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I. INTRODUCTION

United States v. Bazaarvoice, Inc.[2] is a particularly important and highly complex case that raises significant issues regarding (i) the application of merger analysis to high-tech industries, (ii) the importance of deal rationale documents, and (iii) the weight given to customer opinion testimony in merger cases. Judge Orrick applied traditional merger analysis to determine that Bazaarvoice's consummated acquisition of rival PowerReviews was anticompetitive and in violation of Section 7 of the Clayton Act.

Although this merger involves an evolving high-tech product—online platforms for product ratings and reviews ("R&R")—Judge Orrick methodically utilized the same analytical tools that are applied to mergers in more traditional industries to find that Bazaarvoice and PowerReviews were each other's closest competitor in a narrow, highly-concentrated product market with virtually no remaining competitors and entry barriers. He also found that competition between the merging firms had resulted in lower prices. Based on the totality of the evidence, Judge Orrick found that that the transaction would likely result in "significant anticompetitive unilateral effects."[3]

II. THE DECISION

A. Premerger Intent

In making his decision, Judge Orrick heavily focused on the "stark premerger evidence of anticompetitive intent"[4] for the acquisition even though he recognized that "intent is not an element of a Section 7 violation."[5] The evidence showed that the rationale for the deal from both parties, based on an extensive number of documents, was to enable the larger Bazaarvoice to eliminate its closest rival and raise prices. The parties were unable to effectively explain or rebut their own documents using post-acquisition analysis.

Based on these premerger documents and other evidence, Judge Orrick concluded:

> Bazaarvoice recognized that the acquisition of PowerReviews would eliminate its primary commercial competitor, allowing it to scoop up customers that it would otherwise have to expend $32 to $50 million to win over from PowerReviews, raise prices, and discourage any new competitive threats in its existing space while

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[2] *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, slip op. (N.D. Cal. Jan. 8, 2014).
[3] *Id.* at 102.
[4] *Id.* at 10.
[5] *Id.* at 21.

> pivoting to a bigger opportunity through its control of UGS [user-generated-content] in the broader eCommerce market.[6]

B. Existing and Potential Competition

In a highly detailed 141-page opinion, Judge Orrick rejected Bazaarvoice's arguments that there were many other strong firms in the same R&R market and that the relevant product market was broader. He also rejected Bazaarvoice's assertion that technology-oriented firms such as Amazon, Google, Salesforce, Facebook, and Oracle, with the alleged necessary infrastructure, reputation, and relationships with retailers and manufacturers, would become rapid entrants into R&R. Bazaarvoice provided "no reason why those firms would enter the market" particularly when "[t]here was no evidence that any company had made even preliminary analyses of the viability of joining the market."[7]

Judge Orrick also rejected Bazaarvoice's alleged substantial efficiencies claims, ruling thatthey were not cognizable and merger-specific.

C. Post-Merger Evidence and Customer Opinions

Judge Orrick entirely discounted Bazaarvoice's post-merger evidence, particularly since the Department of Justice opened its investigation two days after the merger closed. Judge Orrick gave no weight to claims by Bazaarvoice that the merger had not resulted in price increases because "[t]he post-acquisition evidence regarding pricing and the effect of the merger is reasonably viewed as manipulatable and is entitled to little weight."[8] He also cited to Section 2.1.1 of the Horizontal Merger Guidelines for the point that "a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct."[9] He further warned that "[i]f a court incorrectly relies on post-merger testimony that a merged entity has not raised prices and the court blesses the transaction, there is little to prevent the merged entity from creating anticompetitive effects at a later time."[10]

Significantly, Judge Orrick totally discounted opinions from more than 100 current, former, and potential customers that the merger had not and would not harm them. Judge Orrick credited the testimony of customers "on their need for, use of and substitutability of social commerce products as well as regarding their companies' past responses to price increases."[11] But he rejected customer opinions about the likely effects of the merger because he thought:

> . . . customers generally do not engage in a specific analysis of the effects of a merger. . . . Many of them had given no thought to the effect of the merger or had no opinion. They lacked the same information about the merger presented in court, including from the economic experts. Their testimony on the impact and

[6] *Id.* at 21.
[7] *Id.* at 133.
[8] *Id.* at 108.
[9] *Id.* at 136.
[10] *Id.*
[11] *Id.* at 116.

> likely effect of the merger was speculative at best and is entitled to virtually no weight.[12]

Judge Orrick further stated that the "complexity of the economic and legal issues in antitrust actions warrants affording limited value to lay testimony regarding the effects of the merger."[13]

The rejection of customer opinions (*i.e.*, lay testimony) by Judge Orrick is consistent with Section 2.2.2 of the Horizontal Merger Guidelines. Section 2.2.2 states that customers "can provide valuable information about the impact of historical events such as entry by a new supplier." At the same time, Section 2.2.2 states that "conclusions" about the likely impact of the merger are limited to "well-informed and sophisticated customers," which apparently did not exist in the view of Judge Orrick.

D. Adapting Traditional Merger Analysis to High-Tech Mergers

In applying traditional merger analysis, Judge Orrick frequently cited to the 2010 Horizontal Merger Guidelines, although he largely followed the step-by-step structural market analysis outlined in the 1992 Horizontal Merger Guidelines. To further support his opinion, he cited landmark merger cases where the government had prevailed, including *United States v. Philadelphia National Bank*, *United States v. Brown Shoe Co.*, *FTC v. Staples, Inc.*, *FTC v. H.J. Heinz Co.*, and *United States v. H&R Block, Inc.*, and he distinguished cases cited by Bazaarvoice where either the government or the private party lost, including *United States v. Baker Hughes, Inc.*, *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, Inc., and *United States v. Oracle Corp.*

At the same time, Judge Orrick clearly recognized that he was applying traditional merger analysis to a high-tech merger where the broader "social commerce industry is at an early stage of development, rapidly evolving, fragmented, and subject to potential disruption by technological innovations" and that "the future composition of the industry as a whole is unpredictable."[14] Nevertheless, after evaluating all of the evidence presented at trial, Judge Orrick concluded:

> The fact that social commerce and eCommerce tastes and products are developing and constantly changing does not diminish the applicability of the antitrust laws—they apply in full force in any market. There is no antitrust exemption that allows the market-leading company in a highly concentrated market to buy its closest competitor, even with the evolving social commerce space, when the effect is likely to be anticompetitive.[15]

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[12] *Id.*

[13] *Id.* at 137.

[14] *Id.* at 19-20.

[15] *Id.* at 133. *See also* Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Reflections on Antitrust Enforcement in the Obama Administration," Remarks as Prepared for Delivery to the New York State Bar Association (Jan. 30, 2014) ("the antitrust laws apply with full force to transactions in the high-technology sector").

Judge Orrick concluded his decision by stating, "while Bazaarvoice indisputably operates in a dynamic and evolving field, it did not present evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects."[16]

III. KEY TAKEAWAYS

There are four key takeaways from the *Bazzarvoice* opinion. First, acquiring parties need to consider antitrust risk in non-reportable deals. Second, deal rationale documents carry significant weight and should not be underestimated. Third, customer opinions, while important to agencies in merger investigations, may have limited value at trial. Finally, mergers in evolving, high-tech industries may not receive any extra leeway in merger trials.

A. Parties Need to Evaluate Antitrust Risk in Non-Reportable Deals

Parties to non-reportable mergers must be aware that mergers with competitors may be investigated and they should account for this possibility, as well as a risk of divestiture, in their risk analysis. With victories like *Bazaarvoice*, the agencies will continue to investigate non-reportable consummated mergers and, if necessary, litigate them.

B. Deal Rationale Documents Should Never Be Underestimated

Deal rationale documents are important to the government and to judges. In reportable transactions, the deal rationale documents are included in an HSR filing in response to items 4(c) and 4(d). For investigations of non-reportable transactions, similar deal rationale documents are almost always the agencies' first request. Parties contemplating mergers, either reportable or non-reportable, should be on notice that the initial impressions of the lawyers working on a matter are frequently formed by the discussions in the deal rationale documents. Parties need to be able to explain the contents of "bad documents."

C. Customer Opinions May Have Limited Value in Court but the Agencies Give Them Weight in Investigations

A key issue in Judge Orrick's decision was his decision not to credit opinion testimony from the more than 100 customers who did not believe that the acquisition had harmed or would harm them. Judge Orrick discredited customer opinions because "it was speculative at best and is entitled to virtually no weight."[17]

This is not the first time courts have discredited customer testimony. For example, in a pre-trial motion in *FTC v. H.J. Heinz Co.*, the court granted the FTC's motion to exclude from the record customers' lay opinions on the merger. In *United States v. Oracle Corp.*, moreover, the court also dismissed customer views regarding likely competitive effects—in this case, views by government witnesses. Nevertheless, customer views during an investigation have great weight on the agencies and frequently affect the decision to file a complaint.

[16] *Bazaarvoice,* slip op. at 141.
[17] *Id.* at 116.

D. Mergers in Rapidly Changing, High-Tech Markets are Not Immune From Antitrust Enforcement and are Analyzed Similarly to Other Mergers

No one should be surprised that the government will investigate mergers involving products in a high-tech industry utilizing the same Horizontal Merger Guidelines that apply to all merger investigations—regardless of the industry. As Renata Hesse recently stated, "[h]igh-tech mergers do not get a free pass, and their impact on competition must be evaluated on a case by case basis."[18] Although high-tech industries generally are changing rapidly, the details are still fact-specific for each merger and the government is focused on near-term changes (*e.g.*, entry within about a two-year time frame), not long-term changes over many years. In late 2001, for example, the FTC was prepared to challenge the merger between Monster and HotJobs, which, at the time, were the two largest online job search firms, even though the parties claimed the industry was rapidly evolving. Using the same investigative tools, coupled with detailed economic analysis presented by the merging parties, the FTC cleared Monster's acquisition of HotJobs in 2010 after a detailed investigation due to significantly changed market conditions.

[18] Renata B. Hesse, Deputy Assistant Attorney General for Criminal and Civil Operations, Antitrust Division, U.S. Department of Justice, "At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement," Remarks as Prepared for the Conference on Competition and IP Policy in High-Technology Industries" (Jan. 22, 2014). In the same prepared remarks, Deputy Assistant Attorney General Hesse discussed recent high-tech mergers where the Antitrust Division has sought enforcement such as H&R Block/TaxAct (2011) and AT&T/T-Mobile (2011), as well as high-tech mergers where the Antitrust Division has not sought enforcement such as XM/Sirius (2008) and Google/Admeld (2011).