, especially when the contemporaneous business documents explicitly confirm the expert economic testimony.

The *Bazaarvoice* documents not only shaped the court's definition of the relevant market, but also revealed the parties' intentions. To be clear, intent is not an element of a Section 7 claim. However, that does not mean that the antitrust agencies and the courts will disregard the parties' statements if they reflect a belief or expectation that the transaction will have anticompetitive effects. As Judge Orrick found, "The evidence that Bazaarvoice and PowerReviews expected the transaction to have anticompetitive effects is overwhelming."[16] When the business documents undercut the defense, the parties face a steep uphill battle to persuade the agencies or a court that their ordinary course of business documents had it all wrong.

VII. ECONOMIC EXPERTS ARE THE FINAL PIECE TO THE PUZZLE

The role of economic experts in antitrust cases has expanded over the past few decades. Included as part of the Merger Guidelines, the antitrust agencies and the courts regularly look to economic experts as critical witnesses. The opinions of the economists are important, although they often are not decisive, especially when each side is represented by well-respected economists testifying in favor of opposing conclusions. Instead, the economic testimony is one more piece to the puzzle. Courts typically ask, when considering all of the evidence, whether the economic expert's opinion aligns with the facts, the documents, or the views of the customers. Economic experts, similar to internal documents and customers' opinions, can fill out the picture for the court.

Judge Orrick's opinion references the government's expert, finding that he "testified convincingly" that the acquisition was likely to have anticompetitive effects. However, the court seemed to use that testimony to confirm what it already suspected.[17] Once the parties' ordinary course of business documents creates a presumption of anticompetitive effects, the experts can bolster the case. This was the case in *Bazaarvoice* just as it was in the government's victory in *H&R Block*, which also used internal documents, supplemented by expert economic testimony, to define the relevant market and prove anticompetitive effects.

VIII. *BAZAARVOICE*'S IMPLICATIONS FOR MERGER REVIEWS

While merger review is forward-looking and asks whether a transaction may reduce competition in the future, the answer to that question is often derived almost entirely from

[16] *Bazaarvoice*, slip op. at 6.
[17] *Id* at 7.

historic, backward-looking evidence. Courts are most comfortable relying on hard facts, and hard facts are typically reflected in business documents and historic market metrics. Opinion testimony, thus, is at a disadvantage when confronted with too many "hot" documents. The challenge for merging parties attempting to identify and evaluate antitrust risk is to evaluate the totality of the evidence—documents, customer opinions, market dynamics, and economics—before reaching a conclusion.