UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and STATE OF NEW YORK, *Plaintiffs,* v. TWIN AMERICA, LLC, *et al.*, *Defendants.*	Civil Action No. 12-cv-8989 (ALC) (GWG) Subject to Protective Order: Contains Confidential and Highly Confidential Information **ORAL ARGUMENT REQUESTED** REDACTED PUBLIC VERSION

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

CASES PAGE(S)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

Pursuant to Federal Rule of Civil Procedure 56, Defendants Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC, and City Sights Twin, LLC ("Defendants") respectfully submit this memorandum in support of their motion for summary judgment on all claims.

The United States and State of New York (collectively, "the Government") filed this case, eighteen months ago, to unwind the now five-year old merger of Gray Line and CitySights, two New York City double decker bus tour services that combined in 2009 to become "Twin America." The Government Complaint alleges the deal "creat[ed] a monopoly" that violates federal and state antitrust laws. Compl. ¶ 1.

The Government's alleged monopoly, however, does not exist. Twin America is currently one of ***five*** New York City double decker bus tour services, in a field that now includes two of the largest double decker bus tour operators in the world (neither of them Twin America), as well as two successful bus tours that started from scratch. Watching the competitive frenzy among the ticket agents selling tours for these services in Times Square at any moment on any given day is itself enough to demonstrate the stark inconsistency between the Government's Complaint and the undisputed facts that have developed. That record, showing the flood of new entrants into the Government's alleged antitrust market, is the dispositive underpinning to this summary judgment motion.

To establish an antitrust violation, the Government must prove the merger created a company with illegal "market power"—an antitrust term defined as the power to control price or exclude competition in a relevant antitrust "market." To do so, the Government must prove there are "barriers to entry" that prevent new competition from entering the alleged market.

The reason for the antitrust entry barrier proof requirement is critical—if new competition can enter the market, the merged firm cannot exercise "power" to control price or exclude competition. Put simply, without entry barriers, there can be no illegal market power, and courts have repeatedly ruled against the Government in merger challenges for failing to establish barriers to entry. *See United States v. Syufy Enters.*, 903 F.2d 659, 671 (9th Cir. 1990) ("the lack of entry barriers prevents the government from prevailing on its Clayton Act claim"); *United States v. Baker Hughes, Inc*., 908 F.2d 981, 987 (D.C. Cir. 1990) ("In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time"); *United States v. Waste Mgmt*., 743 F.2d 976, 979 (2d Cir. 1984) ("Because we conclude that potential entry into the relevant Dallas market by new firms or by firms now operating in Fort Worth is so easy as to constrain the prices charged by [Waste Management], we reverse on the grounds that the merged firm does not substantially lessen competition").

The Government's alleged antitrust market in the case is New York City hop-on, hop-off bus tours. Compl. ¶¶ 41-45. Defendants dispute this attempt to limit an antitrust market to a single type of tour service. To the contrary, Defendants contend that Twin America competes with all types of tours and attractions in New York City, for tourist time and dollars. Defendants, however, are not asking the Court to decide market definition questions on summary judgment, because the undisputed record demonstrates as a matter of law and fact that the Government cannot sustain its burden to prove entry barriers for the narrow market it alleges. For the same reason, the Government cannot meet its burden for injunctive relief, because even its narrowly alleged market appears more competitive now than in 2009 when the merger occurred.

The Government also is asking the Court for an equitable disgorgement remedy in this case, an extraordinary request unprecedented where, like here, a parallel private civil class action

has fully protected the alleged injuries of purchasers. The federal government has ***never*** received disgorgement in this context, and the statutes under which the State of New York asserts claims provide for restitution to consumers, not disgorgement to the Government. Given Twin America's agreement to settle the civil class action cases creating, if approved by the court, a $19 million fund, there is no basis for the Government's disgorgement request, which is unfounded and unsupported in any event.

I. BACKGROUND FACTS: THE STORY OF THE MERGER AND THE UNDISPUTED ENTRY OF NEW DOUBLE DECKER BUS TOUR SERVICES

A. CitySights and Its Merger with Gray Line

Double decker bus tours first appeared in New York City during the early 1990s. *See* Defendants' Local Rule 56.1 Statement of Uncontroverted Material Facts ("56.1 Stmt.") ¶ 1. By 2005, Gray Line was operating seventy double decker buses during the peak bus tour season, which runs from April through September. *Id.* ¶ 3.

That same year, 2005, Mark Marmurstein, Twin America's current President and CEO, founded CitySights, a startup double decker bus tour service. *Id.* ¶ 4. Mr. Marmurstein grew up in a family owned business that specialized in airport shuttle and other transportation services. *Id.* ¶ 5. From scratch, he assembled an executive team, and hired drivers, ticket agents and tour guides. *Id.* ¶ 7. In less than a year, Mr. Marmurstein had put together a new open top bus tour company operating eight upper decker buses on the streets of Manhattan. *Id.* ¶ 8.

CitySights was profitable from day one. *Id.* ¶ 9. Over the next three years, the company's growth scaled with its ridership to fifty-four buses by late 2008, when the financial markets crashed in the worst financial crisis in the nation's history since the Great Depression. *Id.* ¶¶ 10, 12. Not only did centuries old financial institutions fail, credit freezes and fright took hold of nearly every business sector in the United States, choking consumer spending to a trickle,

reducing tourism across the nation. *Id.* ¶¶ 12-14. At the same time, the price of oil fluctuated wildly, skyrocketing to more than $145 per barrel, almost three times the price of oil just a year earlier, a critical cost metric for transportation businesses. *Id.* ¶ 15.

In short, the world changed in Fall 2008; all stability and confidence had vanished, credit had vanished, spending was scarce, and costs—transportation costs in particular—became wildly unpredictable. These circumstances lead Coach USA to approach CitySights to discuss the potential for a merger, seeking operational efficiencies in a shrinking tourism sector with an unpredictable future. *Id.* ¶¶ 16-17.[1]

B. The Merger's Regulatory Proceeding and the Government's Investigation

After the merger, Twin America made a filing with the federal Surface Transportation Board ("STB") seeking approval of the transaction. Twin America Answer to Complaint ("Answer") ¶¶ 5, 37. This filing was required by law. While the filing should have been made prior to the transaction, it is not uncommon for parties to make STB filings post transaction.[2]

[1] The Government's Complaint makes allegations regarding a fare increase implemented by Gray Line in February 2009, before the formation of Twin America, and by CitySights in April 2009, after the merger, suggesting these price changes evidence market power. Although not the subject of this Motion, the record shows that Gray Line decided to increase its fares before and separate from the formation of Twin America. Prices go up (and down) in competitive markets all the time, and it is only possible to determine whether such price increases are anticompetitive in the context of a properly defined relevant market with an assessment of barriers to entry, which is the subject of this Motion. *See FTC v. Lundbeck*, Nos. 08-6379, 08-6381, 2010 WL 3810015, at *1 (D. Minn. Aug. 31, 2010), *aff'd* 650 F.3d 1236 (8th Cir. 2011) (price increase of 1300% did not show market power).

[2] *See, e.g.*, *First Group plc—Acquisition—Cognisa Transp., Inc.*, STB No. MC-F-21021, 2007 WL 2022128, at *1 (S.T.B. July 13, 2007); *K.C. Irving, Ltd. And S.M.T. (Eastern), Ltd.—Control—Acadian Lines, Ltd., Nova Charter Servs. Inc., S.M.T. (Eastern), Inc.*, STB No. MC-F-20944, 1999 WL 148242, at *2 (S.T.B. Mar. 19, 1999); *Global Passenger Servs., L.L.C., et al.—Control—Gongaware Tours, Inc. et al.*, STB No. MC-F-20954, 1999 WL 732245, at *3 (S.T.B.. Sept. 20, 1999); *Laidlaw, Inc., et al—Control—Dave Transp. Servs., et al.*, STB No. MC-F-20929, 1998 WL 460308, at *1 (S.T.B. Aug. 7, 1998).

In late July 2009, while Defendants were in the process of completing the STB application, Twin America received subpoenas from the New York State Attorney General's Office ("NYAG") investigating the merger. *See id.* ¶¶ 5, 37. As part of its STB filing, Twin America notified the United States Department of Justice Antitrust Division ("DOJ")—the federal Government plaintiff here—of the merger and the STB filing. *See Stagecoach Group Plc and Coach USA, Inc., et al.—Acquisition of Control—Twin America LLC*, STB Docket No. MC-F-21035 ("STB Docket"), Verified Application, Certificate of Service (Aug. 19, 2009).

Without the benefit of discovery or any evidentiary hearing, the STB denied Twin America's application for approval citing entry barrier concerns based on the fact (at the time) that no new double decker bus service had started operations in New York City since the merger occurred. STB Docket, Decision, at 1, 14-16 (Feb. 8, 2011). The STB gave Twin America the option to divest its interstate charter operations and remain a merged company, which Twin America did. *Id.* at 18; Answer ¶ 5. Subsequently, the DOJ joined the NYAG investigation that had been in progress since 2009. In December 2012, the DOJ and NYAG filed this suit.

C. What Happened Next: The New Wave of Double Decker Bus Tour Services

Since 2012, four new double decker bus tour services have entered the Government's alleged antitrust market.

1. Go New York Tours

The first new entrant to join the New York City double decker tour fray was Go New York ("GO"). [redacted]. 56.1 Stmt. ¶¶ 24-26. GO [redacted]

[redacted] *See id.* ¶¶ 27-33.

According to Mr. Kostadinov, GO's chief executive and owner, GO is [redacted] and at the height of GO's first full season in operation, the 2013 summer tour season, GO carried [redacted] passengers per day. *Id.* ¶¶ 39-40. Reportedly, GO has carried more than 280,000 tour passengers since its inception. *Id.* ¶ 41.

Much like CitySights years earlier, GO started with [redacted] buses and in less than one full year of operations had grown its fleet to [redacted] buses, with a ridership that the Government's own expert characterizes as [redacted] of the Government's alleged antitrust market as of Summer 2013. *Id.* ¶¶ 37-38, 93.

2. Skyline Sightseeing

The next tour to launch was Skyline Sightseeing ("Skyline"), in May 2013, backed by the venture capitalists behind the famous NY Skyride virtual sightseeing tour and well-known attraction housed in the Empire State Building. *Id.* ¶¶ 42-44. [redacted]. *Id.* ¶ 45. By October 2013, within five months of its launch, Skyline was operating [redacted] buses. *Id.* ¶ 46.

At the time of its deposition in October 2013, Skyline had hired [redacted] bus drivers, [redacted] brand ambassadors, [redacted] dispatchers, and [redacted] street sellers. *Id.* ¶ 49. The Government's expert calculates Skyline was able to capture [redacted] of the Government's alleged antitrust market in just the first three months of its operations. *Id.* ¶ 94.

3. Big Bus Tours

Self-described as the largest operator of open top sightseeing tours in the world, running double decker tours in fifteen other cities across three continents, Big Bus began operating hop-on, hop-off tours in New York City on March 1 of this year. *Id.* ¶¶ 56, 71.[3]

[redacted]. *Id.* ¶¶ 61, 65. [redacted]

[redacted]. *Id.* ¶¶ 64, 66, 71.

[redacted]

[redacted] *Id.* ¶ 65.

[redacted]. *Id.* ¶ 70.

4. Open Tour New York

RATP is a state-owned public transportation company headquartered in Paris, and self-described as one of the largest transportation operators in the world, with more than seventy wholly and partially owned subsidiaries operating in twelve countries on five continents. *Id.* ¶¶ 74-75. The RATP Group has over 53,000 employees worldwide and, in 2012, had nearly €5 billion ($6.8 billion) in consolidated sales. *Id.* ¶ 74. It operates double decker bus tours in Paris

[3] The origin of Big Bus itself is notable. Formed by a 2011 merger of London's Big Bus Company Ltd and Les Cars Rouges from Paris, each with more than twenty years of experience in the industry, the company combined Washington, D.C.'s only two double decker tour operations at the time. 56.1 Stmt. ¶¶ 57-58. The DOJ did not challenge that transaction.

under the name L'Open Tour, and in four cities across the UK. *Id.* ¶ 76. In Paris alone, RATP tour buses carry more than 750,000 customers annually. *Id.*

In New York City, RATP started double decker tour operations under its worldwide "Open Tour" name on May 14, 2014, with at least eight buses. *Id.* ¶¶ 77-78. RATP indicates it plans to operate fifteen buses in 2014 and thirty-two in 2015. *Id.* ¶ 79. RATP indicates its service features forty stops with buses arriving in ten-to-fifteen minute intervals. *Id.* ¶¶ 80-82. It anticipates serving 200,000 customers in its first year. *Id.* ¶ 84. RATP CEO, François Xavier Perin, said the company's New York launch "will develop as a jewel in the crown for our group, and an area for growth that will set us apart from the competition." *Id.* ¶ 83.

5. The 2014 Bus Tour Season—What's Happening on the Streets Today

Fact discovery in this case closed January 3, 2014. Since that time, Big Bus and RATP have begun operations in New York City. To gather evidence regarding current market conditions, Twin America hired an independent survey firm to count the current ridership among the five double decker bus tour operators in New York City. *Id.* ¶ 99. In May and June 2014, the survey counted the number of buses being operated, and passengers carried, by the five current double decker tours—Big Bus, GO New York, Open Tour (RATP), Skyline and Twin America (Gray Line and CitySights) —at a prime tourist location, Battery Park. *Id.* ¶¶ 99-103. The survey indicates the four new entrants currently account for approximately 40% of passengers on the double decker tours. *Id.*[4]

[4] The Government has no evidence regarding the scale of entry in 2014, nor has it sought to discover, determine or assess this important fact.

II. THE LEGAL STANDARDS FOR SUMMARY JUDGMENT IN THIS CASE

A. Summary Judgment Standards

To survive summary judgment, the Government must produce evidence sufficient to sustain a verdict on each and every element of its claims. Summary judgment is used "to isolate and dispose of factually unsupported claims . . . particularly in the antitrust context." *Tops Mkts., Inc. v. Quality Mkts., Inc*., 142 F.3d 90, 95 (2d Cir. 1998) (citations omitted). "In the context of antitrust cases . . . summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces. Although all reasonable inferences will be drawn in favor of the non-movant, those inferences must be reasonable in light of competing inferences of acceptable conduct." *Pepsico, Inc. v. Coca-Cola Co*., 315 F.3d 101, 104-05 (2d Cir. 2002) (citations omitted). "[T]he burden on the moving party may be discharged by showing—that is pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case. When the moving party meets this burden, the burden shifts to the nonmoving party to come forward with specific facts showing that there is a genuine issue for trial." *Id.* at 105 (citations omitted); Fed. R. Civ. P. 56(e).

The Government "must do more than simply show that there is some metaphysical doubt as to the material facts." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997) (citations omitted). Rather, the Government must show that the record taken as a whole could lead a rational trier of fact to find in its favor at trial. If the Government fails to make such a showing, then summary judgment is appropriate. *Id.*

B. The Elements the Government Must Prove in Its Merger Challenge

The Government alleges violations of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1.[5] Section 7 prohibits mergers whose effect "may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. Section 1 prohibits contracts, combinations, or conspiracies "in restraint of trade." 15 U.S.C. § 1.

To prevail on either claim in this case, the Government must prove Twin America created a company that has new anticompetitive "power" in the alleged market—typically called "market power"—defined as the ability to raise price above competitive levels or exclude competitors. *Pepsico*, 315 F.3d at 107-108; *Syufy*, 903 F.2d at 664, 671; *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) ("Substantial competitive harm is likely to result if a merger creates or enhances 'market power,' a term that has specific meaning in antitrust law").[6]

III. ENTRY DEFEATS THE GOVERNMENT'S CASE IN ITS ENTIRETY

A. The Government Cannot Meet Its Burden To Prove Market Power Because It Cannot Prove That Barriers to Entry Exist in the Alleged Market

"Market power can persist only when entry barriers—market circumstances, governments, or the defendants—block rivals' entry or expansion. And the lack of significant entry barriers can defeat a monopolization claim, even in the fact [sic] of a defendant's high market share." *Emigra Group, LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F.

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[5] The NYAG's state law antitrust claims, under the Donnelly Act and the New York Executive Law, are predicated on the alleged federal antitrust violations. *See* Compl. ¶ 14.

[6] Although the Government's complaint contains a separate count for violation of Sherman Act Section 1, a rule of reason standard still applies to a merger challenge consistent with Clayton Act Section 7. *See Tops Mkts.*, 142 F.2d at 96. To establish an "unreasonable restraint of trade" under the "rule of reason," the Government must prove the merger had "an ***actual*** adverse effect on competition as a whole in the relevant market," which "significantly" restricts other competitors' ability to enter the alleged market. *Clorox*, 117 F.3d at 56, 59-60 (emphasis in original). If the conduct at issue "[does] not infringe upon the stiffer standards of anti-competitiveness under the Clayton Act, [it] will also be lawful under the less restrictive provisions of the Sherman Act." *Barr Labs. v. Abbott Labs.*, 978 F.2d 98, 110 (3d Cir. 1992).

Supp. 2d 330, 362 (S.D.N.Y. 2009). Absent barriers to entry, a large market share is meaningless and without effect. *See Tops Mkts.*, 142 F.3d at 99 (rejecting claim of market power despite market share of over 70%; "[w]e cannot be blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry"); *Clorox*, 117 F.3d at 59 ("even if true," a 70% share in one alleged market and over a 90% share in another alleged market, "does not establish that the restrictions in the [agreement] violate Section One. The agreement simply does not significantly restrict [plaintiff's], or other competitors', ability to enter these alleged markets"); *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993) (100% market share did not equate to "power to control prices or exclude competition in the absence of any evidence that it could prevent entry of other market participants"); *Baker Hughes*, 908 F.2d at 987 ("In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time"); *Syufy*, 903 F.2d at 664 n.6 ("where entry barriers are low, market share does not accurately reflect the party's market power"); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986) (high market share does not signify market power where barriers to entry are low); *United States v. Consol. Foods Corp.*, 455 F. Supp. 108, 118 (E.D. Pa. 1978) ("High concentration ratios are not regarded as significant . . . in the absence of high barriers to entry").

A "total lack of entry barriers" is determinative of the market power question. *See Syufy*, 903 F.2d at 671 n.21 ("Because others easily could (and did) enter the market successfully, Syufy lacked the ability to maintain [market] share, the power to control prices, [and] the capability of excluding competitors") (citations omitted).

The Government alleged the following three entry barriers to support its pleading: (1) buses; (2) brand recognition; and (3) bus stops. Compl. ¶¶ 52, 53, 54. The undisputed facts

demonstrate these alleged barriers to entry have not prevented new double decker tour bus services from starting and operating in New York City.

1. Buses

The undisputed facts show that buses are not an entry barrier:

GO NY CEO ASEN KOSTADINOV

GO Dep. 309:4-13, Fretto Decl. Ex. 17.

Id. at 312:6-19.

SKYLINE INVESTOR-OWNER WALTER THREADGILL

Skyline Dep. 45:11-24, Fretto Decl. Ex. 21.

Id. at 214:23-215:4.

[redacted]

56.1 Stmt. ¶ 68, Fretto Decl. Ex. 32.

OPEN TOUR

Open Tour began offering double decker tours on or before May 14, 2014—only thirty-seven days ago with at least eight buses. 56.1 Stmt. ¶¶ 77-78. There is no evidence to suggest RATP, self-described as one of the largest transportation companies in the world, has had any difficulty acquiring buses.

2. Brand

Likewise there is no evidence to support the Government's allegation that brand recognition bars a new double decker tour business in New York City. The Government's allegation in this regard ignores the fact that CitySights entered the business with zero brand history. *See id.* ¶ 6. There is no evidence anything is different today. Brand recognition posed no obstacle to GO, which successfully captured [redacted] of the alleged market in its first full season of operation with zero brand history. *See id.* ¶ 93. And after full discovery, the Government did not identify evidence that brand recognition prevented entry. *See* Gov't ROG Resp. Nos. 2 and 8, Fretto Decl. Ex. 65.

Reputation, moreover, according to the Second Circuit, is the natural result of competition rather than an impediment to competition. *Waste Mgmt.*, 743 F.2d at 984 ("The

government argues that consumers may prefer WMI's services, even at a higher price, over those of a new entrant because of its 'proven track record.' We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition"). The Ninth Circuit has gone so far as to foreclose reputation as an entry barrier altogether. *See, e.g., Am. Prof'l Testing Serv. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns*, 108 F.3d 1147, 1154 (9th Cir. 1997); *Syufy*, 903 F.2d at 669; *Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997).

The undisputed record here, moreover, shows entry by three "famous" brands in any event: Big Bus; RATP's Open Tour; and Skyline. Big Bus and RATP's Open Tour are arguably more established in double decker tours than either Twin America's Gray Line or CitySights brands. Big Bus, for example, [redacted] 56.1 Stmt. ¶ 59.

3. Bus Stops

The New York City Department of Transportation ("NYCDOT") bus stop approval process cannot be considered a barrier to entry absent evidence the regulations have deterred incentives to enter the business. *See Barr Labs. v. Abbott Labs.*, 978 F.2d 98, 113-14 (3d Cir. 1992). As the Third Circuit held in *Barr*, a government regulation is not an insurmountable barrier to entry so long as it does not change entrants' ***incentives*** to enter; incentives to enter remain unchanged where entrants continue to "***base their decisions regarding entry to a new market on nonregulatory [business] considerations, including their financial capabilities,***

***long-range goals, production and distribution costs, and profit projections*[.]"** *Id.* at 113 (emphasis added).

Barr was an antitrust case requiring proof of a relevant antitrust market and entry barriers just like this Government merger challenge. Barr alleged that Abbott possessed "market power" based on a high market share and a significant barrier to new entry: requisite federal Food and Drug Administration (FDA) approval. *Id.* at 112-13.

The Third Circuit held that FDA approval did not alter incentives to enter the business, and therefore, did not amount to a high entry barrier. *Id.* at 113. Accordingly, the Third Circuit held Abbott did not possess market power, affirming summary judgment. *Id.* at 114; *see also Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 855 (9th Cir. 1995) (FDA approval "hardly rises to such a level" as to suppress or destroy competition: "[s]uch things constitute costs, obviously, but they are not barriers to market entry").

In New York City, anyone may apply for bus stops. Once the NYCDOT Bus Stop Management Office receives a completed application, it will evaluate the bus stops requested. A completed bus stop application requires information about the service, proof of certification with the Department of Consumer Affairs, vehicle inspection and insurance, the address of the bus stops requested with alternative locations, and the applicant's anticipated pick-up, drop-off schedule. 56.1 Stmt. ¶ 20.

Critically here, the undisputed fact that four companies ***have entered***, including two of the largest in the world, conclusively demonstrates that ***whatever the New York City regulations, those regulations do not and did not impact incentives to enter the Government's alleged market***. GO, Skyline, Big Bus and RATP all understood that they would need to apply through NYCDOT for stops. That consideration did not change their decision to enter.

Big Bus, the most recent entrant and arguably the most experienced in fifteen other cities around the world, including five other cities in the U.S., [redacted] *Id.* ¶ 61. [redacted] *Id.* ¶ 64.

Nor did the bus stop authorization process deter GO or Skyline from entering the Government's alleged antitrust market and capturing almost immediately [redacted] of the ridership according to the Government's own expert. *See id.* ¶ 92.

Consistently, the Director of NYCDOT's Bus Stop Management Office, Tajinder Jassal, testified that there is not now, nor has there ever been, a moratorium on bus stops or a policy against granting bus stop authorizations. *Id.* ¶ 23. RATP's most recent entry underscores the point. With full knowledge of the Government's allegations concerning a purported bus stop entry barrier, it launched a competing double decker bus tour on May 14 advertising forty stops. *Id.* ¶¶ 77, 81.

Bus stops, in short, have not prevented four new double decker bus tour operators from entering the Government's alleged market. The fact of entry here by four companies shows that bus stops have not changed incentives or the ability to enter the business; bus stops, therefore, are not entry barriers as a matter of law.

Nor are bus stops an entry barrier in fact. The Government alleges that "the majority of bus stops at major tourist destinations . . . have been denied, including stops at top attractions such as the Empire State Building, Times Square, Macy's, the World Trade Center site, and Battery Park." Compl. ¶ 52. The Government's expert report adds Central Park and Rockefeller Center to that list. Pittman Report ¶ 154, Fretto Decl. Ex. 55. These allegations did not survive the undisputed record that developed.

All the new entrants have stops in these locations:

- Skyline has at least nineteen NYCDOT authorized bus stops with, as of February 2014, approval of three additional bus stops. 56.1 Stmt. ¶¶ 51, 53-55. ***These approved stops include the same "hot spot" stops that the Government alleged were being denied, in addition to other major New York City attractions: Times Square North; Times Square South; Central Park South; Rockefeller Center; South Street Seaport; and the United Nations.*** *See id.* ¶¶ 51, 53-55.
- GO has at least thirteen bus stops authorized by NYCDOT. *Id.* ¶ 35. GO has ***two bus stops in Times Square (Times Square North; Theater District) and stops at Rockefeller Center, Central Park, Chinatown, South Street Seaport and Columbus Circle***, to name a few. *Id.*
- Big Bus has twenty-three stops, including stops at ***all*** these locations, as part of the Big Taxi acquisition. *Id.* ¶¶ 62-63.
- RATP likewise is advertising ***forty stops***, including according to its website, stops at all these locations. *Id.* ¶ 80. RATP's CEO described its routes:

> Since May 14, 2014, RATP Dev has been offering two tourist routes, one North Manhattan and the other in South, with roughly 40 stops in all, serving the most emblematic sites and districts in New York, such as Times Square,

> Broadway and the Empire State Building. The two tourist routes are handled by 15 buses running every day, every 15 minutes, from 8 a.m. to 9 p.m.

Id. ¶ 81.

Again the testimony of Tajinder Jassal makes the point. While explaining that the City's increasing congestion has made the bus stop approval process more challenging, Mr. Jassal testified that the NYCDOT understands new entrants operating hop-on, hop-off bus tours have been applying for stops around the major attractions, or as Mr. Jassal testified, "hot spots." *Id.* ¶ 22. And he testified that it is NYCDOT's goal to assist these new entrants and find sufficient bus stops for their services in and around those major attractions. *Id.* Given the advertised routes by all four new entrants, it appears the NYCDOT's efforts have been successful. *See* Exhibits A - D (GO, Skyline, Big Bus and Open Tour brochures containing route maps).

The Government also alleges that bus stops alone are insufficient and that an entrant must have stops within a certain distance from every top attraction. The Court should reject the Government's invitation for the Court to substitute its judgment for the judgment of the marketplace. The Second Circuit in *Tops Markets* held that courts should not parse nuanced quality-of-entry arguments, but instead it is the ***fact*** of entry that matters. 142 F.3d at 96-97. Tops sought to enter the supermarket business in Jamestown, New York. It argued that Quality Market's purchase of a particular lot created a barrier to entry, contending that specific site was necessary for it to compete. Affirming the district court's grant of summary judgment in favor of Quality, the Second Circuit held that Tops' inability to open its market on a particular lot did not amount to an entry barrier:

> We find particularly significant Wegmans' subsequent acquisition of land . . . on a different site, which demonstrates the absence of geographic barriers preventing competitors from entering the

> Jamestown area. ***Within one year after opening, Wegmans captured approximately 26 percent of the Jamestown market.***

Id. at 97 (emphasis added).

Just as the Second Circuit in *Tops Markets* found Wegmans' 26% market share in one year persuasive, in an industry where supermarkets compete for geographic location, GO's ability to run a profitable operation and capture [redacted] of the Government's alleged double decker bus tour market in its first year of operation is equally dispositive. *See* 56.1 Stmt. ¶¶ 39, 93. It demonstrates the fact of entry is sufficient to show that, as a matter of law, the number and quality of designated bus stops were not barriers.

The Ninth Circuit, in *United States v. Syufy*, reached the same conclusion in another merger case. 903 F.2d at 666. Syufy, a movie theater operator, entered the Las Vegas market and over the next several years acquired its three primary competitors, leaving only one small exhibitor to compete for first-run films in Las Vegas. *Id.* The DOJ brought suit against Syufy alleging that as the dominant player, Syufy would be able to dictate price to movie distributors. *See id.* at 669. Further, the DOJ argued that the presence of Syufy as an efficient, aggressive market incumbent was a structural barrier to entry: "According to the government, competitors will be deterred from entering the market because they could not hope to turn a profit competing against Syufy." *Id.* at 667. The district court found in favor of Syufy, and the DOJ appealed. *Id.* at 661.

The Ninth Circuit acknowledged that Syufy's acquisitions eliminated competitors, but held the fact unimportant given the market's lack of entry barriers. *Id.* at 664. To resolve the matter, the Ninth Circuit asked whether the situation in *Syufy* was the type "where market forces [were] likely to cure the perceived problem" or whether "barriers [had] been erected" such that "the problem is not likely to be self-correct[ed]." The court found that Syufy's acquisitions

"[did] not necessarily indicate foul play." *Id.* at 663-64. With the entry of Roberts/United Artists, a new competitor, the court held that the market share numbers "reveal[ed] that Roberts/UA has steadily been eating away at Syufy's market share: In two and a half years, Syufy's percentage of exclusive exhibition rights dropped 52% and its percentage of box office receipts dropped 18%." *Id.* at 666.

Thus, the Ninth Circuit held that the district court "had ample basis in the record for its finding that Syufy lacked the power to exclude competitors." *Id.* at 669; *see also Barr Labs.*, 978 F.2d at 113-14 ("we think the continued entry of competition, albeit with small initial market share shown on this record, indicates that Abbott's position is subject to significant potential erosion. . . . Here . . . the evidence established that whatever barrier to entry FDA approval for new products poses, that barrier is not insurmountable"); *Waste Mgmt.*, 743 F.2d at 981-84 (ease of small scale entry negated likelihood of anticompetitive effects).

Here, actual undisputed entry by four double decker bus tour companies immediately "eating away at" Twin America's alleged market share tells the same tale. The Government's own expert has admitted that the assets held by GO and Skyline enabled them to capture [redacted] of the Government's alleged market by Summer 2013. 56.1 Stmt. ¶ 92. And, based on current market observations, with the addition of Big Bus and RATP to the mix, the new entrants have grown to approximately 40% of the count today. *Id.* ¶¶ 99-103.

B. Threat of Entry Also Defeats Any Notion of Market Power—The Very Entrants Twin America Anticipated Entering Did in Fact Enter

Courts have consistently held "a firm that ***never*** enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the ***threat*** of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs." *Baker Hughes*, 908 F.2d at 988 (emphasis in original).

In *Baker Hughes*, a Section 7 case, the DC Circuit held "a number of firms competing in Canada and other countries had not penetrated the United States market, but could be expected to do so if Tamrock's acquisition of Secoma led to higher prices. . . . [T]hese firms would exert competitive pressure on the United States HHUDR market even if they never actually entered the market." *Id.* at 988-89 (internal citations omitted).

Consistently, in *United States v. Waste Management*, the Second Circuit reversed a district court's ruling that Waste Management's acquisition of EMW Ventures violated Clayton Act Section 7. The Second Circuit held "[because] potential entry into the relevant Dallas market by new firms or by firms now operating in Fort Worth is so easy as to constrain the prices charged by [Waste Management], we reverse on the grounds that the merged firm does not substantially lessen competition." 743 F.2d at 979.

The factual circumstances in *Waste Management* were not so different than the facts here. The court found that over the last ten years a number of companies had entered, a few growing substantially through good service and the result of acquiring other companies, but the "majority of new entrants have either remained relatively small or disappeared[.]" *Id.* at 982. The court looked to companies outside of Dallas concluding that, for example, a Fort Worth company could bring their trucks to Dallas if Waste Management's prices rose above competitive levels. The Second Circuit held the market share deemed illegal by the district court "d[id] not accurately reflect future market power." *Id.* at 984.

The same threat of entry the D.C. Circuit in *Baker Hughes* and the Second Circuit in *Waste Management* found persuasive is present here. Twin America's own documents showed from the instant of the merger, as immediately as June and July 2009, and continuing throughout 2010 and 2011, Twin America believed that Big Bus or another new company was planning to

enter New York City. 56.1 Stmt. ¶¶ 85-87. And of course this year, Big Bus did. So did RATP. On top of actual entry a year earlier by GO and Skyline. The actual entry that has occurred underscores the conclusion that the threat of entry was real in this case and operated at all times to prevent the creation of any market power.

C. Actual Entry Also Vitiates the Government's Request for Injunctive Relief To Dissolve the Merger More than Five Years After It Took Place

Entry of four new double decker tour operators in New York City also nullifies the Government's request for injunctive relief dissolving Twin America. A proper remedy analysis looks first to the current state of competition in New York City, not the past period defined by the Government's Complaint. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, § 325c (2014). "For example, the defendant's market share may have been 70 percent when the trial record was made but, owing to unforeseeable events, may have fallen to 40 percent by the time the decree is to be entered. A decree necessary to make a dominated market competitive would likely be excessive or unjustified if the defendant is no longer a dominant firm." *Id.*; *see United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) (holding the purpose of an antitrust remedy is to "restore competition" as "[c]ourts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive").[7]

It is clear that Twin America no longer holds 99% of the alleged relevant market that the Government asserted in its Complaint. Indeed, based on the entry record described above, the Government has admitted that:

[7] Indeed, in *United States v. Blue Cross Blue Shield of Michigan*, the DOJ recognized that changed circumstances can lead to injunctive relief no longer being necessary. *See* No. 10-cv-14155, Dkt. No. 246, Stip. Motion and Brief to Dismiss (E.D. Mich. Mar. 25, 2013). In that case, the DOJ dismissed its action challenging Blue Cross Blue Shield's use of most favored nation clauses after the Michigan legislature banned such clauses. *See id.* ("[t]he parties have conferred and agree that the injunctive relief sought by the United States of America and State of Michigan . . . is now unnecessary").

- There are currently more companies operating hop-on, hop-off bus tours in New York City than there were in 2008. Gov't RFA Resp. No. 17.
- Between January 1, 2012 and August 2013, Twin America's share of the Government's alleged relevant market of hop-on, hop-off bus tours in New York City decreased, whether measured in terms of unit sales or revenues. Gov't RFA Resp. No. 28.
- Between FYE 2012 (April 2011-March 2012) and FYE 2013 (April 2012-March 2013), Twin America's operating margins decreased. Gov't RFA Resp. No. 29.
- Based on data from June to August 2013, GO and Skyline alone had acquired a [redacted] share of the Government's alleged market of hop-on, hop-off bus tours in New York City. *See* 56.1 Stmt. ¶ 92; Gov't RFA Resp. Nos. 21-23.

An independent survey firm Defendants retained to observe current market conditions corroborates these undisputed facts. *See* 56.1 Stmt. ¶¶ 99-103. Over five days, the survey counted Twin America carrying approximately 60% of all passengers, and the new entrants carrying approximately 40% of passengers, at a key New York City attraction, Battery Park. *Id.*[8]

The Herfindahl-Hirschman Index ("HHI"), a measurement of market concentration the Government cites in its Complaint, sings the same song. HHI is a mathematical formula the government uses to determine market concentration in merger analysis. Pittman Report ¶ 131. The Government's expert, Dr. Pittman, calculates the pre-merger HHI to be [redacted]. Relying on this same data, the Summer 2013 HHI is [redacted], showing the level of concentration in the Government's alleged market had [redacted]. The HHI today, based on the survey observations, is 4,148—[redacted] Dr. Pittman's calculated pre-merger HHI. 56.1 Stmt. ¶ 103.

A structural remedy is unnecessary where, as here, the current state of competition is the same if not now more competitive than it was prior to the 2009 merger.

[8] The percentages of buses operated by these companies averaged 64% for Twin America and 36% for the new entrants over the five days at Battery Park. *See* 56.1 Stmt. ¶¶ 99-103.

IV. THE GOVERNMENT HAS NOT ESTABLISHED A BASIS FOR ITS DISGORGEMENT CLAIM IN THIS CASE

The Government claims to be seeking injunctive and other equitable relief under the following *federal* statutes: Sections 15 and 16 of the Clayton Act and Section 4 of the Sherman Act (based on Defendants' alleged violation of Section 7 of the Clayton Act and Section 1 of the Sherman Act). The Government also claims to be seeking injunctive and other equitable relief under the following *state* statutes: Section 342 of the Donnelly Act (based on Defendants' alleged violation of Section 340 of the Donnelly Act); and Section 63(12) of the New York Executive Law predicated on the foregoing alleged violations. Compl. ¶ 13-14.

After the Government filed suit, private plaintiffs seeking to represent a class of purchasers instituted "copycat" civil class action lawsuits challenging the March 2009 merger. 56.1 Stmt. ¶ 117. That consolidated case, also pending before this Court, asserts causes of action that are coextensive with the Government's claims, with the addition of a claim under Section 2 of the Sherman Act. *Id.* ¶¶ 118-119. The private class action case has settled, pending approval by the court, through creation of a $19 million dollar fund for payments to consumers, with any remainder left in the fund transferring to the Government once all claims and costs associated with the settlement are paid. *Id.* ¶¶ 124-126.

As discussed in the following sections, in the absence of express statutory authority, the remedy of disgorgement is premised on the court's inherent equitable powers. The statutes the Government asserts in the Complaint do not expressly include disgorgement as a remedy for an antitrust violation. Further, disgorgement is not appropriate as an equitable remedy on the factual record of this antitrust merger case, particularly where a private lawsuit has led to a proposed settlement that would provide substantial compensation to consumers.

A. The Government Does Not Have Explicit Statutory Authority To Seek Disgorgement

1. The DOJ Does Not Have Explicit Statutory Authority To Seek Disgorgement

Under Section 15 of the Clayton Act, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4, the United States is limited to instituting actions "to prevent and restrain violations" of the antitrust laws. In the merger context, the classic relief the United States typically seeks under these statutes is prospective injunctive relief aimed at remedying any anticompetitive effects that may flow from a merger.

Importantly, neither statute that the United States asserts expressly gives the United States the power to seek monetary relief like disgorgement or restitution, remedies that are aimed at addressing retrospective harm that may have occurred because of a violation of the law. Instead, the antitrust laws protect these interests through private rights of action that provide for recovery of treble damages. Indeed, the DOJ has never sought or obtained disgorgement in a contested merger matter under the federal antitrust statutes. The DOJ sought disgorgement for the first time in 2010, in an agreed upon consent decree, relying on the equitable powers of the court (not the express language of the Sherman Act). *United States v. Keyspan Corp*., 763 F. Supp. 2d 633 (S.D.N.Y. 2011); *see also United States v. Morgan Stanley*, 881 F. Supp. 2d 563 (S.D.N.Y. 2012) (companion consent decree).

Notably, the Second Circuit has recognized the distinction between a Government claim for permissible prospective injunctive relief, on the one hand, and impermissible retrospective monetary relief, on the other, in the context of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961. Specifically, the Second Circuit held that disgorgement is only available under RICO in the limited circumstance where the disgorgement order is "designed to ***'prevent and restrain'*** future conduct rather than to punish past conduct."

United States v. Sasso, 215 F.3d 283, 290 (2d Cir. 2000) (emphasis added). This same "prevent and restrain" language in the RICO statute, heavily modeled on the antitrust laws, is in the Sherman Act, the Clayton Act and the Donnelly Act.

2. The State of New York Does Not Have Explicit Statutory Authority To Seek Disgorgement

Under Section 16 of the Clayton Act, 15 U.S.C. § 26, the State of New York is "entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." This statute authorizes only prospective equitable relief, not relief to address past harm, such as disgorgement. *See In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 233-34 (9th Cir. 1976) ("§ 16 does not allow the claimed relief for past [monetary] loss" by the states); *Coal. for ICANN Transparency Inc. v. VeriSign, Inc.*, 771 F. Supp. 2d 1195, 1202 (N.D. Cal. 2011) ("Disgorgement is a form of retrospective equitable relief. Such relief is unavailable under Section 16") (internal citations omitted); *cf. In re TFT-LCD (Flat Panel) Antitrust Litig.*, 787 F. Supp. 2d 1036, 1040 (N.D. Cal. 2011) (plaintiff states withdrew request for disgorgement).

Nor can the State obtain disgorgement under the Donnelly Act. Section 342 of that Act provides that "[t]he attorney-general may bring an action . . . against any person . . . to restrain and prevent the doing in this state of any act herein declared to be illegal. . . . In such an action, the court may award to the plaintiff a sum not in excess of twenty thousand dollars as an additional allowance." Thus, the remedies the State of New York may seek under the Donnelly Act do not include equitable monetary relief.

The only other statute the State of New York asserts as a basis for its claim for equitable monetary relief—New York Executive Law 63(12)—makes no allowance for disgorgement under the plain language of the statute. Instead, that statute provides that the NYAG can only

sue for an order "*directing restitution and damages*"—and then only when a party has "engage[d] in repeated fraudulent or illegal acts or otherwise demonstrate[d] persistent fraud or illegality in the carrying on, conducting or transaction of business."

The New York Appellate Division recently held that the NYAG could seek disgorgement to remedy securities fraud violations in a case involving the Martin Act and Executive Law 63(12). *See People v. Ernst & Young, LLP*, 980 N.Y.S.2d 456, 457 (N.Y. App. Div. 2014). Importantly, in *Ernst & Young*, the court determined that disgorgement was an appropriate remedy in that case "where . . . there [wa]s a claim based on ***fraudulent activity***." *Id*. at 457; *see also id.* (disgorgement prevents the retention of "ill-gotten gains from ***fraudulent conduct***") (emphasis added). The underpinning to the disgorgement holding in this securities case is ***fraud.*** Here, the NYAG has admitted that Defendants did not engage "in repeated fraudulent acts" or "demonstrate[] persistent fraud" in operating Twin America. Gov't RFA Resp. Nos. 47-49.

The New York Court of Appeals has not decided whether Executive Law 63(12) should be extended to allow the NYAG to seek disgorgement in an antitrust matter asserting claims under the Donnelly Act.[9] And, several of New York's lower courts have read the plain language of Executive Law 63(12) to reach the conclusion that the Executive Law does ***not*** permit disgorgement. *See, e.g., People v. Direct Revenue, LLC*, 862 N.Y.S.2d 816, 816 (N.Y. Sup. Ct. 2008) ("while the Executive Law . . . permit[s] monetary relief in the form of restitution and damages to consumers, the statute[] do[es] not authorize the general disgorgement of profits received from sources other than the public"); *People v. AGIP Gas, LLC*, No. 13-11907, 2013

[9] In *People v. Applied Card Sys., Inc*., 894 N.E.2d 1, 14 n.17 (N.Y. 2008), which involved a fraudulent and deceptive credit card solicitation scheme under New York's General Business Law and Executive Law 63(12), the Court of Appeals stated *in dicta* that the NYAG "might be able to obtain disgorgement" but that "it would be inappropriate for us to" grant such relief given that no such relief was granted by the Supreme Court. *Id.* at 14 n.17.

N.Y. Misc. LEXIS 5129, at *12 (N.Y. Sup. Ct. Oct. 18, 2013) ("The petitioner's further request for disgorgement of profits obtained by the respondent through its illegal acts is denied as well. While . . . *Executive Law § 63 (12)* authorize[s] the granting of restitution to aggrieved consumers . . . [it] make[s] no provision for disgorgement of profits to the State").

3. The State of New York's Claim Under Executive Law 63(12) Is Barred by the Statute of Limitations

Even if the Court were to determine that the State of New York's claim for disgorgement could proceed under Executive Law 63(12), that claim is barred by the statute of limitations. In New York, the statute of limitations for any action "to recover upon a liability, penalty or forfeiture created or imposed by statute" is three years. N.Y. C.P.L.R. § 214(2). This three-year statute of limitations applies to causes of action "where liability would not exist but for a statute." *Gaidon v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 1082 (N.Y. 2001).

Accordingly, Executive Law 63(12) is governed by a three-year statute of limitations pursuant to N.Y. C.P.L.R. § 214(2), unless common law fraud has been alleged, a situation not present here. *See State v. Daicel Chem. Indus., Ltd.*, 840 N.Y.S.2d 8, 11-12 (N.Y. App. Div. 2007) (Executive Law § 63(12) claim "w[as] properly found to be time-barred by the three-year statute of limitations (CPLR 214 [2])" where no common law fraud alleged); *People v. Pharmacia Corp.*, 895 N.Y.S.2d 682, 686 (N.Y. Sup. Ct. 2010) ("An examination of plaintiff's complaint reveals that the State's allegations fall well short of alleging fraud actionable at common law. . . . Under these circumstances, plaintiff's Executive Law § 63(12) claim is governed by the three-year limitations period set forth in CPLR 214 (2)"); *cf. People v. Trump Entrepreneur Initiative LLC*, No. 451463/13, 2014 WL 344047, at *1 (N.Y. Sup. Ct. Jan. 30,

2014) (applying six-year limitations period because fraud asserted was essentially common-law fraud) (citing *State v. Cortelle Corp*., 341 N.E.2d 223 (N.Y. 1975)).[10]

"In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief." *Gaidon*, 750 N.E.2d at 1083. When the parties merged in March 2009, the State of New York was aware of "all of the factual circumstances necessary to establish a right of action." The State of New York was certainly aware when it issued subpoenas to Defendants in July and early August 2009. Compl. ¶ 37. Yet, the Government waited more than three years after that—until December 11, 2012—to file its lawsuit. Because the State of New York's claim under the New York Executive Law is time-barred, the State cannot seek disgorgement pursuant to that statute.

B. The Undisputed Facts of This Case Demonstrate that Disgorgement Is Not an Appropriate Remedy

Without explicit statutory authority to seek disgorgement, the Government is left to call upon the inherent equitable powers of the Court to award disgorgement in this case. The posture and facts of this merger case do not warrant the Court's consideration of disgorgement.

1. Disgorgement Should Not Be Awarded Where Injunctive and Private Relief Are Otherwise Available

This merger case bears no resemblance to *United States v. Keyspan,* the only matter where the DOJ has sought disgorgement to remedy an antitrust violation.[11] In that matter, the

[10] Also citing *Cortelle*, the court in *State v. Feldman* stated that Executive Law 63(12) was subject to a six-year statute of limitations with no further discussion. No. 01-civ-6691, 2003 WL 21576518, at *4 (S.D.N.Y. July 10, 2003).

[11] In the *Keyspan* matter, as is customary in a settlement, the DOJ initiated the case by filing the complaint, the consent decree and the proposed final judgment at the same time. Thus, the matter was only before the court to seek approval of the consent decree under the Tunney Act procedures, which require a district court to consider whether an antitrust consent decree is in the (continued…)

DOJ asserted that Keyspan, an electricity generator, manipulated New York City electricity prices through a swap agreement in violation of § 1 of the Sherman Act. 763 F. Supp. 2d at 635. Specifically, the DOJ maintained that the swap agreement provided Keyspan with an indirect financial interest in the sale of electricity generating capacity by its largest competitor. *Id.* The DOJ claimed that financial interest obviated Keyspan's need to bid competitively during the sale of its own electricity generating capacity at auction, which drove up capacity prices as a whole and increased the cost of electricity to consumers in New York City. *Id.*

The DOJ sought disgorgement as part of its settlement of the case because the filed-rate doctrine, which bars suits against rates charged by regulatory utilities, would likely have prevented any private actions. *Id.* at 643. According to the DOJ: "[a]bsent disgorgement, KeySpan would be likely to retain all the benefits of its anticompetitive conduct. A private lawsuit for damages against KeySpan would face significant obstacles imposed by the filed rate doctrine." *United States v. Keyspan Corp.*, No. 10-cv-1415 (S.D.N.Y.), Competitive Impact Statement at 9 (Dkt. No. 3) ("CIS"). The DOJ noted that "[t]he filed rate doctrine also makes it unlikely that disgorgement will lead to duplicative monetary remedies." *Id.* Further, the DOJ stated that injunctive relief would not be an effective remedy in that case because the specific anticompetitive agreement at issue had expired, and the conduct was unlikely to recur. *Id*.

On these bases, the court approved the consent decree in *Keyspan*, drawing on notions of the court's inherent equitable power: "[d]isgorgement is particularly appropriate where, as here, the anticompetitive conduct in question has ceased. As discussed below, this Court defers to the

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public interest. 763 F. Supp. 2d at 637-38. As the court in *Keyspan* recognized, the court's role on such review is "limited" and a "'narrow one'" requiring "'due respect to the [government's] perception of its case.'" *Id.* Indeed, the final judgment that the court entered in Keyspan noted that it was "without trial or adjudication of any issue of fact or law." *Simon v. KeySpan Corp.*, 694 F.3d 196, 200 (2d Cir. 2012).

Government's conclusion that restitution—*i.e.*, making New York City consumers whole—is likely unavailable. Further, the Swap has expired and, unlike many other antitrust actions, there are no assets to be divested. Thus, 'the exigencies of [this] case' are that, absent disgorgement, the Government is without recourse to remedy Keyspan's anticompetitive conduct." *Keyspan*, 763 F. Supp. 2d at 640. Each of these circumstances is present in this merger case, negating the need for the Government's request for disgorgement.

2. A Government Claim for Disgorgement Should Fail Where a Private Action Obtains Monetary Relief for the Same Alleged Violation

The alternative remedy of a private action is not only available in this case, private plaintiffs pursued a treble damages class action, which the parties resolved with a proposed settlement that includes compensation of $19 million for consumers. 56.1 Stmt. ¶¶ 124-126. None of this amount is permitted to revert back to the Defendants, and instead will revert to the Government if any of the $19 million goes unclaimed. *Id.* ¶ 126.

The Government's claim for disgorgement in this case is coextensive with the relief sought in the private case. The private plaintiffs asserted claims on behalf of consumers that allegedly were "overcharged" based on list price increases that Defendants implemented on their tours in February 2009 and April 2009. *Id*. ¶ 120. Similarly, the Government has focused on the 2009 price increases as the basis for its claim that Defendants have unlawfully profited from the merger. *See id*. ¶ 107. The private action asserted violations that were identical to those asserted by the Government in this action. *Id.* ¶ 117. Thus, given the settlement of that case, the Government does not have a sufficient basis to seek disgorgement under the Court's equitable powers, nor is further disgorgement necessary to serve a deterrent function.

C. The Government Has a Failure of Proof on their Disgorgement Claim

The Government also has failed to produce evidence sufficient to support its disgorgement claim. The Government would need to show that Defendants had gained "improper" profits flowing from the conduct challenged in the Complaint that exceed the $19 million settlement in the private case (plus the other costs incurred by Defendants in the investigations and litigations). The Government has failed to provide adequate support for *any* disgorgement amount above the $19 million settlement fund.

The Government has the burden of "producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain." Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) (2011). The amount of disgorgement is limited to "the net profit attributable to the underlying wrong." *Id.* § 51(4). The Government has not set forth a reasonable approximation of the profits attributable to Defendants' allegedly wrongful conduct. Such a failure of proof requires dismissal of the Government's disgorgement claim. *See, e.g.*, *People ex rel. Spitzer v. Wever Petroleum, Inc.*, 827 N.Y.S.2d 813, 814 (N.Y. Sup. Ct. 2006) (denying disgorgement petition where the State had not introduced evidence sufficient for the court "to determine an appropriate amount for remittance to the State or restitution to the consumers"); *People ex rel. Spitzer v. My Service Ctr., Inc.*, 836 N.Y.S.2d 487, 487 (N.Y. Sup. Ct. 2007) ("no evidence, *e.g.* invoices or receipts, has been tendered to calculate the amount of excess profits subject to disgorgement").

The NYAG served expert reports from Dr. Ben-Ishai and Mr. Ray that purportedly address the profitability of the merger. Defendants have moved to strike and exclude those opinions by separate *Daubert* motion. For many of the same reasons, the reports demonstrate a failure of proof here:

- First, the Government has not tied its proposed disgorgement amounts to the hop-on, hop-off portion of Defendants' business. The Government has admitted that Twin America receives revenue through sources other than sales of hop-on, hop-off bus tour tickets. Gov't RFA Resp. No. 32. Both experts recognize that the merger generates revenues that have nothing to do with the hop-on, hop-off portion of Defendants' business as well. Yet, both experts admittedly did not adjust their disgorgement amounts to take this fact into account. 56.1 Stmt. ¶¶ 127-128. Courts refuse to award disgorgement when the plaintiff cannot specify what proportion of a defendant's profits is attributable to unlawful versus lawful conduct. *See People ex rel. Vacco v. Appel*, 685 N.Y.S.2d 504, 505 (N.Y. App. Div. 1999) (reversing restitution order because plaintiff offered "no proof regarding what percentage of [the defendant's] revenues is attributable" to the defendant's misconduct); *SEC v. Jones*, 476 F. Supp. 2d 374, 386 (S.D.N.Y. 2007) (dismissing disgorgement claim where SEC failed to offer a "reasonable approximation" of the defendants' gains causally connected to their alleged misconduct).
- Second, the Government has not constructed a "but-for world" that considers whether Defendants would have raised prices in the absence of the merger. "A finding that the defendant would have realized the profit in any event may support a judicial conclusion that principles of unjust enrichment do not require that the profit in question be surrendered to the victim of the wrong." Restatement (Third) of Restitution and Unjust Enrichment § 51, cmt. f. For example, the Government did not examine whether other New York City tourism services also increased their prices from 2009 until today. If

but-for prices would have been as high or higher than prices in the actual world, then no ill-gotten gains flow from the merger.

For these and the additional reasons set forth in Defendants' *Daubert* motions, the Government has not passed their threshold burden to set forth a reasonable approximation of Defendant's alleged "ill-gotten gains" attributable to the conduct the Government is challenging in this case.

D. The Combination of Remedies Sought for the Alleged Violation Is Impermissibly Punitive

Allowing disgorgement on top of the settlement in the private case would also significantly heighten the risk that a disgorgement award in this case would be unduly punitive in nature. The treble damages claims in the private case, which Defendants have resolved, serve a punitive purpose. *See Brown v. Presbyterian Healthcare Servs*., 101 F.3d 1324, 1332 (10th Cir. 1996). Courts do not hesitate to deny disgorgement claims where the claim crosses the line into punitive territory. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 886 F. Supp. 2d 14, 19 (D.D.C. 2012) ("When 'liability for the profits so designated would be unacceptably punitive, being unnecessary to accomplish the object of the disgorgement remedy in restitution,' courts may deny disgorgement, even if some level of attribution exists") (quoting Restatement (Third) of Restitution § 51).

V. CONCLUSION

For the foregoing reasons, Defendants request that the Court grant Defendants' motion for summary judgment on all counts, because the Government cannot meet its burden to prove market power in this case due to low entry barriers. Defendants further ask the Court to grant summary judgment against the Government on the injunctive and equitable monetary relief claimed.

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Respectfully submitted,

s/Michael P. A. Cohen
Michael P. A. Cohen
Amanda L. Fretto
Paul Hastings LLP
875 15th Street, N.W.
Washington, DC 20005
Telephone: (202) 551-1880
Facsimile: (202) 551-0280

For Defendants Twin America, LLC, CitySights LLC, and City Sights Twin, LLC

s/Thomas O. Barnett
Thomas O. Barnett
Andrew D. Lazerow
Ashley E. Bass
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

For Defendants Coach USA, Inc. and International Bus Services, Inc.