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

13 UNITED STATES OF AMERICA,

14 *Plaintiff,*

15 v.

16 BAZAARVOICE, INC.,

17 *Defendant.*

Case No. 13-cv-00133 WHO

18 **COMPETITIVE IMPACT**  
19 **STATEMENT**

Judge: Hon. William H. Orrick

20 COMPETITIVE IMPACT STATEMENT

21 Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or  
22 “Tunney Act”), 15 U.S.C. § 16(b)-(h), Plaintiff United States of America files this Competitive  
23 Impact Statement relating to Plaintiff’s Second Amended Proposed Final Judgment, ECF No.  
24 257, (“Proposed Final Judgment”) submitted on April 24, 2014, for entry in this civil antitrust  
25 proceeding.  
26

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## I.

NATURE AND PURPOSE OF THE PROCEEDING

On June 12, 2012, Defendant Bazaarvoice, Inc. purchased PowerReviews, Inc. for approximately \$168.2 million. The United States filed a civil antitrust Complaint against Bazaarvoice on January 10, 2013, seeking to unwind the acquisition. The Complaint alleged that the likely effect of this acquisition would be to lessen competition substantially for ratings and reviews (“R&R”) platforms in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition would likely result in higher prices for R&R platforms and less innovation.

This matter was tried before Judge William H. Orrick of the United States District Court for the Northern District of California from September 23, 2013, through October 10, 2013. The parties called numerous fact and expert witnesses via live testimony and video depositions, and offered a combined total of 980 exhibits into evidence.

On January 8, 2014, the Court issued a Memorandum Opinion finding that Bazaarvoice violated Section 7 of the Clayton Act when it acquired PowerReviews, its “closest and only serious competitor.” Mem. Op. at 141. Pursuant to the Court’s Order Regarding Remedy Phase, ECF No. 248, on February 12, 2014, the United States filed a Motion for Entry of Final Judgment setting forth the elements of a remedy for Bazaarvoice’s unlawful acquisition of PowerReviews, along with a memorandum in support thereof. ECF No. 249-3. On March 4, 2014, Bazaarvoice filed its Opposition to Plaintiff’s Motion for Entry of Final Judgment. ECF No. 250-3. The United States filed its Reply Memorandum in Support of its Motion for Entry of Final Judgment, ECF No. 251-3, along with an Amended Proposed Final Judgment, ECF No. 251-5.

On April 24, 2014, the United States filed a Stipulation and Proposed Order along with Plaintiff’s Second Amended Proposed Final Judgment and an Explanation of Consent Decree Procedures. ECF No. 257. These documents are collectively designed to eliminate the anticompetitive effects of the acquisition. The Proposed Final Judgment, which is explained more fully below, will require Bazaarvoice to divest the assets it acquired from PowerReviews

1 and adhere to other requirements to replace the competition that was lost in the United States  
2 R&R platform market when Bazaarvoice acquired PowerReviews.

3 Specifically, under the Proposed Final Judgment, Bazaarvoice is required to (1) divest all  
4 the tangible and intangible assets it acquired as part of the PowerReviews acquisition; (2) license  
5 the right to sell Bazaarvoice's syndication services to the acquirer's customers; (3) remove trade  
6 secret restrictions on current and former Bazaarvoice employees who are hired by the acquirer;  
7 (4) license its patents related to R&R platforms to the acquirer; and (5) give customers the  
8 freedom to switch from a Bazaarvoice R&R platform to one provided by the acquirer.

9 The United States and Defendant have stipulated that the Proposed Final Judgment may  
10 be entered after compliance with the APPA. Entry of the Proposed Final Judgment would  
11 terminate this action, except that the Court would retain jurisdiction to construe, modify, or  
12 enforce the provisions of the Proposed Final Judgment and to punish violations thereof.

## 13 II.

### 14 DESCRIPTION OF THE EVENTS GIVING RISE TO THE VIOLATION

#### 15 A. *The Defendant and the Transaction*

16 Bazaarvoice provides the market-leading R&R platform to manufacturers and online  
17 retailers. Pre-merger, the vast majority of Bazaarvoice's customers purchased its R&R platform,  
18 and subscription fees from R&R platforms accounted for the majority of Bazaarvoice's revenue.  
19 Bazaarvoice is a publicly traded Delaware corporation headquartered in Austin, Texas.

20 PowerReviews was Bazaarvoice's closest, and only significant competitor in the  
21 provision of R&R platforms to manufacturers and online retailers. Pre-merger, the vast majority  
22 of PowerReviews' customers purchased its R&R platform, and subscription fees from R&R  
23 platforms accounted for the vast majority of PowerReviews' revenue. PowerReviews was a  
24 privately held Delaware corporation headquartered in San Francisco, California. During the  
25 2011 calendar year, the company earned approximately \$11.5 million in revenue.  
26 PowerReviews closed the best quarter in its history just prior to the acquisition.

27 Bazaarvoice acquired PowerReviews on June 12, 2012. The purchase price for the  
28 transaction, including cash and non-cash consideration, was approximately \$168.2 million.

1 B. *The Competitive Effects of the Transaction on the Market for R&R Platforms in the*  
2 *United States*

3 **1. *Relevant Markets***

4 The Court found that the relevant product market is R&R platforms. Mem. Op. at 41-42.  
5 Most online retailers would be unlikely to eliminate R&R entirely because R&R platforms have  
6 become a necessary feature for online retailers. *Id.* at 42. Thus, other social commerce products  
7 serve a different purpose than R&R platforms, and therefore are not substitutes for such  
8 platforms. *Id.* at 46. For that reason, other social commerce products do not substantially  
9 constrain prices of R&R platforms. The Court also found that a hypothetical monopolist of R&R  
10 platforms would find a non-transitory price increase of five or ten percent profitable because few  
11 customers would abandon R&R platforms in response to such a price increase. *Id.* at 125-26.

12 The United States is the relevant geographic market because a hypothetical monopolist  
13 selling all R&R platforms can identify and target price increases to customers operating in the  
14 United States, and those customers cannot engage in arbitrage – using platforms sold for use in  
15 other countries. *Id.* at 51-53. The Court concluded that it was appropriate to define the  
16 geographic market by customer location. *Id.* at 53. *Accord* U.S. Dep’t of Justice & Fed. Trade  
17 Comm’n, *Horizontal Merger Guidelines* § 4.2.2 (2010).

18 **2. *Competitive Effects***

19 The Court found that it is probable that Bazaarvoice’s acquisition of PowerReviews  
20 substantially lessened competition and will result in higher prices for R&R platforms in the  
21 United States. *Id.* at 102-118. To reach this conclusion, the Court found that the United States  
22 established a prima facie case that Bazaarvoice’s acquisition of PowerReviews violated Section  
23 7. *Id.* at 62-73. Bazaarvoice’s acquisition of PowerReviews significantly increased  
24 concentration in the already highly concentrated R&R platform market. Several different  
25 measures of market shares within the relevant market confirmed that, prior to the merger,  
26 Bazaarvoice and PowerReviews were the two leading providers of commercial R&R platforms,  
27 with a combined market share in excess of that required for the government to establish its prima  
28

1 facie case.<sup>1</sup> *Id.* at 68-69. Specifically, the two market share measures principally relied upon by  
2 the Court gave Bazaarvoice a post-merger market share of 68 and 56 percent, respectively. *Id.* at  
3 64-65.<sup>2</sup> To further support its market share findings in a case where no “perfect measure” of  
4 market share was available, the Court relied on additional market share measures calculated  
5 using various other methodologies and data sets. *Id.* at 65-68. These other market share  
6 measures were generally consistent with the measures principally relied upon by the Court and  
7 confirmed the robustness of the Court’s market share findings. *Id.* at 68. The Court also noted  
8 that PowerReviews was Bazaarvoice’s closest competitor. *Id.* at 74.

9 The Court found that the likelihood of anticompetitive effects was supported by the  
10 weight of the evidence produced at trial. *Id.* at 103. More specifically, the transaction is likely  
11 to lead to substantially higher prices for customers of Bazaarvoice’s R&R platforms. *Id.* at 102-  
12 103. The evidence the Court relied upon included win-loss data found in Bazaarvoice’s  
13 Salesforce database, data compiled from “how the deal was done” emails prepared by  
14 Bazaarvoice employees in the ordinary course of business, and other documentary evidence  
15 prepared in the ordinary course of business. *Id.* at 103-06.

### 16 **3. Entry and Expansion**

17 The Court found that Bazaarvoice was unable to rebut the United States’ prima facie case  
18 by demonstrating that entry or expansion of existing providers would be sufficient to replace the  
19 competitive constraint previously provided by PowerReviews. *Id.* at 75-83. The R&R platform  
20 market has significant entry barriers. *Id.* at 93. The entry barriers identified by the Court include  
21 networks effects from syndication, switching costs, moderation, analytics, and reputation. *Id.* at  
22 93-102. Syndication of R&R has become increasingly important to both manufacturers and  
23 retailers “because it allows them to obtain more content than they could independently.” *Id.* at  
24 12. Bazaarvoice recognized that its syndication network differentiated it from its competitors

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26 <sup>1</sup> The Court also concluded that the R&R platform market did not contain any rapid entrants who  
27 should be assigned market share. *Id.* at 130.

28 <sup>2</sup> Post-merger HHIs associated with these market shares were 4,590 and 3,915, with merger-  
related HHI increases of 2,226 and 1,240, respectively. *Id.* at 69

1 and protected its dominant position. *Id.* at 95. The Court found that these barriers to entry  
2 would insulate Bazaarvoice from competition. *Id.* at 102.

3 None of the fringe competitors have achieved a meaningful level of commercial success;  
4 they are not likely, therefore, to provide the same competitive constraint as PowerReviews  
5 before it was acquired by Bazaarvoice. *Id.* at 75-76, 132-33. The Court also found that there  
6 was no evidence that any large software company was likely to enter the R&R platform market.  
7 *Id.* at 87-93.

8 The Court found that in-house supply of R&R platforms was not a viable alternative to  
9 commercial providers of R&R platforms for many customers. *Id.* at 83-86. Several factors,  
10 including cost and the need for features such as moderation and syndication, discourage  
11 customers from choosing to build in-house R&R platforms. *Id.* at 84-85. Indeed, for customers  
12 who desire syndication, in-house supply of R&R platforms is not a viable option. *Id.* at 85. In-  
13 house platforms, therefore, are not a significant constraint on Bazaarvoice's pricing.

#### 14 **4. *Efficiencies***

15 The Court found that the transaction did not, and was not likely to, result in cognizable,  
16 merger-specific efficiencies that will be passed through to customers and sufficient to offset the  
17 anticompetitive effects of the transaction. *Id.* at 121. Bazaarvoice did not claim that the merger  
18 reduced the marginal costs of providing its services. *Id.* at 118. In addition, the Court found  
19 there was no evidence that the merger caused increased innovation. *Id.* at 121.

### 20 III.

#### 21 EXPLANATION OF THE PROPOSED FINAL JUDGMENT

22 The Proposed Final Judgment contains a structural remedy that, along with other  
23 remedial measures, eliminates the likely anticompetitive effects of the acquisition in the R&R  
24 platform market in the United States. The divestitures and other requirements of the Proposed  
25 Final Judgment will create an independent and economically viable competitor to replace the  
26 competition that was eliminated when Bazaarvoice acquired PowerReviews. Specifically, the  
27 divestiture of the PowerReviews assets, the license to certain Bazaarvoice patents, the license to  
28 sell Bazaarvoice's syndication services, the removal of trade secret restrictions on current and

1 former Bazaarvoice employees, and the freedom for customers to switch from a Bazaarvoice  
2 R&R platform to one provided by the acquirer, will provide the acquirer of the divestiture assets  
3 with the tools needed to compete effectively in the R&R platform market in the United States.

4 *A. The Divestiture*

5 The Proposed Final Judgment requires Bazaarvoice, within ten (10) days after entry of  
6 the Final Judgment by the Court, to divest (1) all of the assets Bazaarvoice acquired when it  
7 purchased PowerReviews on June 12, 2012; (2) all assets that were acquired, designed,  
8 developed, or produced for use with the PowerReviews assets; (3) a license to sell Bazaarvoice's  
9 syndication services to the acquirer's customers, along with the technology and know-how to  
10 provide such access; (4) a list of customers that have either renewed their contracts or become  
11 new customers of Bazaarvoice since June 12, 2012; and (5) a list of any improvements, upgrades  
12 or features developed for use with Bazaarvoice's R&R platforms since June 12, 2012.<sup>3</sup>

13 Bazaarvoice must divest these assets to an acquirer acceptable to the United States. The  
14 United States retains discretion to accept or reject a proposed sale agreement to ensure the  
15 acquirer can compete effectively in the business of R&R platforms in the United States. The  
16 assets must be divested and/or licensed in such a way as to satisfy the United States, in its sole  
17 discretion, that the assets can and will be operated by the purchaser as a viable, ongoing business  
18 that can compete effectively in the business of R&R platforms in the United States. Bazaarvoice  
19 must take all reasonable steps necessary to accomplish the divestiture quickly. In the event that  
20 Bazaarvoice does not accomplish the divestiture within ten (10) days after entry of the Final

21 \_\_\_\_\_  
22 <sup>3</sup> Unlike the original Proposed Final Judgment and the Amended Proposed Final Judgment  
23 previously submitted by the United States, the Second Amended Proposed Final Judgment does  
24 not require Bazaarvoice to license a copy of the latest Bazaarvoice R&R platform in the event  
25 less than 80 percent of legacy PowerReviews customers remain on the PowerReviews R&R  
26 platform. The potential license of the Bazaarvoice R&R platform would only have been  
27 triggered if the PowerReviews customer base had diminished substantially at the time of the  
28 divestiture sale. Bazaarvoice's agreement to enter into the Proposed Final Judgment requiring  
the sale of the divestiture assets within ten (10) days of entry of the Proposed Final Judgment  
will help ensure that a critical mass of customers will remain on the PowerReviews R&R  
platform at the time it is sold to an acquirer. In addition, Paragraphs Nine and Ten of the Joint  
Stipulation and Order prohibit Bazaarvoice from migrating legacy PowerReviews customers to a  
Bazaarvoice platform prior to the sale of the divestiture assets and require Bazaarvoice to  
incentivize customers to remain on the PowerReviews R&R platform pending the divestiture.

1 Judgment, the Final Judgment provides that a trustee will complete the divestiture.<sup>4</sup> The trustee  
2 will be selected by the United States and appointed by the Court.

3 B. *Syndication Services*

4 The Court found that “Bazaarvoice’s syndication network is a barrier to entry in the  
5 market for R&R platforms,” Mem. Op. at 93, and that “[b]esides PowerReviews, no credible  
6 syndication competitor existed.” *Id.* at 98. To better enable the divestiture buyer to successfully  
7 replace the competition that PowerReviews would have provided absent the merger, the acquirer  
8 must have access to Bazaarvoice’s syndication network while it works to build its own  
9 syndication network. Thus, the Proposed Final Judgment requires Bazaarvoice to license the  
10 right to sell its syndication services to the acquirer for four (4) years. Section V.A of the  
11 Proposed Final Judgment requires Bazaarvoice to provide the acquirer and the acquirer’s  
12 customers with access to Bazaarvoice’s syndication network on non-discriminatory terms.<sup>5</sup> To  
13 ensure that the acquirer can offer these services at a competitive price, the Proposed Final  
14 Judgment further requires that the fees for providing such services be based only on  
15 Bazaarvoice’s actual costs.<sup>6</sup>

16 These provisions ensure that customers will maintain access to syndication connections  
17 between the two platforms after the sale of the divestiture assets. Moreover, these provisions  
18 provide clients that switch from Bazaarvoice to the acquirer a guarantee that they will not lose  
19 access to their syndication relationships on the Bazaarvoice network. The cross-network  
20 syndication provisions in the Proposed Final Judgment are of limited duration sufficient to  
21 provide the acquirer time to build its own customer base and establish an independent  
22

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23 <sup>4</sup> The Proposed Final Judgment gives the United States the option to extend the time Bazaarvoice  
24 has to divest the assets up to sixty (60) days.

25 <sup>5</sup> Section V.B of the Proposed Final Judgment gives the trustee appointed under Section VI  
authority to investigate any complaints related to the provision of syndication services.

26 <sup>6</sup> The original Proposed Final Judgment and the Amended Proposed Final Judgment previously  
27 submitted by the United States contemplated an upfront payment by the acquirer for syndication  
28 services. The Second Amended Proposed Final Judgment provides for a cost-based fee for the  
provision of this service. This change in payment terms will not impair the acquirer’s ability to  
provide a competitive syndication service.

1 syndication network without establishing a long-term, on-going relationship between  
2 Bazaarvoice and the acquirer as such entanglements between competitors can be problematic.<sup>7</sup>

3 *C. Waiver of Trade Secret Restrictions in Employment Agreements; Employee Hiring*  
4 *Provisions*

5 Section IV.C of the Proposed Final Judgment requires Bazaarvoice to waive trade secret  
6 restrictions related to its R&R technology and intellectual property rights for any of its current or  
7 former employees who are hired by the acquirer. Through its illegal acquisition of  
8 PowerReviews, Bazaarvoice obtained access to PowerReviews' trade secrets, which it could then  
9 leverage in its own research and development efforts. Conversely, Bazaarvoice has performed  
10 minimal maintenance on the PowerReviews R&R platform since the acquisition. *Id.* at 119.

11 Waiving trade secret restrictions for employees who are hired by the acquirer will ensure that the  
12 acquirer, like Bazaarvoice, will benefit from the research and development efforts undertaken by  
13 the combined firm after the merger closed. Moreover, the acquirer will be able to hire former  
14 Bazaarvoice employees to develop new features without fear of being sued by Bazaarvoice for  
15 misappropriation of trade secrets. These provisions are necessary to provide the acquirer with  
16 access to the product improvements Bazaarvoice has developed since the transaction closed.

17 The Proposed Final Judgment also prevents Bazaarvoice from interfering with the  
18 acquirer's efforts to hire any current or former Bazaarvoice employees. This will allow the  
19 acquirer to negotiate employment agreements with the people who are most knowledgeable  
20 about the PowerReviews business and any advancements in R&R platform technology that have  
21 occurred since the merger.

22 *D. License to Bazaarvoice Patents*

23 Section V.D of the Proposed Final Judgment requires Bazaarvoice and the acquirer to  
24 enter into a patent licensing arrangement. The license shall be provided at no ongoing cost to the  
25 acquirer, and it will cover all of Bazaarvoice's patents and patent applications related to R&R  
26

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27 <sup>7</sup> In order to establish a successful syndication network, a R&R provider needs a sufficient  
28 number of manufacturing and retail customers that would be interested in syndicating R&R to  
each other's websites.

1 platforms as of the date the divestiture assets are sold. This arrangement ensures that  
2 Bazaarvoice will not engage in strategic behavior to raise its rival's costs through litigation  
3 related to Bazaarvoice and PowerReviews intellectual property that were commingled through  
4 the transaction.

5 *E. Transition Services Agreement*

6 Section IV.G of the Proposed Final Judgment requires Bazaarvoice to provide transitional  
7 support services to the acquirer for up to one year following the divestiture. These provisions are  
8 necessary to facilitate the seamless transition of the PowerReviews assets from Bazaarvoice to  
9 the acquirer. The transition services will ensure that the acquirer is capable of operating the  
10 divested assets, and that legacy PowerReviews customers will not experience service disruptions  
11 as a result of the divestiture. The agreement is limited to one year to give Bazaarvoice and the  
12 acquirer sufficient time to facilitate the transition without creating any unnecessary entanglement  
13 between the competitors.

14 *F. Customers' Ability to Switch to the Acquirer*

15 As a result of the merger, new R&R platform customers, and existing Bazaarvoice  
16 customers whose contracts came up for renewal, were deprived of the only significant  
17 commercial alternative to Bazaarvoice. Since acquiring PowerReviews, Bazaarvoice has  
18 expanded its dominant position in the sale of R&R platforms. After acquiring the PowerReviews  
19 assets, the acquirer's market share will place it at a disadvantage relative to where  
20 PowerReviews would have been today absent the merger. To expand its market share, which is  
21 critical to its ability to build an independent syndication network, the acquirer needs an  
22 opportunity to effectively solicit Bazaarvoice's customers. As currently structured,  
23 Bazaarvoice's contracts could deter its clients switching to the acquirer mid-contract.  
24 Bazaarvoice's typical service contracts last for at least a one-year term. Trial Tr. 803:19-804:10.  
25 And while the company's former CEO testified at trial that customers typically have a right to  
26 terminate their agreements with thirty days notice, *id.* at 804:1-3, that is not always the case.<sup>8</sup> To

27 \_\_\_\_\_  
28 <sup>8</sup> In December 2013, press reports indicated that Bazaarvoice sued two of its international  
customers for breach of contract when they switched to a competitor.

1 provide the acquirer with that opportunity, Section IV.H in the Proposed Final Judgment requires  
2 Bazaarvoice to waive breach of contract claims against its customers if they switch to the  
3 acquirer during a limited period of time. In addition, Section IV.I in the Proposed Final  
4 Judgment will prevent conduct by Bazaarvoice that is intended to inhibit expansion by the  
5 divestiture buyer after it acquires the PowerReviews assets.

6 To supplement the acquirer's efforts to get Bazaarvoice customers to switch to the  
7 acquirer's R&R platform and aid in the transition period after the sale of the divestiture assets,  
8 Section V.C of the Proposed Final Judgment prohibits Bazaarvoice from soliciting any  
9 customers that move to the acquirer's R&R platform for a period of six months after the date of  
10 sale. This limited non-solicitation period during the first six months after the sale will allow the  
11 acquirer time to develop plans to retain its customers without interference from Bazaarvoice.

#### 12 *G. Trustee*

13 Section VI of the Proposed Final Judgment permits the appointment of a trustee by the  
14 United States, in its sole discretion. The United States intends to recommend a trustee for court  
15 approval. The trustee will be responsible for monitoring Bazaarvoice's compliance with the  
16 Final Judgment, and, if necessary, selling the divestiture assets. The trustee's monitoring duties  
17 include investigating complaints regarding Bazaarvoice's provision of syndication services to the  
18 acquirer's customers and the provision of transition support services. In the event Bazaarvoice  
19 fails to sell the divestiture assets pursuant to Section IV of the Proposed Final Judgment, the  
20 trustee will also be responsible for selling the divestiture assets.

21 The Proposed Final Judgment also provides that Bazaarvoice will pay all costs and  
22 expenses of the trustee. The trustee will have access to all personnel, books, records, and  
23 information necessary to monitor Bazaarvoice's compliance with the Proposed Final Judgment  
24 and, if necessary, effectuate the sale of the divestiture assets. After the trustee's appointment  
25 becomes effective, the trustee will file monthly reports with the Court and the United States  
26 setting forth his or her efforts to accomplish the divestiture and monitor Bazaarvoice's  
27 compliance with the Final Judgment.



V.

PROCEDURES AVAILABLE FOR MODIFICATION  
OF THE PROPOSED FINAL JUDGMENT

The United States and Defendant have stipulated that the Proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the Proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the Proposed Final Judgment within which any person may submit to the United States written comments regarding the Proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the Proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

James Tierney  
Chief, Networks and Technology Enforcement Section  
Antitrust Division  
United States Department of Justice  
450 5<sup>th</sup> Street NW; Suite 7100  
Washington, DC 20530

The Proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered pursuing the remedies set forth in the Amended Proposed Final Judgment, filed with the Court on March 12, 2014, through continued litigation. Continued litigation would have presented both litigation risk and marketplace uncertainty. Moreover, protracted litigation would have magnified the risk of attrition among the PowerReviews customer base. The United States is satisfied that the requirements and prohibitions contained in the Second Amended Proposed Final Judgment provide a prompt, certain, and effective remedy for Bazaarvoice's unlawful acquisition of PowerReviews.

## VII.

STANDARD OF REVIEW UNDER THE APPAFOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the Proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d

1 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp.  
2 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v.*  
3 *InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965  
4 (JR), at \*3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is  
5 limited and only inquires "into whether the government's determination that the proposed  
6 remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether  
7 the mechanism to enforce the final judgment are clear and manageable.")<sup>9</sup>

8 As the United States Court of Appeals for the District of Columbia Circuit has held,  
9 under the APPA a court considers, among other things, the relationship between the remedy  
10 secured and the specific allegations set forth in the government's complaint, whether the decree  
11 is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree  
12 may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the  
13 adequacy of the relief secured by the decree, a court may not "engage in an unrestricted  
14 evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456,  
15 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981));  
16 *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40  
17 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at \*3. Courts have held that:

18 [t]he balancing of competing social and political interests affected by a proposed antitrust  
19 consent decree must be left, in the first instance, to the discretion of the Attorney General.  
20 The court's role in protecting the public interest is one of insuring that the government  
21 has not breached its duty to the public in consenting to the decree. The court is required  
22 to determine not whether a particular decree is the one that will best serve society, but  
23 whether the settlement is "*within the reaches of the public interest.*" More elaborate  
24 requirements might undermine the effectiveness of antitrust enforcement by consent  
25 decree.

26 <sup>9</sup> The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to  
27 consider and amended the list of factors to focus on competitive considerations and to address  
28 potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. §  
16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004  
amendments "effected minimal changes" to Tunney Act review).

1 *Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).<sup>10</sup> In determining whether a  
2 proposed settlement is in the public interest, a district court “must accord deference to the  
3 government’s predictions about the efficacy of its remedies, and may not require that the  
4 remedies perfectly match the alleged violations.” *SBC Commc’ns*, 489 F. Supp. 2d at 17; *see*  
5 *also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be “deferential to the government’s  
6 predictions as to the effect of the proposed remedies”); *United States v. Archer-Daniels-Midland*  
7 *Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the  
8 United States’ prediction as to the effect of proposed remedies, its perception of the market  
9 structure, and its views of the nature of the case).

10 Courts have greater flexibility in approving proposed consent decrees than in crafting  
11 their own decrees following a finding of liability in a litigated matter. “[A] proposed decree  
12 must be approved even if it falls short of the remedy the court would impose on its own, as long  
13 as it falls within the range of acceptability or is ‘within the reaches of public interest.’” *United*  
14 *States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting  
15 *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff’d sub nom. Maryland*  
16 *v. United States*, 460 U.S. 1001 (1983); *United States v. National Broadcasting Co., Inc.*, 449  
17 F.Supp. 1127, 1143 (D.C.Cal. 1978); *see also United States v. Alcan Aluminum Ltd.*, 605 F.  
18 Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would  
19 have imposed a greater remedy). To meet this standard, the United States “need only provide a  
20 factual basis for concluding that the settlements are reasonably adequate remedies for the alleged  
21 harms.” *SBC Commc’ns*, 489 F. Supp. 2d at 17.

22 Moreover, the Court’s role under the APPA is limited to reviewing the remedy in  
23 relationship to the violations that the United States has alleged in its Complaint, and does not  
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25 <sup>10</sup> *Cf. BNS*, 858 F.2d at 464 (holding that the court’s “ultimate authority under the [APPA] is  
26 limited to approving or disapproving the consent decree”); *United States v. Gillette Co.*, 406 F.  
27 Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to “look at the  
28 overall picture not hypercritically, nor with a microscope, but with an artist’s reducing glass”).  
*See generally Microsoft*, 56 F.3d at 1461 (discussing whether “the remedies [obtained in the  
decree are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the  
public interest’”).

1 authorize the court to “construct [its] own hypothetical case and then evaluate the decree against  
2 that case.” *Microsoft*, 56 F.3d at 1459; see also *InBev*, 2009 U.S. Dist. LEXIS 84787, at \*20  
3 (“the ‘public interest’ is not to be measured by comparing the violations alleged in the complaint  
4 against those the court believes could have, or even should have, been alleged”). Because the  
5 “court’s authority to review the decree depends entirely on the government’s exercising its  
6 prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only  
7 authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire  
8 into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this  
9 court confirmed in *SBC Communications*, courts “cannot look beyond the complaint in making  
10 the public interest determination unless the complaint is drafted so narrowly as to make a  
11 mockery of judicial power.” *SBC Commc’ns*, 489 F. Supp. 2d at 15.

12 In its 2004 amendments, Congress made clear its intent to preserve the practical benefits  
13 of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that  
14 “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing  
15 or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2). The language wrote  
16 into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator  
17 Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended  
18 proceedings which might have the effect of vitiating the benefits of prompt and less costly  
19 settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of  
20 Senator Tunney). Rather, the procedure for the public interest determination is left to the  
21 discretion of the court, with the recognition that the court’s “scope of review remains sharply  
22 proscribed by precedent and the nature of Tunney Act proceedings.” *SBC Commc’ns*, 489 F.  
23 Supp. 2d at 11.<sup>11</sup>

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25 <sup>11</sup> See *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the  
26 “Tunney Act expressly allows the court to make its public interest determination on the basis of  
27 the competitive impact statement and response to comments alone”); *United States v. Mid-Am.*  
28 *Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (“Absent a  
showing of corrupt failure of the government to discharge its duty, the Court, in making its  
public interest finding, should . . . carefully consider the explanations of the government in the  
competitive impact statement and its responses to comments in order to determine whether those  
explanations are reasonable under the circumstances.”); S. Rep. No. 93-298, 93d Cong., 1st  
COMPETITIVE IMPACT STATEMENT CASE NO. 13-CV-00133 WHO

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the Proposed Final Judgment.

Dated: May 8, 2014

Respectfully submitted,

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Sess., at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”).