LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, MARCH 21, 2014

PERSPECTIVE

# Bazaarvoice merger faces a bizarre fate after court ruling

By Scott D. Stein and Marie L. Fiala

What if the government told you that you have to license your intellectual property to your closest competitor, and allow your employees to work for that same competitor and disclose your trade secrets? That is the position that one company finds itself in as a result of an adverse verdict earlier this year in an antitrust case brought by the Department of Justice in federal district court in San Francisco.

Bazaarvoice provides ratings and review ("R&R") software and technology. R&R enables manufacturers and retailers to collect, organize and display consumer-generated product reviews and ratings online — think of customer reviews you see on the websites of retailers like Best Buy and Sephora.

In June 2012, Bazaarvoice acquired its next largest competitor, PowerReviews, in a transaction too small to require the federal premerger notification which provides the Federal Trade Commission and the DOJ with information about large mergers and acquisitions before they occur. Nevertheless, last year the DOJ sued to unwind the merger, claiming that the acquisition would lead to anticompetitive effects in the market for R&R services.

In January, following a three-week trial, Judge William Orrick held that Bazaarvoice 's acquisition of PowerReviews was likely to result in anticompetitive effects in the form of higher prices for consumers of R&R services. The court has invited the parties to offer their proposals on how the antitrust violation should be remedied, and is expected to issue its ruling next month.

The Supreme Court has given courts broad latitude to craft remedies for violations of the antitrust laws that will help "restore competition" to the affected market. There seems to be no dispute that Bazaarvoice will be required to sell the assets it acquired from PowerReviews, including customers who currently subscribe to PowerReviews' R&R platform, to another buyer. According to court filings, the process of soliciting bids for those assets is currently underway.

However, the relief proposed by the government goes beyond merely requiring Bazaarvoice to sell PowerReviews' assets to a new owner. Because the DOJ asserts that Bazaarvoice siphoned R&D resources and customers away from PowerReviews after the acquisition, its proposed remedy includes a variety of controversial provisions that, the DOJ contends, will "create the competitive landscape that would have existed today if Bazaarvoice had not acquired PowerReviews." Among the key provisions of the DOJ's proposed remedy which Bazaarvoice opposes are:

**Forced licensing of IP.** If the divestiture results in the purchaser retaining 80 percent of PowerReviews' customers (weighted by revenue) at the time of divestiture, the DOJ will consider divestiture to have "effectively restore[d] the lost competition" from the merger. If, however, that benchmark is not met, DOJ's remedy would force Bazaarvoice to provide a perpetual, irrevocable license to its R&R platform to the purchaser of PowerReviews' assets. This would, in essence, require Bazaarvoice to provide a new competitor with Bazaarvoice's own product to compete against it.

**Waiver of Employment Restrictions.** The DOJ is also seeking to compel Bazaarvoice to waive all restrictions on the use or disclosure of Bazaarvoice's trade secrets by any Bazaarvoice employees who go to work for the purchaser of PowerReviews' assets. The DOJ says this is necessary to help the buyer "close the innovation gap" it theorizes was created by the transaction due to the lack of investment in the PowerReviews platform during that time period, and the fact that Bazaarvoice has had access to PowerReviews' technology and incorporated aspects of it into its own R&R products.

**Appointment of a Special Master.** The DOJ also asks the court to appoint a special master to oversee the divestiture process and then provide ongoing supervision of Bazaarvoice's compliance with the eventual judgment.

Because significant portions of the record in the case remain sealed, neither we nor the public at large have access to all of the facts on which the court is being asked to decide the appropriate scope of relief. That being said, the onerous nature of the proposed relief — including forced IP licensing, disclosure of trade secrets, and the potentially open-ended appointment of a special monitor — raises the question whether the government's proposed remedy goes beyond merely restoring competition and instead seeks to dictate what the DOJ believes a "better" form of competition in the market for R&R services would be.

The government's proposed remedy also raises the question of whether the court should, as a first step rather than as a last resort, compel or authorize the wholesale transfer of intellectual property when it is possible that divestiture will succeed in restoring the competition that the court found was lost when Bazaarvoice acquired PowerReviews a mere 18 months ago.

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Bazaarvoice and PowerReviews are not the only providers of R&R services. Indeed, the court recognized that R&R is part of a "dynamic and fast evolving e-Commerce industry" — one that is "rapidly evolving, fragmented, and subject to potential disruption by technological innovations." While the court concluded that a significant new competitor was not likely to enter the R&R market within the next two years, the forced divestiture of PowerReviews has the potential to create a new competitor to Bazaarvoice that is stronger than PowerReviews was or would have been. Potential acquirers of PowerReviews' assets could include the companies' smaller competitors in the R&R space, or another player in the larger social commerce space looking to expand into R&R services.

Whomever acquires PowerReviews' assets, there is no reason to believe that the acquiror(s) will be anything but motivated to obtain the best deal possible and to compete vigorously with Bazaarvoice.

Yet the DOJ's arguments in support of its proposed remedy are strangely dismissive of market forces. Indeed, in rejecting the argument that the onerous IP transfer provisions are likely to be unnecessary, the DOJ goes so far as to argue that it is "irrelevant" whether prospective buyers "believe they can profitably operate the PowerReviews assets" without the IP transfer provisions sought by the DOJ. The disputed provisions are — in the DOJ's view — "necessary to allow the divestiture buyer to gain its footing and establish itself as an effective competitor." But the DOJ does not convincingly explain why its own judgment should supplant that of an informed purchaser that actually operates in this space, or why the divestiture process should not be allowed to play itself out before implementing the more troubling provisions.

It is of course possible the divestiture alone will not be sufficient to restore effective competition to the market, or that the package of PowerReviews assets that Bazaarvoice will seek to divest simply will not be marketable absent the other provisions being requested by the DOJ. However, it is unclear why this dynamic competitive process should not be given breathing room to operate, hopefully spurring innovation and robust competition, before immediately implementing onerous conduct remedies such as those the DOJ is requesting.

A more conservative course of action would be entirely consistent with the court's judgment that the acquisition of PowerReviews violated the Clayton Act, while also recognizing that courts and regulators should be wary of dictates that seek to implement their view of how the market "should" work as opposed to allowing it to work freed from competitive constraints.

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