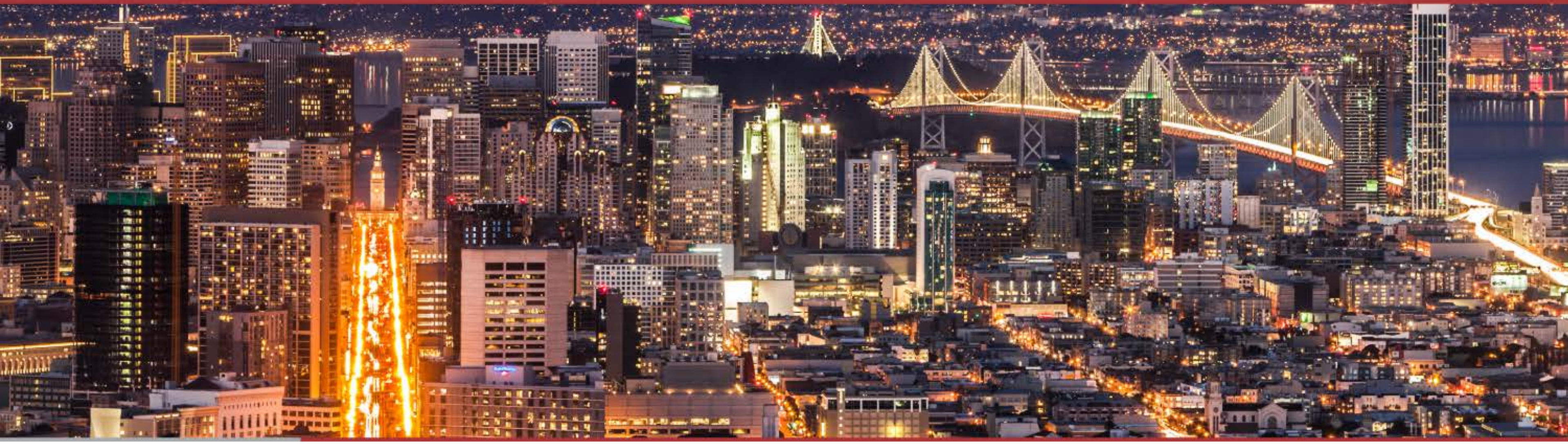


Antitrust in 2016

Challenges and Conundrums for the West Coast in 2016

Friday, January 29, 2016

BAZAARVOICE / POWERREVIEWS (2014)

- **<u>Transaction</u>:**
  - Bazaarvoice acquired PowerReviews for $168.2 million in June 2012.
  - Transaction was not reportable.
  - Both parties created and marketed internet ratings and review platforms (R&R).
- **<u>DOJ concern</u>:**
  - Acquisition would eliminate Bazaarvoice's only meaningful direct competitor in market for online platforms for product ratings.
  - Customers would lose "critical negotiating leverage and are vulnerable to anti-competitive price increases."
- **<u>Parties' Arguments</u>:**
  - DOJ focused on old documents that paint inaccurate picture of the marketplace.
  - Entry is easy.
  - Customers not concerned.

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Thursday, January 10, 2013

Justice Department Files Antitrust Lawsuit Against Bazaarvoice Inc. Regarding the Company's Acquisition of PowerReviews Inc.

Lawsuit Seeks to Restore Competition in Market for Product Ratings and Reviews Platforms Sold to Retailers and Manufacturers

WASHINGTON – The Department of Justice filed a civil antitrust lawsuit today against Bazaarvoice Inc. challenging the company's June 2012 acquisition of PowerReviews Inc. The department said that the $168.2 million transaction substantially lessened competition in the market for product ratings and reviews platforms in the United States, resulting in higher prices and diminished innovation.

The department's lawsuit, filed in the U.S. District Court in the Northern District of California, in San Francisco, seeks to restore the competition that was extinguished by the transaction.

Bazaarvoice's acquisition of PowerReviews was not reported under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which requires companies to notify and provide information to the department and the Federal Trade Commission before consummating certain acquisitions. The department began its investigation shortly after the transaction closed.

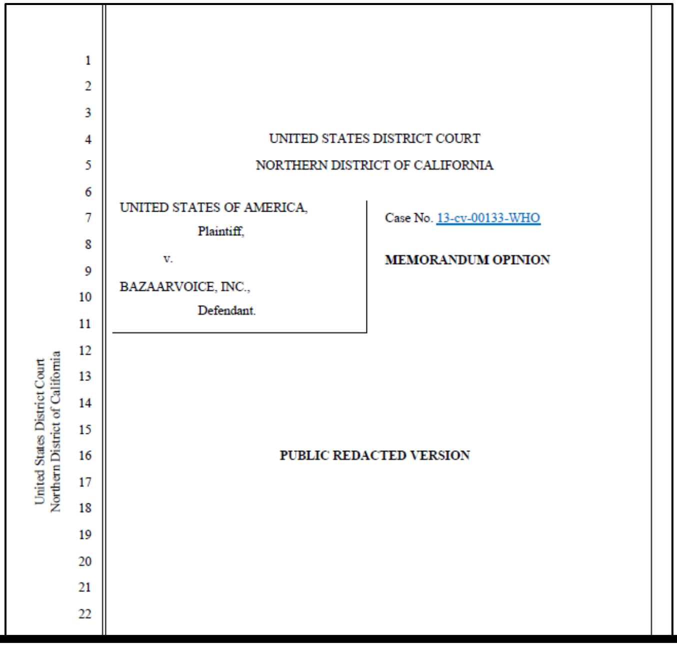
"Bazaarvoice bought PowerReviews knowing that it was acquiring its most significant rival and hoping to benefit from diminished price competition," said Bill Baer, Assistant Attorney General in charge of the Department of Justice's Antitrust Division. "Without competitive pressure from PowerReviews, Bazaarvoice will be able to increase prices to retailers and

<u>Department of Justice</u>:

"**Bazaarvoice bought PowerReviews knowing that it was acquiring its most significant rival and hoping to benefit from diminished price competition** . . . Without competitive pressure from PowerReviews, Bazaarvoice will be able to increase prices to retailers and manufacturers for its product ratings and review platform."

BAZAARVOICE / POWERREVIEWS (2014) (CONT'D)

- **Outcome**:
  - DOJ filed suit to challenge merger, and after 3-week trial, district court ruled in favor of DOJ.
  - Court held that Bazaarvoice's transaction constituted the purchase of its "closest and only serious competitor."
  - Court found significant barriers to entry and expansion in R&R market, including network effects from syndication, high switching costs, know how and reputation.
  - Bazaarvoice agreed to divest all of PowerReviews assets to a new buyer and to compensate for the deterioration of PowerReviews' competitive position that occurred as a result of the transaction.



United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
BAZAARVOICE, INC.,
Defendant.

Case No. 13-cv-00133-WHO

MEMORANDUM OPINION

PUBLIC REDACTED VERSION

District Court:

"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 anti-competitive effects**."

BAZAARVOICE / POWERREVIEWS (2014) (CONT'D)

"**If we buy them it changes everything for our model….Because 10-20% price erosion will disappear**….Because this is competitively HUGE and I have opinions."

"Power Reviews is our biggest competitor."

"There is **no doubt that Power Reviews brings our pricing down**."

"Combined, we would be approaching the **50% share** point….There is no other competitor with more than 10 clients."

Potential benefits of the transaction include "no meaningful direct competitor" and **"less pricing dilution."**

The transaction will cause a "dramatic increase in reach and overall market share **making future competition extremely difficult**."

"We are extraordinarily fortunate to operate in a **duopoly**."

"Glad to see competition light a fire…let's crush these guys now…and damnit lets just buy them now."

"Pros- **Elimination of our primary competitor** in both the U.S. and Europe. An expected impact of this consolidation is **relief from the price erosion** that Sales experiences in 30-40% of deals."

Company documents were central to DOJ's case

STERIS / SYNERGY (2015)

- **Transaction**:
  - Steris sought to acquire Synergy for $1.9 billion in October 2013.
  - Transaction would combine #2 and #3 medical sterilization providers world-wide.
- **FTC concern**:
  - Sued on potential competition grounds.
  - But for the transaction, Synergy was likely to enter U.S. market quickly by establishing an X-ray sterilization facility that would disrupt market.
- **Parties' Arguments**:
  - Synergy was not actually likely to enter.
  - X-ray sterilization would not likely achieve significant market share so as to produce any pro-competitive benefits.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FEDERAL TRADE COMMISSION,	)	CASE NO. 1:15 CV 1080
	)	
Plaintiff,	)	JUDGE DAN AARON POLSTER
	)	
vs.	)	OPINION AND ORDER
	)	
STERIS CORPORATION, et al.,	)	
	)	
Defendants.	)	

On May 29, 2015, the Federal Trade Commission (FTC) filed a Complaint for Temporary Restraining Order and Preliminary Injunction against Defendants Steris Corporation (Steris) and Synergy Health plc (Synergy). (Doc #: 1.) The FTC asked the Court to grant

"If the FTC is correct, the **evidence should show that if the merger does not go through** (either because the parties abandon it or a permanent injunction is issued), **Synergy is likely to revive its plans** and build one or more x-ray facilities in the U.S. **in the near future**."

STERIS / SYNERGY (2015) (CONT'D)

- **Outcome**:
  - Court ruled against FTC in detailed factual opinion, finding Synergy was not likely to enter.
  - Court found that Synergy discontinued its U.S. x-ray project due to lack of customer interest—not due to the acquisition by Steris. In court's view, this showed that Synergy was not likely to enter absent the merger.
  - After losing, FTC decided not to appeal.

UNITED STATES DISTRICT COURT
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EASTERN DIVISION

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"The FTC has to show a likelihood of proving at trial that, absent the merger, Synergy probably would have entered the U.S. contract sterilization market by building one or more x-ray facilities in the U.S. within a reasonable period of time. . . . The FTC has not met its burden. In the end, the **evidence unequivocally shows that the problems that plagued the development** of X-ray sterilization as a viable alternative to gamma sterilization . . . **justified termination of the project** in 2015: the failure to obtain customer commitments and the inability to lower capital costs."

STERIS / SYNERGY (2015) (CONT'D)

". . . while Synergy's PLC Board had endorsed the concept of U.S. x-ray in September 2014, **the business plan had not been approved** and there were **significant obstacles** that [Synergy personnel] knew they needed to overcome in order to win approval."

". . . the most significant reason Synergy opted to discontinue the U.S. x-ray project **was lack of customer commitment**."

The merger "had no significant impact on Synergy's plans for U.S. x-ray. [Synergy personnel] continued to . . . **try to obtain customer buy-in, to bring down the cost of new facilities, and to work . . . to develop a dual-capability machine** . . ."

The new process "would need to be tested, then . . . approved by the FDA . . . then the site would have to be qualified . . . . [T]his **conversion process could take several years**."

Synergy was "**unable to harness the capital costs** to build x-ray facilities in the United States."

The decision to discontinue x-ray was made because "there **was little to no likelihood of obtaining [Synergy board] approval, let alone approval from a combined Synergy/Steris board**."

" . . . the evidence shows that the **negotiations between Steris and Synergy had no effect whatsoever** on the work of Synergy's U.S. x-ray team."

Court engaged in deep factual analysis to determine likelihood of entry

NIELSEN / ARBITRON (2013)

- **Transaction**:
  - Nielsen sought to acquire radio ratings company Arbitron in deal valued at $1.26 billion in December 2012.
- **FTC concern**:
  - FTC challenged merger on potential competition grounds, arguing merging firms were likely to become "substantial head-to-head competitors" absent the merger.
  - Parties were both developing national syndicated cross-platform audience measurement services, which would allow audiences to be measured accurately across multiple platforms, such as TV and online.
  - Interviews with customers showed that Nielsen and Arbitron would be by far the two strongest competitors in this new space.
- **Parties' arguments**:
  - Speculative to assume the parties would compete in new market. We do not know how their products would differ, how the market will evolve, what other competitors might enter.
  - Any anti-competitive effects are minor, since national syndicated cross-platform measurement services are likely to have modest sales for the foreseeable future.

NIELSEN / ARBITRON (2013) (CONT'D)

- **Outcome**:
  - FTC accepted remedy that required Nielsen to license, for at least eight years, data and technology needed to develop national syndicated cross-platform audience measurement services.
  - Settlement marked first time FTC took steps to protect future competition in a prospective market for a service—cross-platform measurement—that did not yet exist.
  - Transaction closed in September 2013.

Statement of the Federal Trade Commission[1]
In the Matter of Nielsen Holdings N.V. and Arbitron Inc.
File No. 131-0058

Commission Statement:

"**Although this is a future market**, with an amount of concomitant uncertainty, **effective merger enforcement always requires a forward-looking analysis of likely competitive effects**. On the evidence here, the Commission has reason to believe that the proposed remedy is necessary to address the likely competitive harm that would result from the acquisition."

As television viewership has shifted from traditional television screens to mobile devices,

Commissioner Wright's Dissent:

"**Although all merger review necessarily is forward looking, it is an exceedingly difficult task to predict the competitive effects of a transaction where there is insufficient evidence to reliably answer . . . basic questions upon which proper merger analysis is based.** Without these critical inputs, our current economic toolkit provides little basis from which to answer accurately the question of whether a merger implicating a future market will result in a substantial lessening of competition."

APPLIED MATERIALS / TOKYO ELECTRON (2015)

- **<u>Transaction</u>:**
  - U.S.-based Applied Materials announced plans to acquire Japanese rival Tokyo Electron in $9.3 billion all-stock deal in September 2013.
  - Merger would have combined #1 and #3 global suppliers of semiconductor manufacturing equipment.
- **<u>DOJ concern</u>:**
  - Focused on overlaps between the companies' current and future products, as well as general effects of merger on future innovation.
  - In particular, DOJ expressed concerns about merger's effect on "the development of equipment for next-generation semiconductors."
  - Concern driven in part by customer complaints.
- **<u>Parties' arguments</u>:**
  - Speculative to focus on markets for products that are still under development, which are not sold to customers and for which the parties have no market share.

APPLIED MATERIALS / TOKYO ELECTRON (2015) (CONT'D)

- **Outcome**:
  - Parties submitted global remedy proposal to resolve horizontal competition concerns of DOJ and foreign regulators.
  - DOJ rejected remedy, citing innovation concerns.
  - Parties abandoned merger, citing DOJ's position.

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Monday, April 27, 2015

Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy

Applied Materials Inc. and Tokyo Electron Ltd. abandoned their plans to merge after the Department of Justice informed the companies that their remedy proposal failed to resolve the department's competitive concerns.

"The companies' decision to abandon this merger preserves competition for semiconductor manufacturing equipment," said Acting Assistant Attorney General Renata B. Hesse of the Justice Department's Antitrust Division. "The semiconductor industry is critically important to the American economy, and the proposed remedy would not have replaced the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors."

The proposed merger of Applied Materials and Tokyo Electron would have combined the two largest competitors with the necessary know-how, resources and ability to develop and supply high-volume non-lithography semiconductor manufacturing equipment.

During the investigation, the division cooperated with the Korean Fair Trade Commission, China's Ministry of Commerce,

...ny semiconductor manufacturing

...ductor manufacturing equipment

Antitrust Division

Updated April 27, 2015

"**The companies' decision to abandon this merger preserves competition for semiconductor manufacturing equipment**. The semiconductor industry is critically important to the American economy, and the proposed remedy would not have replaced the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors."

ST. LUKE'S / SALTZER (2015)

- **Transaction**:
  - In December 2012, St. Luke's acquired Saltzer, a multi-specialty group of 44 physicians located in Nampa, Idaho, for $16 million.
  - Parties closed transaction despite requests from FTC to delay closing so it could complete its investigation.
- **FTC concern**:
  - FTC filed suit, seeking to unwind the transaction.
  - Combination would give St. Luke's market power to demand higher rates for health care services provided by primary care physicians in Nampa, Idaho and surrounding areas, ultimately leading to higher costs for health care consumers.
- **Parties' arguments**:
  - Merger would yield merger-specific efficiencies sufficient to outweigh any anticompetitive effects.
  - For example, merger would reduce costs through shared electronic medical record system and by moving away from fee-for-service care and towards risk-based care.

ST. LUKE'S / SALTZER (2015) (CONT'D)

- **<u>Outcome</u>**:
  - District court held that the acquisition violated antitrust laws, and ordered St. Luke's to fully divest Saltzer's physicians and assets.
    - Relied on Herfindahl-Hirschman Index (HHI) analysis in assessing market concentration.
    - Found barriers to entry were high due to difficulty recruiting physicians into the area.
    - Rejected using quality care improvements standing alone to defend a merger.
  - Ninth Circuit affirmed.
  - Parties declined to appeal to U.S. Supreme Court.

UNITED STATES DISTRICT COURT

IN THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER - NAMPA, INC., TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP, SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC. Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD. Defendant.	Case No. 1:12-CV-00560-BLW (Lead Case) **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
FEDERAL TRADE COMMISSION; STATE OF IDAHO Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD.; SALTZER MEDICAL GROUP, P.A. Defendants.	Case No. 1:13-CV-00116-BLW

"There is a substantial risk that the combined entity will use its dominant market share (1) to negotiate higher reimbursements with health plans and (2) charge more services at the higher hospital billing rates. **This will raise costs to consumers**."