UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

Other Authorities

Plaintiff Natasha Bhandari respectfully submits this motion seeking: (i) certification of this action as a class action pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2), and (b)(3); (ii) appointment of Bhandari and Tracey Nobel[1] as class representatives; and (iii) appointment of Susman Godfrey LLP as class counsel pursuant to Fed. R. Civ. P. 23(g).

INTRODUCTION

CitySights and Gray Line operate hop-on, hop-off bus tours in New York City—tours where a consumer can hop on a tour bus, hop off at a stop of interest (such as the Empire State Building) and then hop back on the bus to continue the tour. Before 2009, the two companies were fierce head-to-head competitors: each described the other as its "**sole competitor**," "**main competitor**," or "**biggest competitor**."[2] In 2008, the competitors realized that they could not increase fares without joining forces, and they began discussing a plan to create a joint venture to enable them to "**implement a fare increase of approximately 10%.**" Defendants exchanged memos noting the "benefits" of this plan such as "[e]asier decision making as **sole player in 'double deck' market**," and "**[f]lexibility regarding pricing**." Although they were worried about the obvious antitrust implications—Coach (which operated Gray Line) suggested the competitors falsely tell the public they intended to offer a low-priced service as an "**[a]nti-trust cushion**"—the competitors entered into a joint venture in March 2009. Shortly thereafter, CitySights increased its fares by 10% to match the fare increase Gray Line had put in place in February (after checking with CitySights to make sure their "**Fare Increase**" was "**OK!**"). Consumers immediately felt the impact: Prices increased across the board by about $5 per

[1] Bhandari has written the Court to request a pre-motion conference regarding a motion to amend her complaint to add Tracey Nobel as a plaintiff; should the Court grant this motion, Bhandari requests appointment of Nobel as a class representative as well.

[2] All quotations from documents in this Introduction are cited to their sources in the Statement of Facts below.

ticket.[3] Natasha Bhandari and Tracey Nobel bought several of these tickets and paid the overcharge.[4]

The Sherman Act was enacted to prevent exactly this situation: a sham joint venture between the two biggest head-to-head competitors in a market, formed with the explicit purpose of increasing prices and reducing competition.[5] The federal agency in charge of this industry has **already concluded that defendants' actions were anticompetitive**: the Surface Transportation Board (STB), the agency that approves certain mergers and other transactions between interstate transportation companies,[6] has already adjudicated the joint venture's competitive effect, concluding that "[t]he transaction creates a combined entity that possesses **excessive market power** and has the **ability to raise rates without competitive restraint** . . . ." (Defendants invoked the jurisdiction of the STB in order to avoid antitrust scrutiny from the New York Attorney General's office; the STB noted its concern that the "**Board's processes may have been manipulated to avoid the inquiry by NYAG**.")

This is a case perfectly suited for class certification: anticompetitive conduct proved by common evidence of the competitors' agreement to raise prices, followed by classwide injury and damages as prices increased across the board for hop-on, hop-off tours. Courts routinely certify classes very much like the one here—classes of consumers who paid an overcharge because of defendants' anticompetitive conduct.[7] The Court should do the same.

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[3] *See* Declaration of Dr. Hal J. Singer ("Singer Decl.") ¶¶ 18-20.
[4] *See* Declaration of Natasha Bhandari ("Bhandari Decl.") ¶ 3; Declaration of Tracey Nobel ("Nobel Decl.") ¶¶ 3-5.
[5] *See* 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 901a at 6 (3d ed. 2009) ("[A] series of mergers, virtually monopolizing several leading industries, was primarily responsible for the passage of the Sherman Act.").
[6] *See* 49 U.S.C. § 14303.
[7] *See, e.g.*, *Blessing v. Sirius XM Radio Inc.*, No. 09 CV 10035, 2011 WL 1194707 (S.D.N.Y. Mar. 29, 2011) (certifying class of satellite radio subscribers who paid higher prices after merger of Sirius and XM Radio); *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98 (C.D. Cal. 2007) (certifying class of purchasers of rock concert tickets who paid higher prices because of Clear Channel's anticompetitive conduct); *In re Domestic Air Transp. Antitrust*

STATEMENT OF FACTS

I. CITYSIGHTS AND GRAY LINE WERE THE PRIMARY COMPETITORS IN THE MARKET.

Before the joint venture, CitySights and Gray Line were the two largest providers of hop-on, hop-off bus tours in New York; each company described the other as its "**sole competitor**,"[8] "**main competitor**,"[9] or "**biggest competitor**."[10] The companies competed vigorously and (at times) violently, monitoring and matching discounts,[11] spying on one another with "secret shoppers,"[12] and hustling on-street ticket sales with such force that the police had to break up fights between rival ticket sellers.[13] (A Gray Line ticket seller had to be hospitalized after a particularly violent altercation.)[14] At one point, CitySights hired a "tough guy" attorney to draft a lawsuit against Gray Line because they wanted to "send these guys a message," and "make them shiver."[15] CitySights claimed in the draft complaint that Gray Line threatened to monopolize the "Double Decker, Hop-on, Hop-off Bus Tours Market."[16]

Gray Line was the older and better-established of the two companies; CitySights' draft lawsuit estimated Gray Line's market share at 99% before CitySights' entry.[17] But by 2007, the

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Litig., 137 F.R.D. 677 (N.D. Ga. 1991) (certifying class of airline ticket purchasers who paid higher prices on tickets because of horizontal price-fixing conspiracy at airline hubs).

[8] Declaration of Jordan Connors Ex. 1 (Decl. of Zev Marmurstein in *Private One* ¶ 12 (Doc. No. 24)) (emphasis added).

[9] Connors Decl. Ex. 2 (Compl. ¶ 7 *Private One of New York, LLC v. JMRL Sales & Serv., Inc.*, No. 06-cv-00546 (Doc. No. # 1)) (emphasis added); Connors Decl. Ex. 3 (Answer of Suburban Transit and Coach USA, Inc., in *Private One* ¶ 7) ("Admit . . . that CitySights' main competitor is Gray Line, Inc. . . ."); Connors Decl. Ex. 4 (COACH_DOJ_00003710-23 at COACH_DOJ_00003713) (referring to CitySights as Gray Line's "main competitor").

[10] Connors Decl. Ex. 5 (TWINCLASS0000292-98 ¶27) (emphasis added).

[11] Connors Decl. Ex. 6 (COACH_DOJ_00052527-28) (Gray Line immediately matches CitySights buy one get one free winter special on hop-on, hop-off tours).

[12] Connors Decl. Ex. 7 (COACH_DOJ_00007105-06); *see* Connors Decl. Ex. 8 (COACH_DOJ_00006939-43); Connors Decl. Ex. 9 (COACH_DOJ_00008289-91); Connors Decl. Ex. 10 (COACH_DOJ_00006936-39); Connors Decl. Ex. 11 (COACH_DOJ_00003898-902); Connors Decl. Ex. 12 (E-COA00000011-12).

[13] Connors Decl. Ex. 13 (Marmurstein Invest. 151/22–152/11; 171/4–21).

[14] Connors Decl. Ex. 14 (COACH_DOJ_00006944).

[15] Connors Decl. Ex. 13 (Marmurstein Invest. at 158/6–12; 160/2–7).

[16] Connors Decl. Ex. 15 (COACH_DOJ_00003769–784 ¶ 27) (emphasis added).

[17] *Id.* ¶ 18.

competition had grown intense—CitySights estimated it had captured 20% of the market[18]—and Gray Line started to get nervous. A spring 2007 summary of the "**most significant business risks**" facing the U.S. operations of Coach USA ("Coach") (the company that operated Gray Line in New York City) identified "**Competition**" as a risk with "high" severity, specifically noting the entrance of "a **competitor** in the New York City sightseeing market."[19] Coach wondered whether lower sales in summer 2007 were "**reason for alarm**" due to "**CitySights getting more of a market share**,"[20] and Coach's 2007–8 budget expressed concern that "**CitySights as competition**" constituted a "**Risk**" to revenue.[21] Joint venture discussions in 2007 went nowhere, but in the spring of 2008, Sir Brian Souter, the CEO of the international conglomerate that owned Coach, was "re-considering making an offer to [CitySights]."[22] Dale Moser, Coach's Chief Operating Officer and President, ordered a survey of CitySights' "current market share."[23] The survey results were worrisome: they showed CitySights with "market share" of about 30%[24]—up from the 20% CitySights had estimated just a year earlier. ("Wow," marveled one Coach executive when he learned of CitySights' "big number" for "market share.")[25] Coach re-engaged CitySights with a new "sense of urgency".[26] Sir Brian Souter flew from Scotland to meet with Mark Marmurstein, CitySights' CEO, at the Waldorf-Astoria in New York.[27]

In the summer of 2008, as results from the ordinarily high-revenue tourist season started to come in, Coach executives began to panic. June financial results were "below par," which

[18] *Id.* ¶¶ 18, 31.
[19] Connors Decl. Ex. 16 (COACH_DOJ_00008860–73, at COACH_DOJ_00008860, 62 (emphasis added).
[20] Connors Decl. Ex. 17 (COACH_DOJ_00008148-49), (emphasis added).
[21] Connors Decl. Ex. 18 (COACH_DOJ_00004000-09 at COACH_DOJ_00004004) (emphasis added).
[22] Connors Decl. Ex. 19 (COACH_DOJ_00006585-86).
[23] *Id.*
[24] Connors Decl. Ex. 20 (E-COA00000011-12).
[25] Connors Decl. Ex. 21 (E-COA00000492–93).
[26] Connors Decl. Ex. 22 (E-COA00000010).
[27] Connors Decl. Ex. 23 (CS0003303).

Coach blamed on "**increased competition**" from CitySights.[28] One executive warned that "below norm trends" were likely due to CitySights' newly expanded bus fleet ("much higher than they ever had in the past," the executive fretted),[29] and worried that CitySights' estimated 30% market share (which Coach independently validated with CitySights[30]) could cause Gray Line's "market share to decline."[31]

II. CITYSIGHTS AND GRAY LINE AGREE TO FIX PRICES.

Coach's solution to this competitive threat was simple: join forces with City Sights and raise prices. A December 2008 presentation circulated within Coach made the plan explicit: "Overall strategy is to integrate both businesses drive out synergies and **implement a fare increase of approximately 10%.**"[32] This planned price increase drove the deal; document after document reflected the competitors' plans to "**increase fares by 10%**" with a joint venture.[33] The competitors knew they couldn't sustain a price increase unless they did it together: Gray Line financial projections assumed **"[n]o fare increase (due to competition)**," if they did not complete the joint venture, as compared to the "**10% fare increase**" they could impose with the joint venture.[34] In September 2008, Moser sent CitySights' Mark Marmurstein a joint venture proposal, noting "benefits" of combining such as "[e]asier decision making as **sole player in**

[28] Connors Decl. Ex. 4 (COACH_DOJ_00003710-23 at COACH_DOJ_00003711) (emphasis added).
[29] Connors Decl. Ex. 24 (DOJ-00000612-14).
[30] Connors Decl. Ex. 25 (DOJ-00000619-20).
[31] Connors Decl. Ex. 24 (DOJ-00000612-14).
[32] Connors Decl. Ex. 26 (DOJ-00000898–904, at DOJ-00000899) (emphasis added).
[33] Connors Decl. Ex. 27 (DOJ-00000622–32 at DOJ-00000627) (emphasis added); *see, e.g.*, Connors Decl. Ex. 28 (CS0000094–106 at CS0000095) (CitySights plans "Price increase 10% less associated costs"); Connors Decl. Ex. 29 (DOJ-000000840–45, at DOJ-000000845) (Gray Line plans "10% Fare Increase"); Connors Decl. Ex. 30 (DOJ-000000846–48, at DOJ-000000848) ("10% Fare Increase"); Connors Decl. Ex. 31 (DOJ-00000818-20) ("10% Fare Increase"); Connors Decl. Ex. 32 (Coach_DOJ_50001015-27); Connors Decl. Ex. 33 (DOJ-00000639).
[34] Connors Decl. Ex. 34 (E-COA00000017–20, at E-COA00000020) (emphases added). A January 2009 GrayLine budget overview similarly reflected the competitive landscape without the joint venture, warning that "[a]ny new price reductions by our main competitor or entry of a new competitor could force Grayline to lose sales and/or lower prices." Connors Decl. Ex. 35 (COACH_DOJ_00000252–60 at COACH_DOJ_00000258).

'double deck' market," and "**[f]lexibility regarding pricing.**"[35] The parties planned to keep the Gray Line and CitySights brands separate after the transaction in order to fool the public (and potential new competitors) into thinking two independent companies were still competing: "Politically and **competitively** keeping both brands **keeps the competition at bay as they continue to see two suppliers of tour services in the market** . . . ."[36]

The competitors actively worked toward the joint venture in late 2008 and early 2009.[37] But Gray Line couldn't wait to implement the agreed price increase. In January, Moser decided to discuss a potential Gray Line price increase with CitySights' Marmurstein—at the time, still a direct head-to-head competitor. Moser's January 22 handwritten notes said "**Fare Increase GLNY-- ? MM.**"[38] Moser and Marmurstein discussed and confirmed the price increase: the next day, Moser wrote "**Fare Increase – MM**,"[39] which he circled and drew an arrow to show was "**OK!**"[40] Sure enough, GrayLine implemented a $5 price increase in February,[41] and CitySights planned to match it, although it didn't want to do so immediately because the brochures and price sheets were already printed.[42]

The joint venture agreement was executed March 17, 2009, forming "Twin America" as the new post-JV entity.[43] The parties immediately discussed implementation of CitySights' price

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[35] Connors Decl. Ex. 36 (CS0003915–18) (emphases added).
[36] Connors Decl. Ex. 37 (CS0000075–76, at CS0000076) (emphasis added). Similarly, in a "high level view" of the merger circulated between the parties, Coach noted "As discussed we feel keeping two companies separate reduces the labor and competition issues," Connors Decl. Ex. 31 (DOJ-00000818-20, at DOJ-00000819).
[37] Connors Decl. Ex. 38 (DOJ-00000949); Connors Decl. Ex. 39 (DOJ-00000974–76); Connors Decl. Ex. 40 (DOJ-00001030).
[38] Connors Decl. Ex. 41 (COA000393–413 at COA000396). Although Dale Moser denied under oath that the "MM" referred to Marmurstein he could not think of anyone else with "MM" as initials. Connors Decl. Ex. 42 (Moser Invest. 303/18–304/5; 377/21–378/2).
[39] Connors Decl. Ex. 41 (COA000393–413 at COA000397).
[40] *Id.*
[41] Connors Decl. Ex. 43 (CS0000283–85, at CS0000284).
[42] Connors Decl. Ex. 44 (CS0000293–94).
[43] Connors Decl. Ex. 45 (COACH_DOJ_50001559–1609).

increase,[44] CitySights increased its prices in April,[45] and the competitors' agreed price increase was complete. The price increase had its intended effect. In late April, Moser noted that "**price increases**" had helped the financial results;[46] by January 2010, Coach celebrated the fact that "year over year **revenue growth**" accounted for the majority of Twin America's improved results over the pre-JV individual companies.[47] And the JV of course eliminated competition between the two rivals: Marmurstein boasted to a colleague that "**we now have them** [Gray Line] **under control**."[48]

The competitors worried about one final barrier to their plan to join forces and hike prices: antitrust scrutiny. Moser suggested that press releases say that the joint venture "afford[s] the ability to offer lower priced tour services to the public." "This way," he explained, "in the event competition enters the market with a lower fare alternative, we had already went public that we intended to extend a lower price service prior. **Anti-trust cushion.**"[49] Moser also suggested filing (belatedly) with the Surface Transportation Board (STB), in hopes that STB approval would "grants is [sic] some **anti-trust protection.**"[50]

III. THE SURFACE TRANSPORTATION BOARD REJECTS THE JOINT VENTURE AS ANTICOMPETITIVE.

In July and early August 2009, the New York Attorney General (NYAG) subpoenaed defendants for documents related to the antitrust issues implicated by the transaction.[51]

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[44] On March 26, Moser prompted Marmurstein "Is your plan to still implement a fare increase of $5 on April 1st?" to which Marmurstein responded "After Easter," causing Moser to send a piqued email internally: "No fare increase till after Easter, that [sic] already 10 days later than discussed before!" Connors Decl. Ex. 46 (E-COA00001656–57).
[45] Connors Decl. Ex. 47 (COACH_DOJ_00044792–93).
[46] Connors Decl. Ex. 48 (DOJ-00001505–08, at DOJ-00001505) (emphasis added).
[47] Connors Decl. Ex. 49 (COACH_DOJ_00015857–72 at COACH_DOJ_00015860) (emphasis added).
[48] Connors Decl. Ex. 50 (TWIN0004182-83, at TWIN0004182) (emphasis added).
[49] Connors Decl. Ex. 51 (E-COA00003835) (emphasis added).
[50] Connors Decl. Ex. 52 (COACH_DOJ_00013114–15, at COACH_DOJ_00013114) (emphasis added).
[51] Connors Decl. Ex. 53 (Comment of the State of New York, *Stagecoach Group plc and Coach USA, Inc., et al., Acquisition of Control-Twin America, LLC*, STB No. MC-F-21035, at 1 (Nov. 2, 2009) (discussing July 31, 2009 and August 3, 2009 NYAG subpoenas).

Defendants quickly applied to the STB for approval, immediately informing the NYAG that they believed the filing of the STB application removed the transaction from NYAG's jurisdiction.[52] This was a transparent attempt to evade the NYAG's antitrust investigation—as the STB stated in its published decision, "[w]e are concerned that the **Board's processes may have been manipulated to avoid the inquiry by NYAG**,"[53]—but STB proceedings went forward over the next 2 ½ years, with several rounds of briefing, multiple expert submissions, and oral argument.

In February 2011, the STB issued its initial decision rejecting the joint venture, concluding that "[t]he transaction creates a combined entity that possesses **excessive market power** and has the **ability to raise rates without competitive restraint**," and ordered Twin America to either unwind the JV or divest its interstate operations so the STB would no longer have jurisdiction.[54] Defendants petitioned for reconsideration and, after another round of briefing and expert analysis, the STB rejected the petition, reaffirming its finding that the JV "**overly concentrates market power**."[55] Defendants then spun off their interstate operations to avoid the STB's jurisdiction,[56] but continued their combined New York operations as before.

IV. DEFENDANTS CONTINUE TO FIX PRICES TO THIS DAY THROUGH TWIN AMERICA.

Currently, Twin America dominates the market for hop-on, hop-off bus tours in New York City. [redacted].[57]

Potential new entrants consistently note Twin America's monopoly. CircleLine observed that

[52] *Id.* at 2.
[53] Connors Decl. Ex. 54 (Decision, *Stagecoach Group plc and Coach USA, Inc., et al., Acquisition of Control-Twin America, LLC*, STB No. MC-F-21035, at 2 (Feb. 8, 2011) ("Feb. 2011 STB Decision") (emphasis added)).
[54] *Id.* at 2, 18 (emphasis added)).
[55] Connors Decl. Ex. 55 (Decision, *Stagecoach Group plc and Coach USA, Inc., et al., Acquisition of Control-Twin America, LLC*, STB No. MC-F-21035, at 1 (Jan. 9, 2012) ("Jan. 2012 STB Decision")).
[56] Connors Decl. Ex. 56 (Applicant's Notice of Implementation of Compliance Plan, *Stagecoach Group plc and Coach USA, Inc., et al., Acquisition of Control-Twin America, LLC*, STB No. MC-F-21035 (May 21, 2012)).
[57] Connors Decl. Ex. 57 (Deposition of Hernando Castro (Sept. 19, 2013), at 19/3–20/16).

[redacted][59] No new entrant has been able to challenge defendants' monopoly: even the most successful of the recent entrants, Go New York Tours, [redacted][0]

Defendants know they are a monopolist, and so they are now resorting to open bribery to try to gin up a factual record of a competitive market: they are approaching smaller operators and offering to help the smaller operators compete so that the smaller operators will testify in this lawsuit that the hop-on, hop-off market is vigorously competitive. Mark Marmurstein, Twin America's CEO, approached Go New York and said (according to sworn testimony from Go New York's President):

[redacted]

[58] Connors Decl. Ex. 58 (NEW-000581–96 at NEW-000583–84) (emphasis added); Connors Decl. Ex. 59 (NEW-000687–89, at NEW-000688).
[59] Connors Decl. Ex. 60 (SKY_00171–72, at SKY_00171) (emphasis added).
[60] Connors Decl. Ex 61 (Deposition of Asen Kostadinov (Sept. 23, 2013), at 138/14–145/14).
[61] *Id.* at 164/24–165/7; 165/9–13) (emphasis added).

[redacted]

V. DR. HAL SINGER'S ANALYSIS.

Dr. Hal Singer, a Managing Director of Navigant Consulting, has submitted a declaration demonstrating how causation, injury, and damages could be shown on a classwide basis, using defendants' transaction data from 2005 to the present, and described how he could use common proof to conduct other inquiries at the merits stage such as market definition and market share.[63]

[redacted] Dr. Singer then shows how injury to consumers could be demonstrated classwide, conducting illustrative regressions to test whether any post-JV discounting immunized consumers from the price increase [redacted] Finally, although discovery in this case is ongoing, Dr. Singer provides a sample methodology for how damages

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[62] [redacted] *See* Singer Decl. ¶¶ 34-37. Discovery is not complete, and Dr. Singer's damages analysis is a preliminary one based on his analysis of the evidence produced as of the date of this brief. Plaintiffs may update and modify the model described in Dr. Singer's declaration as more evidence is elicited and this case proceeds in discovery.

[64] *See* Singer Decl. ¶¶ 18-20.

[65] "Multiple regression involves a variable to be explained—called the dependent variable—and additional explanatory variables that are thought to produce or be associated with changes in the dependent variable." Federal Judicial Center, *Reference Manual on Scientific Evidence* 305 (3d ed. 2011).

[66] *See* Singer Decl. ¶¶ 22-27.

[67] *See* Singer Decl. ¶¶ 28-33.

could be calculated on a classwide basis, [redacted]

ARGUMENT

A class action must meet all the prerequisites of Rule 23(a)—commonly referred to as "numerosity," "commonality," "typicality," and "adequacy" (*see Amchem Prods. v. Windsor,* 521 U.S. 591, 613 (1997))—and fit at least one of the case types of Rule 23(b). Bhandari here moves for certification of her injunctive relief claim under Rule 23(b)(2) and her money damages claim under Rule 23(b)(3).

I. THE PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23(A).

A. Ascertainability

Although not mentioned in Rule 23, many courts have held that a certifiable class must be ascertainable—that is, the class's membership must be "defined by identifiable objective criteria." *Engel v. Scully & Scully, Inc.*, 279 F.R.D. 117, 128 (S.D.N.Y. 2011). Here, plaintiffs' proposed First Amended Consolidated Class Action Complaint defines the class as:

> All persons who, or entities that, directly purchased "hop-on, hop-off" bus tours in New York City from Twin America under the Gray Line brand from April 1, 2009, and under the CitySights brand from June 1, 2009, until the effects of defendants' anticompetitive conduct cease (the "Class Period"). Excluded from the Class are defendants, their present and former parents, subsidiaries, affiliates, and employees.

Proposed First Amended Consolidated Class Action Complaint ¶ 64.[69] This is an objective definition—it is clear who is in the class and who is not—and defendants' own transaction records as well as class members' credit card statements (such as those retained by Bhandari and

[68] *See* Singer Decl. ¶¶ 39-49.

[69] This differs from the class definition in the currently governing Complaint in that it specifies New York City as the relevant geographic market and defines the class period more precisely with reference to the dates when defendants' transaction data demonstrate that their 2009 price increases were complete. *See* Singer Decl. ¶¶ 18-20.

Nobel) will provide a way to verify class membership.[70]

B. Numerosity

Plaintiff's expert Dr. Hal Singer has estimated that there are approximately 3.9 million class members (Singer Decl. ¶ 48 n.22); far above the Second Circuit's guidance that numerosity is presumed with a class of 40.[71]

C. Commonality

Commonality requires the identification of a common contention, one "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Bhandari has asserted federal and state antitrust claims: for violations of Section 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 & 2), Section 7 of the Clayton Act (15 U.S.C. § 18), and New York's Donnelly Act (N.Y. Gen. Bus. Law § 340). The elements of an antitrust claim are "(1) a violation of antitrust law; (2) injury and causation; and (3) damages."[72] The proof of these elements will require the resolution of many common questions, outlined in more detail below.

1. Violation of antitrust law

On the Section 1 claim, Bhandari asserts that the parties agreed before the joint venture to increase prices—a *per se* violation of the Sherman Act[73]—and that the joint venture itself was created to enable price-fixing and is thus also *per se* illegal.[74] The Second Circuit and other

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[70] *See* Singer Decl. ¶ 48 n.22; Vasquez Decl. ¶ 34.
[71] *See Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).
[72] *Cordes & Co. Financial Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001)). The New York Court of Appeals has called the Donnelly Act a "Little Sherman Act" and instructed that it should generally be construed in light of federal antitrust precedent. *See Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (N.Y. 1988).
[73] *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 61 (2d Cir. 2012).
[74] *See Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593, 598 (1951) ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every

courts have consistently recognized that questions of the existence, duration, and scope of a price-fixing agreement are common.[75] Here, Bhandari intends to prove a *per se* illegal agreement to fix prices by common evidence: the communications between direct competitors Marmurstein and Moser before the joint venture confirming a planned "**Fare Increase**" was "**OK!,**" followed shortly thereafter by Gray Line's fare increase, the numerous documents planning a "**10% Fare Increase**" with the joint venture, the explicit statement that the JV would give the former competitors "[e]asier decision making as **sole player in 'double deck' market,**" and "**[f]lexibility regarding pricing,**"—all followed by the maintenance of the GrayLine price increase and CitySights' own price increase.[76] This evidence of Defendants' plans and conduct will not vary by class member.

Defendants may argue that the JV should be evaluated under the rule of reason, which requires a comparison of the restraint's anticompetitive effects with its procompetitive benefits.[77] (This threshold question of the proper legal standard is another common "question of law".) Although that is incorrect, rule of reason analysis also raises many common questions. The JV's anticompetitive effects are (1) the post-JV price increases outlined above, all shown by evidence common to the class, and (2) the creation of a dominant firm in the hop-on, hop-off bus tour

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agreement and combination to restrain trade could be so labeled."), *abrogated on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 326 (2d Cir. 2010); *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1013 (7th Cir. 2012) (Posner, J.); *U.S. v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 429–30 (S.D.N.Y. 1980), *aff'd* 659 F.2d 1063 (2d Cir. 1981); *cf. Texaco, Inc. v. Dagher*, 547 U.S. 1, 5–6 & n.1 (2006).

[75] The Second Circuit has held that "allegations of the existence of a price-fixing conspiracy are susceptible to common proof," and, in a price-fixing case, that "all factual and legal questions that must be resolved to determine whether the defendants violated Section 1 of the Sherman Act" were common questions. *Cordes & Co Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105, 108 (2d Cir. 2007). *See In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 509–10 (S.D.N.Y. 1996) (stating that "[n]umerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of Rule 23(a)(2)" and collecting cases).

[76] *See* Statement of Facts ("SOF") Section II.

[77] *See U.S. v. VISA U.S.A., Inc.*, 344 F.3d 229, 237–38 & n.4 (2d Cir. 2003).

market. This second anticompetitive effect will be shown by common evidence.[78] The definition of the relevant market is a common question: Bhandari has argued for a market of hop-on, hop-off tours in New York City, which defendants have criticized in favor of a broader market including more tourism options.[79] Regardless who prevails, the proper relevant market will not differ by class member.[80] Similarly, Bhandari will argue that the New York Department of Transportation's limit on bus stops and the need for a large bus fleet show substantial barriers to entry.[81] Defendants may counter, as they did in their Answers, that new entrants such as Go New York Tours and CitySights' own experience demonstrate low barriers to entry.[82] Once more, the existence of barriers to entry will be common across the class.[83] And finally, the post-JV market shares will be shown by common evidence.[84] Evidence of any purported procompetitive benefits will also be common. Defendants argued before the STB that the JV was "procompetitive," noting specifically that since the JV maintenance costs had fallen and the JV had realized "savings" by "better fuel purchase arrangements"[85]—arguments that, if true, are common to the class.

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[78] *See Midwestern Machinery v. Northwest Airlines, Inc.*, 211 F.R.D. 562, 569 (D. Minn. 2001) (question whether merger decreased competition and increased prices common to the class).

[79] Answer of Defendants Coach USA, Inc., and Int'l Bus Servs., Inc. ("Coach Answer") (Doc. No. 47) at 1; Answer of Defendants Twin America, LLA, Citysights LLC, and City Sights Twin, LLC ("Twin Answer") (Doc. No. 45) at 1.

[80] *See Blessing v. Sirius XM Radio Inc.*, No. 09 CV 10035, 2011 WL 1194707, at *7 (S.D.N.Y. Mar. 29, 2011) ("Courts have held that defining the relevant product market in an antitrust lawsuit may be susceptible to class-wide proof because the definition affects all members of the putative class"); Singer Decl. ¶¶ 35-36 (explaining how proof of relevant market will not vary by class member).

[81] *See* Singer Decl. ¶ 38 (describing barriers to entry); 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 941a at 210, 213 (3d ed. 2009) (discussing "government limits on entry" and "economies of scale" as entry barriers).

[82] *See* Coach Answer at 26–28; Twin Answer at 27–29.

[83] *See* Singer Decl. ¶ 38 (describing how proof of entry barriers will not vary by class member).

[84] *See* Singer Decl. ¶ 37 (describing how market share will not vary by class member).

[85] Connors Decl. Ex. 62; Reply of Applicants to Comments of New York State Attorney General, *Stagecoach Group plc and Coach USA, Inc.—Acquisition of Control – Twin America, LLC*, STB No. MC-F-21035 at 38–39 (Nov. 17, 2009).

Bhandari's Section 2 monopolization claim will also present common questions.[86] A monopolization claim "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[87] The first element (monopoly power) can be shown by direct evidence of anticompetitive effects or indirectly by a showing of high market share in a relevant market with barriers to entry.[88] These inquiries will turn on common evidence for the reasons outlined above. Bhandari will also show the second element of the monopolization claim—anticompetitive conduct—with common proof. Bhandari will argue that the creation of the JV itself is a combination of competitors explicitly intended to establish market power (or, in defendants' words, to be the **sole player in 'double deck' market**,"[89]), which both the Supreme Court and the Second Circuit have recognized demonstrates anticompetitive conduct for purposes of a monopolization claim.[90] This proof will not vary by class member; nor will proof of other anticompetitive conduct, such as

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[86] *See All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund*, 280 F.R.D. 78, 85 (E.D.N.Y. 2012) (question of "whether Defendants have monopoly power in the relevant market and how such power was acquired or is maintained" is common); *Jennings Oil Co. v. Mobil Oil Co.*, 80 F.R.D. 124, 128 (S.D.N.Y. 1978) ("The monopolization claims are contingent upon a showing of monopoly power and an examination of the manner in which such power was acquired or maintained. These issues, along with others, are questions that are undoubtedly common to all the members of the putative class.") (citation omitted)); 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §18.5 (4th ed. 2002) ("An allegation of . . . monopolization . . . will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question.").

[87] *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

[88] *See Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

[89] *See* SOF Section II.

[90] *See, e.g.*, *Grinnell*, 384 U.S. at 566–71, 575-76 (alarm company's acquisition of competitors until it controlled 87% of the market "perfected the monopoly power to exclude competitors and fix prices"); *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) ("question of intent is relevant" to § 2 monopolization claim to determine whether "the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory.'"); *Standard Oil Co. v. U.S.*, 221 U.S. 1, 72–75 (1911) (affirming liability on § 2 claim where Standard Oil monopolized petroleum industry by acquiring controlling interests in multiple competitors and noting that acquisitions showed Standard Oil acquired monopoly power "not as a result of normal methods of industrial development" but by "new means of combination . . . , the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce"); *Volvo N.A. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 73 (2d Cir. 1988) (listing tennis association's merger with competitor as evidence of how association "willfully maintained their monopoly power").

defendants' recent attempt to create a false factual record of competition by assisting smaller operators explicitly so that the smaller operators would "**go with them to court or to the government and say that you helped us and now we can compete with you** . . . ."[91]

Finally, Section 7 of the Clayton Act prohibits mergers (including joint ventures like Twin America) where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," (15 U.S.C. § 18)—here, an inquiry very similar to the Section 1 and Section 2 inquiries[92] and focused on common questions, such as whether the transaction combined two head-to-head competitors to produce a dominant firm in the relevant market.[93]

2. Causation and Injury

All of Bhandari's causes of action will require a showing that defendants' actions caused injury—this is sometimes referred to (on a classwide basis) as a showing of common impact. Bhandari will show this through both fact and expert evidence: fact evidence in the voluminous documentary record that defendants agreed to increase fares and then followed through on the agreed increase—all of which will be common to the class as it focuses on defendants' conduct[94]—and expert evidence through the testimony of Dr. Singer. Dr. Singer demonstrates

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[91] *See* SOF Section IV.

[92] *See U.S. v. Rockford Memorial Corp.*, 898 F.2d 1278, 1281 (7th Cir. 1990) (Posner, J.) (interpretations of Section 1 of Sherman Act and Section 7 of Clayton Act have "converged"); *see, e.g.*, *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107–08 (2d Cir. 1989) (discussing importance of market share evidence in evaluating Clayton Act Section 7 claim).

[93] The Supreme Court has noted in a Clayton Act case that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363–64 (1963) (enjoining merger where post-merger entity would control 30% of the market). *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 1 (Aug. 19, 2010) ("2010 Merger Guidelines") ("A merger can enhance market power simply by eliminating competition between the merging parties."); 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 901b at 8 (3d ed. 2009) ("Among the most anticompetitive consequences of mergers is the creation of a monopoly or dominant firm where none had existed before.").

[94] *See, e.g.*, *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 89–90 (D. Conn. 2009) (across-the-board list price increases show common proof of impact to class); ABA Section of Antitrust Law, *Econometrics* 203 (2005) ("[D]irect documentary evidence that firms met, agreed to raise prices, and in fact implemented the agreed upon prices provides substantial evidence of common impact.").

that causation can be shown on a classwide basis through a regression analysis; [redacted]

[redacted]

The question of causation is clearly common—the JV either did or did not cause the prices to increase; and defendants' alternative explanations for the price increase are similarly either true or untrue across the class.

The question of injury involves two separate questions: "One is the familiar factual question whether the plaintiff has indeed suffered harm, or 'injury-in-fact.' The other is the legal question whether any such injury is injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Cordes & Co. Financial Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 106 (2d Cir. 2007) (internal quotation marks and citations omitted). The legal question is unquestionably common, as *Cordes* held. [96] But the factual question is also common. As the Second Circuit observed in *Cordes*: "If the plaintiffs' single formula can be employed to make a valid comparison between the but-for fee and the actual fee paid, then it seems to us that the injury-in-fact question is common to the class. Otherwise, it poses individual ones." *Cordes*, 502 F.3d at 107. Here, Dr. Singer's analysis demonstrates how a regression could be used to show that the price increase affected all or almost all class members, across all or almost all hop-on, hop-off tour products defendants offer, and he has calculated overcharges that can be formulaically applied across the class to calculate

[95] Singer Decl. ¶¶ 25-27. Regression analyses of the type Dr. Singer performed are properly accepted as evidence of causation. ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 131 (2d ed. 2010).

[96] *See Cordes & Co Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107 & n.12 (2d Cir. 2007) (question of whether overcharge from a price-fixing conspiracy is an antitrust injury is "not only common, but . . . readily resolved" as purchasers who pay supracompetitive prices have suffered antitrust injury).

the difference between the but-for price and the actual price paid.[97] Courts regularly accept regression models similar to those offered by Dr. Singer in order to show common impact.[98]

3. Damages

Bhandari's damages theory is an "overcharge," "the difference between the price the purchaser paid and the price it would have paid absent the violation." 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 784 (7th ed. 2012). [redacted].[99] Any variations in the amount of class member damages would not be relevant to Rule 23(a) commonality (the Supreme Court has held that "even a single common question" suffices for Rule 23(a) purposes[100]) but to Rule 23(b)(3) predominance, which will be discussed below.

4. The STB Proceedings

Any doubt about the numerous common questions involved in this case can be resolved by looking at the STB proceedings, which involved essentially an antitrust inquiry: The STB used "economic analysis" to ascertain whether there were "anticompetitive effects" from the

[97] Singer Decl. ¶¶ 26-27, 40-49. Both Dr. Singer's analysis of impact and his overcharge calculation (discussed in more detail in the next section) show common impact. *See In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 115 (S.D.N.Y. 2010) (common impact shown by comparison of actual prices to but-for prices); *In re Buspirone Patent Litig.*, 210 F.R.D. 43, 58 (S.D.N.Y. 2002) (plaintiff "seeks to establish the overcharges to the class and the antitrust injury using evidence that is applicable to the class as a whole, and this method of relying on generalized proof of class-wide injury has been employed by a number of other courts in almost identical contexts."); *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 25–29 (N.D. Ga. 1997). As the Second Circuit has observed in *dicta*: "If the [plaintiffs] establish at the trial for liability that the defendants engaged in an unlawful . . . conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that [defendants] conduct caused injury to each [plaintiff.]" *In re Master Key Antitrust Litig.*, 528 F.2d 5, 12 n.11 (2d Cir. 1975).

[98] *See, e.g.*, *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153–55 (3rd Cir. 2002); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 220–22 (M.D. Pa. 2012); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 95–102 (D. Conn. 2009) (discussing "economic multiple regression analysis" plaintiffs offered to show "class-wide impact").

[99] Singer Decl. ¶¶ 26-27, 40-49; *see In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 115 (S.D.N.Y. 2010) ("Based on Plaintiffs' proposed methodology for determining the difference between the 'but for' fee and the actual fee, it should be possible to calculate the amount of the fee paid by each member for each transaction that was an overcharge on a class-wide basis."); ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 212 (2d ed. 2010) ("[R]egression analysis of overcharges in price-fixing cases . . . has become the standard mode of analysis used by both plaintiffs and defendants.").

[100] *Dukes*, 131 S. Ct. at 2556 (internal quotation marks and citations omitted).

transaction.[101] The STB concluded that the post-JV price increases demonstrated that the transaction "enhanced market power," (rejecting defendants' argument that rising fuel prices caused the post-JV price increases),[102] that the transaction created an entity with a very high market share in a "relevant market" of "double-decker, hop-on, hop-off bus tours in NYC" (rejecting defendants' argument for a broader market),[103] that there were "significant" barriers to entry (rejecting defendants' argument of easy entry),[104] and that no procompetitive "efficiencies" counteracted the "evidence of competitive harm."[105] None of the STB's conclusions depended in any way on any variations among the consumers affected by the restraint; indeed, defendants litigated the entire case before the STB with legal argument and economic analysis very similar to what their pleadings suggest they will present here,[106] showing further that the crucial questions can be resolved in a representative action just as they were litigated and resolved before the STB.

D. Typicality

Rule 23(a) (3) requires class representatives to present claims that are typical of the class. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993). Here, Bhandari purchased two CitySights "All

[101] Connors Decl. Ex. 54 (Feb. 2011 STB Decision at 9).
[102] *Id.* at 10-11.
[103] *Id.* at 11–13.
[104] *Id.* at 13–16.
[105] *Id.* at 16–17.
[106] Defendants' attorneys argued before the STB that "The Transaction Is Procompetitive" (Connors Decl. Ex. 62 (TACID0000517–94 at TACID0000554)), "The Transaction Does Not Create A Monopoly In a Relevant Market," (*Id.* at TACID0000557), that "The Transaction Does Not Raise Barriers to Entry, (*Id.* at TACID0000566), and that "There Is No Horizontal Agreement." (*Id.* at TACID0000567).

Around Town" tours for $98 ($49 each) in May 2012,[107] receiving a discount for purchasing online but still paying an overcharge of approximately $5, like the other class members who were overcharged.[108] She is typical of the class: she suffered an injury by paying an overcharge, just as the rest of the class did.[109] If the Court grants the pending motion for leave to amend to add Tracey Nobel as a plaintiff, then she is typical for the same reasons: she bought three Gray Line "All Loops" tours for $162 in October 2010,[110] paying an overcharge just as other class members did.

E. Adequacy

Rule 23(a)(4) requires that class representatives "fairly and adequately protect the interests of the class," which requires a showing that: (1) "class counsel must be qualified, experienced, and generally able to conduct the litigation," and (2) "the class members must not have interests that are antagonistic to one another." *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992) (internal quotation marks and citations omitted). Susman Godfrey is adequate for the reasons explained below discussing the Rule 23(g) requirements for appointment of class counsel. As to the second element, only a "fundamental" conflict between the interests of the class representative and the absent class members will defeat certification. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). Here, Bhandari and Nobel will vigorously pursue the claims as a representative of the class,[111] and there are no conflicts.[112]

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[107] Bhandari Decl. ¶ 3.
[108] Singer Decl. ¶ 33.
[109] *See In re Buspirone Patent Litig.*, 210 F.R.D. 43, 57 (S.D.N.Y. 2002) (class representative who paid overcharge typical because it "alleges that it was injured in the same general way and by the same general course of conduct that allegedly injured the other members of the class"); *In re Playmobil Antitrust Litig.*, 35 F. Supp.2d 231, 241 (E.D.N.Y. 1998) (claims in price-fixing cases are typical "even if members purchase different quantities and pay different prices").
[110] Nobel Decl. ¶ 3.
[111] Bhandari Decl. ¶¶ 1, 6; Nobel Decl. ¶¶ 1, 6.
[112] *See Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 307 (D.D.C. 2007) ("[P]laintiffs seek damages in the amount of alleged overcharges resulting from [the alleged violation] and because all direct purchasers are entitled to recover such overcharges, Plaintiffs and the absent class members have exactly the same

II. THE PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23(B)(2).

A class is properly certified under Rule 23(b)(2) when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted . . . . Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 131 S. Ct. at 2557 (internal quotation marks and citation omitted). Here, Bhandari's currently operative complaint prayed for such relief other than damages as the Court finds appropriate (Compl. ¶ 86(c)), and Bhandari has requested permission to amend the Complaint to further specify that she will request relief under Section 16 of the Clayton Act[113] in the form of divestiture of a portion of the JV to restore competitive conditions.[114] The Supreme Court has stated that divestiture is the "remedy best suited to redress the ills of an anticompetitive merger,"[115] and the remedy that "should always be in the forefront of a court's mind when a violation of s[ection] 7 has been found;"[116] should Bhandari prevail on liability, divestiture to restore conditions of competition would clearly be appropriate and would benefit the entire class at once.

Bhandari also seeks money damages, and certification of money damages under Rule 23(b)(2) is not proper unless the money damages are "incidental to the injunctive or declaratory relief." *Dukes*, 131 S. Ct. at 2557. Here, Bhandari requests the Court to certify the injunction-seeking class under Rule 23(b)(2) and the damages class under Rule 23(b)(3), as courts in this

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interests in maximizing recovery of overcharge damages on each qualifying direct purchase or assigned claim.") (internal quotation marks omitted).

[113] Section 16 authorizes suits for injunctive relief "against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26.

[114] *See* Proposed First Amended Consolidated Class Action Complaint ¶ 88.

[115] *California v. Am Stores Co.*, 495 U.S. 271, 285 (1990).

[116] *U.S. v. E.I. De Pont de Nemours & Co.*, 366 U.S. 316, 330-31 (1961).

district have before and after *Dukes*.[117]

III. THE PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23(B)(3).

Certification under Rule 23(b)(3) requires a showing that "questions of law or fact predominate over any questions affecting only individual members," and the class action must be "superior to other available methods for fairly and efficiently adjudicating the compromise" (Fed. R. Civ. P. 23(b)(3))—two requirements referred to as "predominance" and "superiority." *Amchem Prods. v. Windsor,* 521 U.S. 591, 615 (1997).

A. Predominance

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623–24. Predominance is clearly met here given the number of common issues: this case demonstrates the truth of the Supreme Court's observation that "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Id.* at 625.[118] To the extent that defendants point to the existence of individualized defenses as a reason why common issues do not predominate, courts have made clear that the existence of "such defenses does not bar predominance where 'a sufficient constellation of common issues binds class members together.'" *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, ___ F.R.D. ___, 2013 WL 4067116, at *13 (E.D.N.Y. Aug. 7, 2013), quoting *Brown v. Kelly*, 609 F.3d 467, 484 (2d Cir. 2010). There is no question that this condition is satisfied here.

Defendants may argue that the damages inquiry involves some individualized questions,

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[117] *See, e.g., All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund*, 280 F.R.D. 78, 86 (E.D.N.Y. 2012) (certifying both injunction-seeking class and damages-seeking class); *Jermyn v. Best Buy Stores*, 276 F.R.D. 167, 169–174 (S.D.N.Y. 2011) (denying motion for decertification of injunction-seeking class after *Dukes*); *Easterling v. State of Connecticut Dep't of Correction*, 278 F.R.D. 41, 45–51 (D. Conn. 2011) (same).

[118] *See* 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §18.26 (4th ed. 2002) ("In antitrust suits, the issues of conspiracy, monopolization, and conspiracy to monopolize have been viewed as central issues which satisfy the predominance requirement.").

but Dr. Singer has presented a sample damages methodology to calculate damages suffered by the class as a whole that can be allocated formulaically to class members at a distribution stage based [redacted].[119] The fact that the collusive price increase affected many different products does not create individual issues: [redacted][20] and courts in this district have recognized that the fact that anticompetitive behavior affects a variety of products does not create individualized issues.[121] Similarly, the presence of discounting for certain tickets does not create individual issues: [redacted];[122] and, in any event, courts in this district have recognized that a claim for fixing list prices can be certified even with individually negotiated individual discounts (not present here) because the discounts were applied to inflated list prices.[123]

B. Superiority

Rule 23(b)(3) also requires that a class action be "superior to other available methods for

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[119] *See In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 116 (S.D.N.Y. 2010) ("Based on Plaintiffs' proposed methodology for determining the difference between the 'but for' fee and the actual fee, it should be possible to calculate the amount of the fee paid by each member for each transaction that was an overcharge on a class-wide basis."); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009) ("[O]ne way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the 'but-for' level for all plaintiffs.").

[120] Singer Decl. ¶ 33.

[121] *See, e.g.*, *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383–84 (S.D.N.Y. 1996).

[122] Singer Decl. ¶¶ 31-32.

[123] *See, e.g.*, *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. at 89–90; *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 166–67 (S.D.N.Y. Apr. 20, 2000); *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. at 383 ("[C]ourts have certified classes where the plaintiffs have alleged that the defendants conspired to set an artificially inflated base price from which negotiations for discounts began. The theory that underlies these decisions is, of course, that the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market. Hence, if a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury." (citations omitted)); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996) ("Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected generally.").

fairly and efficiently adjudicating the controversy," which may involve consideration of "(A) the class members' interests in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already begun by or against class members, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Here, one alternative to class adjudication is thousands of individual trials, where each purchaser would attempt to prove the common questions—the anticompetitive effect of the JV, relevant market, market share, and so on—over and over again. Or another alternative is no trials at all, as the individual overcharges are so small, which the Supreme Court has acknowledged weighs in favor of superiority.[124] Nor does this action raise any particular management difficulties: Alan Vasquez, who has worked on notice and administration matters at Gilardi & Company, a class action administration firm, has submitted a declaration detailing how Gilardi could administer notice and a claims process.[125]

IV. PROPOSED CLASS COUNSEL MEETS THE REQUIREMENTS OF RULE 23(G).

Rule 23(g) governs appointment of class counsel. It states the Court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class;

(Fed. R. Civ. P. 23(g)(1)(A)(i-iv)), and may consider any other matter "pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

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[124] *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.") (internal quotation marks and citation omitted); *In re Playmobil Antitrust Litig.*, 35 F. Supp.2d 231, 247-48 (E.D.N.Y. 1998) (noting fact that "individual claims probably are too small to justify pursuing litigation" as reason for superiority).

[125] *See* Vasquez Decl. ¶¶ 10-41.

Susman Godfrey LLP has vigorously prosecuted this case since the Court appointed it lead counsel. Susman Godfrey has reviewed more than 50,000 documents comprising nearly 400,000 pages, participated in five depositions, and analyzed roughly a gigabyte of transaction data.[126] Susman Godfrey also has significant experience in antitrust litigation and class actions,[127] which makes the firm particularly well-suited to serve as class counsel.

CONCLUSION

For the reasons set forth herein, Bhandari's motion should be granted.

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Respectfully submitted,

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[126] Declaration of William Carmody ("Carmody Decl.") ¶ 4.
[127] Carmody Decl. ¶¶ 5-11.