UNITED STATES DISTRICT COURT
FOR THE 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) ECF CASE **REDACTED** **PUBLIC VERSION**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs United States and State of New York ("Plaintiffs") respectfully submit this memorandum of law in opposition to the motion for summary judgment by Defendants Coach USA, Inc. and International Bus Services, Inc. (collectively "Coach"), CitySights LLC and City Sights Twin, LLC (collectively "City Sights"), and Twin America, LLC ("Twin America").

INTRODUCTION

In March 2009, Coach and City Sights entered into an unlawful agreement to form a joint venture that ended competition between the only significant providers of hop-on, hop-off bus tours in New York City. The joint venture, Twin America, enjoyed close to a 100% share of the market for over three years after it was formed and still holds a dominant share of the market today. By forming their joint venture rather than continuing to compete, Defendants were able to immediately raise prices to consumers by 10%, and have continued to be able to raise prices even as several smaller players have attempted to enter the market during the past two years. Plaintiffs estimate that Defendants have reaped [redacted] million in ill-gotten gains by ending the competition between them, an amount that grows with each passing day.

It is difficult to imagine a more blatant violation of the federal and New York antitrust laws that were enacted to prohibit business combinations that substantially lessen competition. Indeed, Coach's executives were well aware of the fact that combining with City Sights and increasing prices could draw antitrust scrutiny. For example, Coach wondered at the start of negotiations "would a fare increase upon combining the two businesses trigger an anti-trust inquiry and if so what would be our position?" but took comfort in the belief that the "[d]eal value [was] below scope normally looked at by Department of Justice" and that the "New York Attorney General [was] currently focus[]ed on Wall Street and this would likely not be high profile enough for him to get involved."

Twin America has already been found to be anticompetitive by the federal Surface Transportation Board ("STB"). Defendants belatedly sought review by that agency in an effort to obtain antitrust immunity just weeks after the New York Attorney General's Antitrust Bureau served them with subpoenas. But after a thorough investigation, and with concern that "the Board's processes may have been manipulated to avoid the inquiry by [NYAG]," the STB concluded that Defendants' joint venture "possess[ed] excessive market power and has the ability to raise rates without competitive restraint." In response to this unfavorable decision, Defendants spun off nominal interstate assets in order to divest the STB of jurisdiction. This divesture, however, did not in any way address the competitive harm caused by Defendants' unlawful joint venture, thereby requiring the federal and New York antitrust authorities to pursue remedial action to protect consumers.

Despite the STB's prior finding and a large body of evidence showing that their joint venture has resulted in significant harm to consumers – and despite the absence of caselaw cited by Defendants in which a court has granted summary judgment on the merits to a defendant in a government merger challenge – Defendants now ask the Court to forgo a bench trial and grant them summary judgment on two grounds. First, Defendants claim that evidence of other hop-on, hop-off bus tour companies recently attempting to compete for passengers is so compelling that the Court can find as a matter of law that there is no triable issue regarding the sufficiency of entry to offset Twin America's anticompetitive effects. This argument is without merit. Plaintiffs will present substantial evidence at trial showing, among other things, that obtaining approval from the New York City Department of Transportation ("NYC DOT") for bus stops that are near top attractions and have sufficient service frequencies is a very significant barrier for these new companies. For example, Plaintiffs will offer evidence that:

- Two companies that attempted to enter the market, Trans Express and Circle Line, have been blocked entirely by their inability to obtain sufficient bus stop authorizations;

- After two years of submitting bus stop requests to NYC DOT, two of the companies featured in Defendants' motion (Go NY and Skyline) have secured only meager collections of bus stops that pale in comparison to Twin America's in terms of number, proximity to attractions, and permitted service frequency;

- Big Bus, which "entered" in early 2014 by acquiring a long-standing fringe player, is bound by a significant frequency limitation that prevents it from legally operating service at a level anywhere close to the peak service levels offered by Twin America;

- Open Tour, the market's newest "entrant," does not have *any* approved bus stops, and is therefore operating in complete defiance of NYC DOT regulations (something that NYC DOT has summoned the NYPD to redress); and

- All of the entrants (as illustrated by Defendants' made-for-litigation "survey") need to operate to varying degrees in violation of the terms of their bus stop authorizations to compete with Twin America, and do so at risk of NYC DOT enforcement action that could curtail their operations at any time.

These difficulties, among others, have prevented any competitor from replacing the vigorous competition that existed prior to the joint venture.

Second, Defendants argue that one element of the relief sought by Plaintiffs (disgorgement of ill-gotten gains) is appropriate for disposition at this stage and should be resolved in their favor. Disgorgement is well within a federal district court's inherent equitable powers in government enforcement actions. *See United States v. Keyspan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y. 2011). Such relief is fully warranted on the facts here, as this case involves a consummated transaction that has unjustly enriched Defendants by [redacted] million to date – [redacted] the amount Defendants agreed to pay to settle the private class action. Only after a full trial on the merits will the Court be in a position to determine how to exercise its equitable authority to address Defendants' unlawful gains.

STATEMENT OF FACTS

A. Defendants Form Twin America to End Competition and Increase Prices

1. City Sights Becomes Coach's Only Real Competitor

City Sights entered the hop-on, hop-off bus tour market in May 2005. (Plaintiffs' Local Rule 56.1 Counter-Statement of Material Facts ¶ 4.)[1] At the time, the only provider of hop-on, hop-off bus tours in New York City other than Coach (operating as Gray Line) was Big Taxi Tours ("Big Taxi"), a family-owned business that ran fewer than five buses and never achieved more than a tiny share of the market. (¶¶ 132-34.)

Prior to commencing operations, City Sights sought and quickly received over 40 bus stops from NYC DOT at locations throughout Manhattan, including stops at Times Square, the Empire State Building, Battery Park, and many other key attractions. (¶¶ 129-31.) These bus stops enabled City Sights to offer tours comparable to Coach, which itself possessed around 60 bus stops. (¶ 135.) Between 2005 and 2008, City Sights steadily expanded its business, growing its bus fleet to over 50 by 2008, providing the scale to rival Coach's fleet of over 70 buses. (¶¶ 3, 10.) Consumers benefited from the intense competition as Coach monitored City Sights and improved its own products and services in response to City Sights innovations. (¶¶ 136-42.)

2. Defendants Combine their Hop-On, Hop-Off Businesses and Increase Prices

By mid-2008, City Sights' continuing growth was causing concern among Coach's top executives and its corporate parent Stagecoach. For example, in June 2008, Stagecoach's executives informed the company's board of directors that Coach's "business faced increased competition with the main competitor [City Sights] matching the Group 'bus for bus' on its most

[1] All references to Plaintiffs' Local Rule 56.1 Counter-Statement of Material Facts are denoted as "(¶ __.)"

busy routes," information consistent with Coach's observations about City Sights' "growing market share" and predictions that Coach's market share would decline further. (¶¶ 143-46.)

Starting in June 2008, Coach set out to combine with City Sights and eliminate this competition. After unsuccessful attempts to acquire City Sights, in September Coach proposed a joint venture in which Coach and City Sights would divide profits and management rights. (¶¶ 148-50.) As Coach highlighted to City Sights in its proposal, the joint venture would provide for "[e]asier decision making as sole player in 'double deck' market," and enable "[f]lexibility regarding pricing." (¶ 151.) Defendants negotiated the terms of the joint venture, which was executed on March 17, 2009, and, by April 14, 2009, had completed a price increase of approximately 10% across all of their hop-on, hop-off bus tours. (¶¶ 18, 157, 164.)

Defendants now claim that their merger was prompted by the 2008 financial crisis (a fact that even if true would be irrelevant to the antitrust analysis) and that the fare increase was wholly unrelated to the combination. (Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Def. Mem.") at 3-4 & n.1.) Contemporaneous evidence, however, contradicts these post hoc explanations. Coach initiated negotiations with City Sights months before the financial crisis at a time when Coach and Stagecoach executives were concerned about City Sights' competitive impact. (¶¶ 16, 144, 148.) And Coach assumed from the start that a 10% fare increase would follow a business combination with City Sights. Discovery has revealed that this 10% fare increase assumption was included in deal-related documents for months, including documents exchanged and discussed with City Sights. (¶¶ 152-54.) From the outset, Coach was aware that a fare increase upon merging could attract antitrust scrutiny. To this end, in a July 2008 presentation shared with Stagecoach management (¶ 156), Coach executives explained:

Anti-Trust

- Currently under review by New York anti-trust lawyers, key question
  - would a fare increase upon combining the two businesses trigger an anti-trust inquiry and if so what would be our position ?
  - My position would be increasing fares due to increased cost of fuel and other cost pressures. We recognise the increased cost to customers so we are introducing a second tier product priced lower to cater for the more price sensitive customers
- Consider factoring in language in the Asset Purchase Agreement that unwinds the acquisition should anti-trust issues emerge (incentive to keep sellers from raising this issue after the deal has closed)
- Deal value is below scope normally looked at by Department of Justice
- New York Attorney General currently focussed on Wall Street and this would likely not be high profile enough for him to get involved

(¶ 155.) The antitrust concerns did not stop Defendants from implementing the joint venture or the fare increase.[2]

3. Defendants Belatedly File Transaction with STB to Evade Antitrust Review

According to Coach, the company believed prior to consummating the joint venture that the transaction was within the STB's jurisdiction. (¶ 165.) However, instead of filing with the STB *prior* to closing as federal law requires, Coach and City Sights began commercial operation of Twin America on March 31, 2009 and then discussed whether an STB filing was in their strategic best interest. (¶¶ 106, 166.) For example, on April 28, 2009, Coach's President wrote City Sights' President to advise, "[n]ow that dust has settled, we should seriously consider filing

[2] Defendants claim that the price increase was unrelated to the joint venture because Coach raised prices on Gray Line tours on February 6, 2009 – six weeks prior to the joint venture execution. (*See* Def. Mem. at 4 n.1.) This is a hotly disputed issue in the case. As Plaintiffs will show at trial, contemporaneous evidence, including notes in a personal diary kept by Coach's President, connects the February price increase to the joint venture. (¶¶ 158-61.) In fact, the February increase caught Gray Line's own employees by surprise. (¶ 162.) Even after the price increase, Defendants continued to link it to the joint venture. Stagecoach, for example, represented to its lenders on March 2, 2009 that the "[u]pdated fares structure" was a joint venture benefit that would yield millions of dollars. (¶ 163.)

for STB approval for our JV. By doing so it grants is [sic] some anti-trust protection. A value in itself."[3] (¶ 166.) No application followed, however, in May, June, or July.

On July 31 and August 3, 2009, the NYAG's Antitrust Bureau served subpoenas on Defendants seeking information about Twin America. (¶ 167.) On August 18, 2009, the day before Defendants filed at the STB, Twin America's lawyer informed the NYAG that "antitrust review and clearance rests exclusively with the [STB]." (¶¶ 168-69.) For the next two years, Defendants asserted that it was "crystal clear" the NYAG's investigation was preempted by the STB. (¶ 170.)

On February 8, 2011, after a thorough review of fact and expert evidence, the STB rejected the joint venture. Expressing "concern[] that the Board's processes may have been manipulated to avoid the inquiry by NYSAG," the STB concluded that "[t]he transaction produce[d] an unacceptably high market concentration that can lead to, and has in fact led to, unchecked rate increases, and that holds the potential for other harmful effects of excessive market power." (¶ 171.) The STB also held that Defendants "ha[d] not satisfied their burden of demonstrating that barriers to entry are sufficiently low," because, among other things, "the number and location of bus stops that are available could be a barrier to entry that could put potential entrants into the market at a serious competitive disadvantage." (*Id.*)

Defendants moved for reconsideration, but in January 2012, the STB issued an order rejecting all of their arguments. (¶ 172.) The STB gave Defendants the option of unwinding Twin America or spinning off certain interstate services Twin America was operating, which would divest the STB of jurisdiction. On February 8, 2012, Defendants chose the latter and divested the STB of jurisdiction. (¶ 173.)

[3] The parties to a transaction approved by the STB are "exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction." 49 U.S.C. §14303(f).

B. New Firms Seek to Enter the Market, but Are Stymied by Bus Stop Barrier

During the pendency of the STB proceedings, Twin America enjoyed a complete monopoly ([redacted] market share) over the hop-on, hop-off bus tour market in New York City. (¶¶ 134, 174, 190.) For over three years, there was no new entry, Twin America sustained the early 2009 price increases, and Defendants enjoyed increased revenues, margins, and profits. (¶¶ 176, 190.) Twin America continued to operate the Gray Line and City Sights brands (as it still does) using each company's pre-existing bus stop authorizations, which included over 120 bus stops with no frequency limitations in close proximity to all of Manhattan's major tourist attractions. (¶¶ 177-80, 182, 187-88.)

1. Entrants Are Operating Under a Severe Competitive Disadvantage Because of Difficulties Obtaining Bus Stop Authorizations

In the years following Twin America's formation, entrants have been stymied by the inability to obtain bus stop authorizations from NYC DOT. Bus stop authorizations are required to legally offer hop-on, hop-off service. (¶ 191.) To obtain them, an operator must submit to NYC DOT an application with its desired bus stop locations and a proposed service schedule. NYC DOT surveys the requested locations and approves or rejects each one. (¶¶ 192-93.) If locations are approved, NYC DOT provides an authorization letter permitting their use on the proposed schedule. The letter warns that "fail[ure] to comply with the schedule of operations" may result in "suspension or revocation of the authorization granted herein." (¶¶ 194-95.)

Defendants place weight on the fact that there is no official NYC DOT "moratorium" against granting bus stops. (*See* Def. Mem. at 16.) However, companies attempting to enter since Twin America's formation have faced chronic difficulties, never encountered by Defendants, in obtaining stops and securing competitive service frequencies. According to NYC DOT's Director of Bus Stop Management, Tajinder Jassal, the "hot spots" – "where every bus operator wants to stop" such as the "Empire State Building, [and] Times Square" – are likely already to be at full capacity, a consequence of Twin America having one or more stops at all those locations and of NYC DOT's policy of awarding stops on a "first come, first served" basis. (¶¶ 196-200.) Increasing congestion has further limited NYC DOT's ability to approve key stops. (¶¶ 198, 201.) As a result, Jassal estimates that NYC DOT has denied over 90% of the stop requests at the Empire State Building and Times Square since 2009. (¶ 202.) The record contains hundreds of denials in other key locations as well. (¶ 203.) NYC DOT also has curtailed the service frequencies with which entrants can operate, in stark contrast to Twin America, which is not bound by any limits because Coach and City Sights obtained bus stop authorizations years earlier when frequencies were not limited. (¶¶ 185-88, 236, 252, 255.)

The end result is that each "entrant" trumpeted by Defendants – as well as two companies Defendants ignore (Circle Line and Trans Express) – has been impeded or blocked by the inability to obtain sufficient bus stop authorizations. At trial, Plaintiffs will offer evidence of the following facts, among others, to show how Defendants' entry arguments are meritless.

Circle Line. Circle Line, the provider of sightseeing boat cruises, [redacted]

[redacted] Of this total, Circle Line has obtained only 15 stops, [redacted]

Trans Express. Trans Express started applying for stops in January 2009, with the intent of offering hop-on, hop-off bus tours at lower prices than Gray Line and City Sights. (¶¶ 217-18.) By November 2012, Trans Express had applied for bus stops six times, requesting over 50 stops, but received *only three*, which meant it "w[as]n't going to be able to operate." (¶¶ 219-22.) Trans Express even tried to focus on seven of the "most important" stops that it was "willing to accept . . . to just get started," but got none of them. (¶ 223.) Pleas to NYC DOT that Trans Express "plan[ned] to bring fair competition to the sightseeing industry" that was "totally monopolized" by Twin America went nowhere, and Trans Express abandoned entry. (¶ 224, 226.) The manager who told NYC DOT that Twin America was an illegal monopoly now works for Twin America. (¶ 225.)

Go New York Tours. Go NY's quest for bus stops has involved a three-year process with NYC DOT involving 22 separate applications for over 160 stops [redacted]), and requests for [redacted] (¶¶ 227-29, 231-32.) Go NY's efforts have resulted in only 13 authorized stops; the company continues to [redacted], and its stops [redacted]. (¶¶ 230, 233, 235.) [redacted]

[redacted] (¶¶ 236-37.) [redacted] (¶¶ 238-39.) As Go NY's owner admits, [redacted] (¶¶ 240-41.) [redacted] (¶ 234.)

Skyline Sightseeing. Skyline began applying for bus stop authorizations in February 2012. (¶ 242.) More than two years later, it has submitted five bus stop applications, in which it has requested over 150 stops (including "much needed" stops "critical" for the company's survival) and mapped out for NYC DOT locations where Twin America holds a "monopolistic" advantage. (¶¶ 243-44, 246.) Skyline has received only 22 stops, many of which [redacted].[4] (¶¶ 245, 247-48.) Skyline continues [redacted] (¶¶ 249-50.) [redacted], Skyline has no choice but to stop illegally at certain locations. (¶ 251.) NYC DOT is aware and collecting evidence of Skyline's unauthorized operations. (¶ 253.) Skyline's approved schedule of operations only allows it to run buses once every 25 minutes (at best). (¶ 252.) Skyline's owner testified that [redacted] (¶ 254.)

4 [redacted] (¶ 248.)

Big Bus Tours. By acquiring Big Taxi in early 2014 and inheriting Big Taxi's bus stop approvals (¶ 255), Big Bus has avoided some of the challenges that have confronted the companies described above. However, Big Bus is still at a significant competitive disadvantage to Twin America: its authorized stops are far fewer in number (23 vs. 128), weaker in coverage of Manhattan, and encumbered by a 30-minute service frequency limit affirmed in an affidavit Big Bus executed for NYC DOT. (¶¶ 179, 255-58.) [redacted]. (¶ 259.) [redacted]. And if it seeks additional bus stops or better service frequencies from NYC DOT, it faces the same uphill battle as the other entrants.

Open Tour NY. The market's newest "entrant," Open Tour (owned by the French company RATP), is currently operating without *any* approved stops from NYC DOT. (¶ 261.) In other words, it is not legally permitted to use *any* of the 40 "advertised stops" Defendants repeatedly highlight in their brief (*see* Def. Mem. at 7-8, 17) or operate hop-on, hop-off service at all. As documents recently obtained from NYC DOT reveal: Skyline has complained repeatedly to NYC DOT about Open Tour's illegal stopping; NYC DOT has notified Open Tour that it is not allowed to operate without NYC DOT approval and warned Open Tour that "this . . . activity must stop;" NYC DOT has directed the New York Police Department (NYPD) to take corrective measures; and NYPD has recently done so. (¶¶ 262-66.) The Court should give no weight to the competitive significance of a company whose entire operations are unlawful.

As plaintiffs will show at trial, these difficulties have left the entrants at a significant competitive disadvantage to Twin America across several important dimensions:

- **<u>Lack of Bus Stops at Key Attractions</u>:** Twin America offers customers access to every major attraction, holding multiple stops at many of them. (¶¶ 179-82.) Entrants, by contrast, have crucial holes in their portfolios. [redacted] Moreover, the number of stops held by Twin America in total dwarfs those held by each entrant, providing Twin America with far greater access and operational flexibility. (¶¶ 179-81.)

- **<u>Poor Proximity to Tourist Attractions</u>:** The "judgment of the marketplace" (*see* Def. Mem. at 18) is that a bus stop should be no more than a block away from the relevant attraction, as Twin America's bus stops typically are. (¶¶ 182-83.) Even Twin America's President, Mark Marmurstein, testified that, when starting City Sights, he wanted stops "as close as possible. Otherwise what good are you?" (¶ 184.) Several stops that entrants have obtained near attractions are far more distant. [redacted]

- **<u>Stringent Frequency Limitations</u>:** Twin America legally can and does run buses with extremely high frequency – as often as once every few minutes during peak season – providing customers the short wait times they desire. (¶ 189.) The entrants' frequencies, by contrast, are explicitly capped, forcing them to violate their approved operations schedules if they want to offer competitive wait times. (¶¶ [redacted], 252, 255.)

- **<u>Illegal Operations</u>:** Unlike Twin America, several entrants operate illegally, whether through use of unapproved bus stops or violations of their permitted frequencies. (¶¶ [redacted], 251, 261-65.) This creates a risk of enforcement action that Twin America does not face – one that a competitor like Twin America could seek to precipitate at any time. (¶ 260.)

2. Other Barriers Further Impede Entrants from Rivaling Twin America

In addition, although less significant than the bus stop barrier, the evidence shows that securing a large fleet of buses to rival Twin America's fleet of over 100 buses, as well as garage and maintenance facilities to house them, can also be an impediment to sufficient entry. [redacted] (¶¶ 267-68.) There is also evidence that brand recognition can be a barrier. [redacted] (¶ 269.) Defendants' executives, too, have recognized the importance of brand recognition to entry, evidence consistent with the STB's finding that Twin America's established brands were a barrier. (*Id.*)

3. Twin America Continues to Harm Consumers and Dominate the Market

As a result of the difficulties discussed above, no entrant has been able to replace the scale and strength of either Coach or City Sights prior to the joint venture. Notably, entry by new firms has neither rolled back the early 2009 fare increases nor prevented Twin America from imposing further increases (which it did in early 2013), underscoring the fact that Twin America continues to inflict substantial consumer harm. (¶ 270.) Nor have Defendants offered evidence that entrants have spurred Twin America to introduce new products, increase promotions or discounts, or improve services. According to the most recent data in the record from the summer of 2013, Twin America's market share stood at [redacted] percent. (¶ 271.)

ARGUMENT

To prevail on summary judgment, Defendants must show that "there is no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although Plaintiffs must offer specific facts to show a "genuine" issue exists requiring trial, the court must draw all reasonable inferences and consider the evidence in the light most favorable to Plaintiffs. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 61 (2d Cir. 2012). Only when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party" is there no "genuine issue for trial." *Matsushita*, 475 U.S. at 587.

I. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON ENTRY

Defendants assert that summary judgment is appropriate because of the entry of competitors years after the formation of Twin America. In light of the large body of evidence that Plaintiffs will introduce at trial showing that these competitors have been impeded by significant entry barriers, summary judgment is not appropriate.

a. The Joint Venture Is Presumptively Unlawful

Section 7 of the Clayton Act forbids transactions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (2012). Section 7 applies to the formation of a joint venture that eliminates actual or potential competition between the joint venture's participants. *See United States v. Penn-Olin Chem. Co*., 378 U.S. 158, 170-71 (1964). In applying Section 7, courts employ a "burden-shifting framework" that first requires a plaintiff to "establish a *prima facie* case that an acquisition is unlawful" by showing that "the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition." *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 981 (2d Cir. 1984). Once the plaintiff makes such a showing, a defendant may rebut the presumption "by producing evidence to cast doubt on the accuracy of the [plaintiff's] evidence as predictive of future anti-competitive effects." *Chicago Bridge*, 534 F.3d at 423. If the defendant does so, "the burden of production shifts back to the [plaintiff] and merges with the ultimate burden of persuasion, which is incumbent on the [plaintiff] at all times." *Id.*

A plaintiff typically establishes its prima facie case by offering evidence of market concentration using data on market shares and a market share-based measure called HHI. [5] *See*

[5] The Herfindahl-Hirschmann Index ("HHI") is a commonly used tool for measuring market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a

FTC v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001). "Sufficiently large HHI figures establishes . . . [a] prima facie case that a merger is anti-competitive," *id.*, and discharges the plaintiff's initial burden.[6] *Id.* Here, Plaintiffs will establish at trial the strongest possible presumption of illegality based on the joint venture's increase in concentration because the merger gave Defendants a monopoly with [redacted] market share. (¶ 174.) Specifically, the joint venture increased the relevant market's HHI by [redacted] points from [redacted] to approximately [redacted], about as high as they can possibly be, unequivocally rendering the joint venture presumptively unlawful. (¶ 175.)

Defendants point to no case granting summary judgment on the merits to a defendant in a government merger challenge, or in any merger challenge that gave rise to a strong presumption of illegality. The three Section 7 cases Defendants cite for the proposition that low entry barriers can defeat liability were all decided after full bench trials and none had facts close to those at issue here. *See Waste Mgmt.,* 743 F.2d at 977; *United States v. Syufy Enters.*, 903 F.2d 659, 661 (9th Cir. 1990); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990).[7]

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market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

[6] *See, e.g.*, *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011) (government established prima facie case where merger gave the combined entity a 28.4% market share and increased the market's HHI by 400 points to 4691); *Heinz*, 246 F.3d at 711, 716-17 (government made prima facie showing "by a wide margin" where merger gave the combined firm a 32.8% market share and increased the pre-transaction HHI of 4775 by 510 points); *United States v. Bazaarvoice, Inc.*, No. 13-cv-133 (WHO), 2014 WL 203966, at *70 (N.D. Cal. Jan. 8, 2014) ("government easily made a prima facie showing of a Section 7 violation" where the HHI increased from 2674 pre-merger to 3915 post-merger); *Waste Management*, 743 F.2d at 981 (holding that post-merger market share of 48.8% was "sufficient to establish *prima facie* illegality"); *United States v. Franklin Electric Co.*, 130 F. Supp. 2d 1025, 1032 (W.D. Wis. 2000) (joint venture joining only meaningful competitors created presumption of illegality).

[7] In *Syufy*, the Ninth Circuit affirmed the rejection of monopolization and Clayton Act claims against a movie theater operator because the government had "concede[d] that there [were] no structural barriers to entry in the market." 903 F.2d at 666-67. The court found that *just two years after* the merger had given the defendant a monopoly, an entrant was operating more movie screens than the defendant. *Id.* at 665, 666 n.11. Similarly, in *Waste Management*, the question before the Second Circuit was whether evidence of easy entry could rebut a plaintiff's prima facie showing of illegality as a matter of law. *See* 743 F.2d at 978-79, 981-83. The Second Circuit held for the defendant because the district court itself had found that entry was "relatively easy . . . and the barriers to entry not great." *Id.* at 981-82. And in *Baker Hughes*, the D.C. Circuit affirmed the district court's conclusion that actual

b. Defendants Ignore the Relevant Legal Standards Applicable to Entry

As set forth in the *Merger Guidelines*[8] and endorsed in many modern merger cases, the entry of competitors can only rebut the presumption that a transaction is anticompetitive if the evidence demonstrates that such entry is "timely, likely, and sufficient in its magnitude, character, and scope" to deter or counteract the transaction's anticompetitive effects. *H & R Block*, 833 F. Supp. 2d at 73; *Chicago Bridge*, 534 F.3d at 430; *Bazaarvoice*, 2014 WL 203966, at *71; *see also United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001). This same standard is used to assess the possibility of expansion in the relevant market by existing firms. *See, e.g.*, *H & R Block*, 833 F. Supp. 2d at 73.

In addition, some courts and commentators have suggested that a defendant faces an elevated burden when the challenged transaction merges the dominant firms in the market. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 911b (3d ed. 2007) ("Even relatively easy entry should not ordinarily be a defense to a merger creating a monopolist or dominant firm. . . . Thus, when a merger creates a monopolist or dominant firm we would always place on the defendant the burden of showing that entry is so easy that monopoly profits could not be sustained for any significant length of time."); *Franklin Electric*, 130 F. Supp. 2d at 1035 (rejecting defendants' entry defense in merger of only competitors because defendants "ha[d] not shown that entry is so easy that [the joint venture] could not sustain monopolist profits for some period of time").

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and threatened entry, as well as a number of non-entry factors, rebutted the government's prima facie case after concluding that entry barriers were low. 908 F.2d at 988-99.

[8] Although they are not binding on federal courts, the DOJ & FTC's *Horizontal Merger Guidelines* (Aug. 19, 2010) ("*Merger Guidelines*"), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010 html, have routinely been used as persuasive authority to evaluate a merger's legality. *See, e.g.*, *United States v. Kinder*, 64 F.3d 757, 771 (2d Cir. 1995) (citations omitted) ("Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect, courts commonly cite them as a benchmark of legality."); *Chicago Bridge*, 534 F.3d at 431 n.11.

Timeliness and sufficiency are two of the key considerations in the entry analysis. To demonstrate that entry is "timely," several courts, citing a prior version of the *Merger Guidelines*, have required entry to occur within two years of the challenged merger.[9] The *Merger Guidelines* no longer identify a specific time period, but instruct that the entry must be "rapid enough to make unprofitable overall the actions causing . . . [anticompetitive] effects" and to ensure that "customers are not significantly harmed by the merger." *Merger Guidelines* § 9.1. Plaintiffs will introduce evidence at trial showing that the entry relied upon by Defendants, coming years after they formed Twin America, did not come close to rendering Defendants' price increases unprofitable. For entry to be sufficient, "the entry has to be of a 'sufficient scale' adequate to constrain prices and break entry barriers" and enable the entrant to "compete on the same playing field." *Chicago Bridge*, 534 F.3d at 429, 430. *See also FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *34 (N.D. Ohio Mar. 29, 2011) (explaining that entry "must replace at least the scale and strength of one of the merging firms in order to replace the lost competition from the Acquisition").[10] Plaintiffs here will show at trial that entry has been insufficient across multiple dimensions.

Although a "total lack of entry barriers" can demonstrate a merger's legality (Def. Mem. at 11), entry barriers that do not *fully block* entry can still permit the exercise of significant market power. *See Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995) ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. . . . Barriers may still be 'significant' if the market is unable to correct itself despite the entry of small rivals."). And courts in consummated merger cases have held mergers

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[9] *See Bazaarvoice*, 2014 WL 203966, at *70 n.19; *H & R Block*, 833 F. Supp. 2d at 73 n.28; *FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *30 (N.D. Ohio Mar. 29, 2011); *Syufy*, 903 F.2d at 666 n.11.

[10] *See also Bazaarvoice*, 2014 WL 203966, at *72; *H & R Block*, 833 F. Supp. 2d at 74; *Merger Guidelines* § 9.3 (observing that entry may not suffice where there are "constraints that limit entrants' competitive effectiveness").

unlawful despite post-merger entry. For example, in *United States v. Bazaarvoice, Inc.*, the district court rejected the defendants' claim that actual entry overcame the merger's presumption of illegality, observing that although "a few companies have entered the market recently, their entry is of such a minimal scale that it is not close today, and is unlikely to be close in the next two years, to replacing [the acquired firm]." 2014 WL 203966, at *72.[11] That is fact-specific and certainly not an issue that can be resolved short of trial.

Finally, *threatened* entry may also rebut a presumption of anticompetitive effects, but only if entry barriers are low. *See Chicago Bridge*, 534 F.3d at 436. For this reason, among others, Defendants' claims about threatened entry by Big Bus and other firms (*see* Def. Mem. at 20-22) are unavailing for the same reasons their broader entry arguments fail.

In an attempt to overcome the many factual disputes about entry barriers and the sufficiency of entry in this case, Defendants attempt to take two inapposite non-merger cases and construct rules of law that the cases themselves do not state. First, relying on *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90 (2d Cir. 1998), they claim that a court is not to examine "quality-of-entry arguments" and just look at the "fact of entry." (Def. Mem. at 18.) But *Tops Markets* nowhere says this. That case involved one supermarket's alleged entry into a contract to block a rival's attempt to secure a parcel of land to build a competing market. *Tops Markets*, 142 F.3d at 94-95. The court held that the plaintiff could not demonstrate that the single contract violated Section 1 or supported a monopolization claim because the unrebutted evidence showed that there was ample land available to build a competing market and that competitors had, in fact,

[11] *See also Chicago Bridge*, 534 F.3d at 410, 436 (rejecting defendants' argument that foreign competitors had made "significant inroads" in the relevant markets where evidence showed "that actual entry . . .was marginal at best"); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1080-82 (D. Del. 1991) (concluding that actual entry evidence did not overcome presumption of illegality where barriers "hinder[ed] both new entrants and incumbents in their efforts to gain market share or effect prices" and actual entrant was "burdened by [a] terrible performance record").

acquired such land. *Id.* at 97-99.[12] The court did not suggest it was inappropriate to scrutinize the "quality" of entry; it found no entry barriers. Entry barriers that compromise an entrant's quality, meanwhile, are plainly cognizable. For example, in *McCaw Personal Communications v. Pacific Telesis Group*, 645 F. Supp. 1166 (N.D. Cal. 1986), the court denied summary judgment in a paging business merger because the frequency available to new firms to enter was "not equal in cost or quality" to the spectrum controlled by the merged firm, which was "superior." *Id.* at 1174. The court explained that the "key question" was the "height of entry barriers" and concluded that the competing evidence was properly weighed at trial. *Id.*

Second, Defendants assert that *Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98 (3d Cir. 1992), stands for the proposition that an entry barrier is not cognizable if it "does not change entrants' *incentives* to enter" and that "incentives to enter remain unchanged where entrants continue to '*base their decisions regarding entry to a new market on nonregulatory [business] considerations*. . . ." (Def. Mem. at 14 (emphasis in original).) But again, the case says no such thing. Rather, Defendants have taken out of context a single passage in which the court contrasted a case in the banking industry where the Supreme Court had found regulatory entry barriers with a case in the beer industry with no such barriers as part of a broader discussion rebutting the plaintiff's contention that "*any form* of government approval that is required for market entry *automatically* establishes an entry barrier" (a claim Plaintiffs do not make here). *See Barr Labs*, 978 F.2d at 113 (emphasis added). The case does not state that a court's focus is to be on entry *incentives* instead of entry's timeliness and sufficiency.

[12] Even without evidence of any entry barriers, the Second Circuit still *sustained* the plaintiff's attempted monopolization claim, finding the claim was inappropriate for summary judgment. *Id.* at 99-102.

c. Entry Years After Defendants' Joint Venture Does Not Demonstrate Entry's Sufficiency

Plaintiffs have presented numerous triable issues regarding entry's sufficiency when the evidence is evaluated against these settled legal standards. First, entry did not occur for more than three years after the formation of Twin America and has still failed to counteract the price increases implemented by the joint venture. These facts raise a triable issue about whether entry is "so easy that monopoly profits could be sustained for any significant length of time," *Franklin Electric*, 130 F. Supp. 2d at 1035, or that entry has been "rapid enough that customers are not significantly harmed," *Merger Guidelines* § 9.1. Although Defendants claim that "the record shows that Gray Line decided to increase its fares before and separate from the formation of Twin America" (Def. Mem. at 4 n.1), that is a disputed fact, and for purposes of summary judgment, the court must draw all inferences and resolve all ambiguities in the non-moving party's favor. Plaintiffs have offered substantial evidence linking the Defendants' early 2009 fare increases to the joint venture, including numerous documents assuming a 10% post-merger fare increase, and expert economic evidence from Dr. Russell Pittman. (¶¶ 152-54, 158-63.)

Second, the record convincingly shows that securing sufficient bus stops at competitive frequencies has blocked or impeded entry and left entrants unable to replace the scale and strength of either Coach or City Sights prior to the joint venture. It is well-established that a government licensing process can serve as a cognizable entry barrier. *See, e.g.*, *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 377-79 (1970); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 629 (1974); Areeda & Hovenkamp, *Antitrust Law* ¶ 941a; *see also Syufy*, 903 F.2d at 673 ("It is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation.").[13] Defendants' joint venture holds over 120 bus stops that enable it to stop in close proximity to all of New York City's major attractions with no frequency limitation. By contrast, new entrants have faced chronic difficulties securing bus stop authorizations that have blocked two firms from entering altogether and severely impeded the others. These facts leave no doubt that summary judgment is inappropriate, and the evidence creates a triable issue on entry barriers such as buses, garage and maintenance facilities, and brand as well.

Finally, Defendants identify no evidence that the entrants are *actually constraining* Twin America. For example, Defendants have pointed to no product or service improvements, discounts or promotions, or other consumer benefits that competition with the entrants has generated since their emergence in 2012. Instead, Defendants were able to increase prices further in 2013, after the entry relied upon by Defendants was already underway.

d. Defendants' Made-for-Litigation "Survey" Does Not Support Summary Judgment

Defendants rely on a survey that was conducted by one of their paid consultants for the purposes of litigation. (Def. Mem. at 8, 23.) This survey was not disclosed to Plaintiffs in Defendants' expert reports and surfaced for the first time in Defendants' motion. For this reason alone, the Court should give it no weight.

Moreover, the survey proves nothing, and certainly does not eliminate all factual disputes relating to entry. It appears to have been conducted by watching buses stop at Battery Park over a handful of days in May and June and attempting to count the number of riders on each bus. But even a casual review shows that the survey's methodology, which was not validated by

[13] *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848 (9th Cir. 1995) does not suggest otherwise. There, the court merely found that a "five-month delay" faced by the plaintiff in obtaining FDA approval was a not an entry barrier standing alone even though "[t]he burden of FDA regulations might arguably constitute a barrier under some circumstances." *Id.* at 855. Here, Plaintiffs will introduce evidence that the bus stop barrier results in far more than a brief delay.

expert testimony, is unsound. Watching one location out of dozens in the city over a period of several days and counting passengers on the fly through human observation tells the Court nothing about the New York City hop-on, hop-off bus tour market. Should the Defendants seek to admit this survey into evidence (over Plaintiffs' objections), the evidence described throughout this brief would be introduced at trial to show that the survey lacks credibility and is not probative on the issue of entry.

That said, taking some of the survey's observations at face value underscores precisely why the sufficiency of entry must proceed to trial. First, the survey highlights the extent to which the recent entrants rely on unauthorized operations. In fact, neither Go NY, Skyline, nor Open Tour have approved bus stops at the Battery Park observation points utilized in the survey. The observer reports also illustrate that Go NY, Skyline, and Big Bus are all violating their authorized schedules of operation (Open Tour has no approved schedule). Second, the survey illustrates that rivals cannot match Twin America's scale or strength. For example, the survey shows that Twin America ran far more buses than each entrant on each day surveyed; in fact, on several days, *Gray Line alone* operated more buses than Go NY, Skyline, Big Bus, and Open Tour *combined*, and in several instances, Gray Line was running so many buses that the observers could not even count their passengers. (¶¶ 279-81.) Notably, a hypothetical merger between Coach and City Sights at even the unreliable market shares measured by Defendants' survey would increase HHI by 1660, well in excess of the 200 point threshold at which a merger is "presumed to be likely to enhance market power." *Merger Guidelines* § 5.3.

e. Summary Judgment on the Government's Request for Injunctive Relief Is Also Inappropriate

Summary judgment is similarly not warranted on Plaintiffs' request for divestiture or dissolution of Twin America where, as here, the pre-merger competition has not been restored by entry. "[O]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). In assessing an appropriate structural remedy, the Supreme Court has highlighted that divestiture is the "most drastic, but most effective, of antitrust remedies . . . simple, relatively easy to administer, and sure." *Id.* at 326, 330-31; *see also id.* at 330 ("The very words of [§] 7 suggest that an undoing of the acquisition is a natural remedy."). Relying on *du Pont*, both courts and the FTC have routinely ordered divestitures and unwound transactions to restore competition in the consummated transaction context.[14] Here, the record has extensive evidence showing that Twin America has substantially harmed consumers for more than five years and that entry remains insufficient to redress Twin America's anticompetitive effects. A determination of the appropriate injunctive relief should thus await a full trial on the merits.

II. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON DISGORGEMENT

a. Defendants' Wrongful Conduct Fully Supports Disgorgement to Prevent Unjust Enrichment and Deter Future Antirust Law Violations

Defendants' attack on the basis for disgorgement under the Sherman and Clayton Acts similarly falls flat. Defendants are correct that the word "disgorgement" does not appear in the text of the Sherman and Clayton Acts. But as the Supreme Court and Second Circuit have long held (and as Defendants appear to concede), federal statutes commonly preserve a district court's inherent equitable authority to order disgorgement when necessary to ensure that the United States can obtain complete relief for statutory violations. And, as explained below, the unique

[14] *See, e.g., Chicago Bridge*, 534 U.S. at 440-42; *United Tote*, 768 F. Supp. at 1085-87; *In re Polypore Int'l, Inc.*, 2010 WL 9933413, at *32 (FTC Dec. 13, 2010), *aff'd*, *Polypore Int'l Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012); *FTC v. ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *48 (FTC Mar. 28, 2012), *aff'd*, *ProMedica Health Sys. Inc v. FTC*, 749 F.3d 559 (6th Cir. 2014).

circumstances of this case – a consummated merger involving an anticompetitive price increase and deliberate attempts to evade antitrust enforcement – present a compelling argument for the discretionary exercise of such powers to deprive Defendants of illicit profits they retain even after the class settlement and to deter future antitrust law violations.

Disgorgement is an equitable remedy that seeks to "depriv[e] violators of the fruits of their illegal conduct" by "forc[ing] a defendant to give up the amount by which he was unjustly enriched." *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) (internal quotation marks omitted). By "prevent[ing] wrongdoers from unjustly enriching themselves through violations," disgorgement has the forward-looking "effect of deterring subsequent fraud." *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006). Disgorgement is a "distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions," *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011), whose "emphasis [is] on public protection, as opposed to simple compensatory relief," *Cavanagh*, 445 F.3d at 117. The law is clear that disgorgement does not serve the same purpose as damages. *See, e.g., SEC v. Commonwealth Chem. Sec.*, *Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (Friendly, J.).

Consistent with its "emphasis on public protection," *Cavanaugh*, 445 F.3d at 117, an award of disgorgement is an appropriate exercise of a district court's inherent equitable powers when the federal government is seeking to redress statutory violations. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity," a district court's ability to exercise the full powers of equity jurisdiction, including disgorgement, "is not to be denied or limited." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Mitchell v. Robert De Mario Jewelry*, *Inc.*, 361 U.S. 288, 289, 291-92 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."). Applying the principles recognized in *Porter* and *Mitchell*, the Second Circuit has repeatedly affirmed that federal statutes authorize district courts to award disgorgement pursuant to their inherent equitable authority. For example, the Second Circuit authorized disgorgement as an inherent equitable remedy to redress Securities Exchange Act violations for decades. *See, e.g., Commonwealth Chem.*, 574 F.2d at 102-03; *see also SEC v. DiBella*, 409 F. Supp. 2d 122, 128-32 (D. Conn. 2006). Similarly, the Second Circuit recently affirmed the FTC's right to seek disgorgement pursuant to the court's inherent equitable powers in actions brought under Section 13(b) of the FTC Act. *See Bronson Partners*, 654 F.3d at 365-67, 372-74.

Consistent with this long line of cases, in *United States v. Keyspan Corp.*, Judge Pauley acknowledged the government's ability to seek disgorgement in antitrust suits brought under the Sherman Act. 763 F. Supp. 2d at 638-41. Considering the issue as a matter of first impression, Judge Pauley reviewed *Porter*, *Mitchell*, and *Cavanagh* and concluded that disgorgement was within a district court's inherent equitable powers and fully consistent with "established principles of antitrust law." *Id.* at 639-40. In reaching this conclusion, Judge Pauley observed that "there appear[ed] to be little disagreement among commentators about the propriety of disgorgement as an antitrust remedy," relying on the leading antitrust law treatise's conclusion that "equity relief may include, where appropriate, the disgorgement of improperly obtained gains." *Id.* at 640 (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 325a (3d ed. 2007)).[15]

[15] The FTC has also sought and obtained equitable monetary relief, including disgorgement, in antitrust cases. *See* Final Order and Stipulated Permanent Injunction, *FTC v. Hearst Trust*, Civ. No.1:01CV00734 (TPJ) (D.D.C. Dec. 18, 2001) (awarding FTC $19 million in disgorgement in consent decree resolving challenge to consummated merger) (attached as Ex. 100 to the Declaration of Sarah L. Wagner in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999) (affirming FTC right to seek disgorgement as part of antitrust challenge to licensing agreements that limited entry of generic drugs).

Although *Keyspan* only considered the availability of disgorgement under the Sherman Act – the source of the United States's second cause of action here – Judge Pauley's analysis applies with equal force to violations of the Clayton Act, whose statutory text is identical in relevant part, authorizing the United States to bring suits "in equity to prevent and restrain such violations." *Compare* Sherman Act, 15 U.S.C. § 4 (2012) *with* Clayton Act, 15 U.S.C. § 25 (2012). This "prevent and restrain" language invokes this Court's full equitable jurisdiction. *Cf. Mitchell*, 361 U.S. at 289, 291-92 (federal statute authorizing district court "to restrain violations" of the Fair Labor Standards Act invoked court's full equitable powers).[16]

Defendants do not dispute that disgorgement is within this Court's inherent power; instead, they argue that "disgorgement is not appropriate as an equitable remedy on the factual record of this antitrust merger case." (Def. Mem. at 24.) But Defendants' framing of the argument illustrates precisely why it must be rejected – whether disgorgement is "appropriate . . . on the *factual record* of this antitrust merger case" is a question for trial. For present purposes, it suffices to note that, just as in *Keyspan*, there are several specific "exigencies of [this] case" that support a disgorgement award. *Keyspan*, 763 F. Supp. 2d at 640. First, unlike the majority of Section 7 challenges brought by the United States, which are filed *before* the closing of the challenged transaction[17] – and thus before the challenged transaction can result in actual harm to consumers or unjust enrichment to the merging parties – this action involves a consummated

[16] Defendants' discussion of *United States v. Sasso*, 215 F.3d 283, 290 (2d Cir. 2000), is unavailing. (Def. Mem. at 25-26.) In *Keyspan*, Judge Pauley considered and rejected the argument that the similar "prevent and restrain" language in the RICO statute limited the availability of disgorgement under the Sherman Act, noting that the RICO statute had different limiting provisions and other distinguishing characteristics. *See* 763 F. Supp. 2d at 641. Other courts have also pointed to RICO's limiting provisions in declining to extend it to other statutory contexts. *See, e.g., United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 232-33 (3d Cir. 2005) (rejecting comparison to RICO in interpreting Federal Food, Drug and Cosmetic Act); *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1059 (10th Cir. 2006) (similar).

[17] Mergers that meet certain thresholds for size are subject to the advance reporting requirements of the Hart-Scott-Rodino Act and are generally challenged prior to consummation. *See generally* 15 U.S.C. §18a (2012).

joint venture with actual consumer harm and unjust enrichment. In contrast to the relief the government obtains when it blocks an illegal merger *prior to* consummation, whatever structural remedy the government may obtain at trial here will not prevent ill-gotten gains.

Second, the Defendants were well aware that undertaking their merger in order to increase prices was anticompetitive. For example, Coach highlighted the risk that a merger and fare increase could prompt an antitrust inquiry from the beginning of its consideration of a business combination with City Sights (but apparently took comfort in the belief that government enforcers would not notice) and looked to the STB to provide "anti-trust protection" after they completed the merger and implemented the fare increases.

Third, Defendants' tactics – illegally consummating their transaction prior to seeking STB approval, belatedly seeking such approval to shield themselves from an antitrust inquiry, and then divesting the STB of jurisdiction after receiving an adverse ruling – enabled them to reap illicit profits and to do so for years longer than they would have in the absence of their procedural gamesmanship. Disgorgement is necessary here to deter future potential antitrust law violators from engaging in similar improper conduct.

Defendants' settlement of the private class action does not compel a different result. To the contrary, in *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450 (2d Cir. 1996), the Second Circuit rejected exactly the argument Defendants purport to advance here – that the government cannot obtain disgorgement where the defendant settles a private "tag along" class action arising out of the same violation:

> Defendants also contend that disgorgement is not needed to reimburse defrauded customers because defendants settled a class action, without objection by the SEC . . . This argument too is wide of the mark. Since disgorgement is a method of forcing a defendant to give up the amount by which he was unjustly enriched, it is unlike an award of damages . . . and is neither foreclosed nor confined by an amount for which injured parties were willing to settle.

101 F.3d at 1475 (citations omitted). There, the defendants had paid $5 million toward a class settlement, but the ill-gotten gains exceeded $27 million. *Id.* Here, Defendants have agreed to pay $19 million toward a class settlement, but Plaintiffs have quantified ill-gotten gains [redacted] million. Although this Court may take the class settlement amount into account in any disgorgement award, *see id.*, Defendants' assertion that the class settlement renders Plaintiffs without "a sufficient basis to seek disgorgement" (Def. Mem. at 31) is at odds with *First Jersey*, as well as the numerous cases emphasizing very different purposes disgorgement serves than private damages, *see, e.g.*, *Commonwealth Chem.*, 574 F.2d at 102. Defendants' related suggestion that a disgorgement award would be "unduly punitive" (Def. Mem. at 34) similarly fails where, as here, Plaintiffs are seeking to disgorge only the amount by which Defendants were unjustly enriched. *See First Jersey*, 101 F.3d at 1475 (explaining that disgorgement amount was "not punitive in nature"). Defendants' settlement therefore provides no basis for granting summary judgment and is a remedy issue that should be resolved at trial.

b. Disgorgement Is Also Available as a Remedy to Redress Violations of New York's State Law Claims

i. New York Has Authority to Seek Disgorgement Under Both Section 63(12) of the Executive Law and the Donnelly Act

Defendants' attack on New York's disgorgement claims under state law fares no better. In *People v. Applied Card Systems, Inc.*, 894 N.E.2d 1 (N.Y. 2008), New York's highest court expressly recognized the ability of the NYAG to obtain disgorgement under Section 63(12) of the Executive Law *even after* a prior class action settlement.[18] Since *Applied Card*, other New

[18] The court held that a prior class action settlement precluded the NYAG from seeking *restitution* under Section 63(12) for individuals covered by the settlement, but explained that this holding would not undermine the public interest because, *inter alia,* the NYAG still retained the ability to seek "disgorgement – an equitable remedy distinct from restitution – of profits that respondents derived from all New York consumers, whether within the . . .

York courts have affirmed the NYAG's authority to obtain disgorgement for reasons consistent with *Keyspan.* The general principle in state law, like federal law, is that it is not necessary for a statute to explicitly list disgorgement as a remedy – a court sitting in equity possesses the authority to order disgorgement unless the statute in question takes it away. Thus, where a statute, such as Section 63(12) or the Donnelly Act, confers upon the NYAG general equitable powers, the court retains its inherent equitable powers to order disgorgement.

For example, in *People v. Ernst & Young LLP*, 980 N.Y.S.2d 456 (App. Div. 2014), the Appellate Division, relying on *Applied Card*, rejected the defendant's argument that the NYAG's remedies under Section 63(12) and the Martin Act, N.Y. Gen. Bus. Law, Art. 23-A, §§ 352-59, did not include disgorgement because disgorgement was not expressly delineated in those statutes. *Id.* at 457. The court held, with reasoning that is particularly apt here, that "maintaining disgorgement as [an independent] remedy within the court's equitable powers is crucial, particularly where the Attorney General may be precluded from seeking restitution and damages if defendant settled the private class action."[19] *Id.*; *see also People v. Trump Entrepreneur Initiative*, 2014 WL 344047, at *1 (N.Y. Sup. Ct. Jan. 30, 2014) ("63(12) empowers the Attorney General to seek permanent injunctive relief, restitution, *disgorgement* and damages . . .") (emphasis added); *People v. Greenberg*, 34 Misc. 3d 1229(A), at *1-2 (N.Y. Sup. Ct. May 28, 2014) (rejecting defendants' arguments that the NYAG could not pursue its disgorgement remedy under the Martin Act or Executive Law 63(12)).[20]

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settlement class or not." 894 N.E.2d at 16. The availability of disgorgement was fundamental to the court's conclusion that precluding NYAG from seeking restitution would not undermine the public interest.

[19] The two Section 63(12) lower court decisions cited by Defendants (*see* Def. Mem. at 27-28) were overruled by *Ernst & Young*. *See* 980 N.Y.S.2d at 456.

[20] *See also People v. Greenberg*, 994 N.E.2d 838 (N.Y. 2013) (upholding NYAG's equitable claims on appeal).

Defendants' suggestion that disgorgement might be limited to cases involving "fraudulent conduct" and not the "illegality" prong of Section 63(12) is meritless.[21] There is no basis in the statutory text for such a distinction – the grant of equitable relief in Section 63(12) applies to both repeated fraud and repeated illegality. Defendants provide no explanation (or case law supporting) why equitable remedies available under Section 63(12) would be available for some violations but not others. And while the litigated cases upholding NYAG's right to seek disgorgement generally included allegations of fraud, they also included allegations of "illegality," *e.g.*, violations of consumer protection laws (*Applied Card*) or the securities laws (*Ernst & Young, Greenberg*).

For the same reasons, disgorgement is also available under the Donnelly Act, which contains a general grant of equitable jurisdiction virtually identical to the statutory language interpreted in *Keyspan,* and as broad as New York's Martin Act, which has been held to allow NYAG to seek disgorgement. *See Greenberg*, 43 Misc. 3d at *1-2.[22] *See also People v. Am. Ice Co.*, 120 N.Y.S.2d 41, 445-45 (N.Y. App. Div. 1909) (although Section 342 provides for an injunction, "[i]t does not necessarily follow that the only relief to which the People may become entitled . . . is an injunction").

ii. New York's Disgorgement Claim Under Section 63(12) Is Not Time Barred

There is no dispute that NYAG's Donnelly Act claim, with a four-year statute of limitations, is timely. Defendants' suggestion that NYAG's Section 63(12) claim is time barred is incorrect. Defendants wrongly suggest that the three-year period in N.Y. C.P.L.R. § 214(2)

[21] New York Executive Law § 63(12) allows the Attorney General to bring an action for fraud, as well as an action challenging repeated illegality (i.e., violations of other laws, both federal and state). Here, the NYAG alleges repeated violations of federal and state antitrust statutes.

[22] Defendants cite language in the Donnelly Act that allows recovery of an "additional allowance" of up to $20,000 (presumably for costs). This supplemental allowance does not remove any of the general equitable powers otherwise granted to NYAG under the Donnelly Act, and is no basis for limiting a disgorgement right. Indeed, very similar language is in the Martin Act. *Compare* N.Y. Gen. Bus. Law § 353(1) *with* N.Y. Gen. Bus. L. § 342.

applies to actions under Section 63(12) unless "common law fraud" is alleged, but the actual rule is that 214(2) applies to liability created by statute unless *any type* of claim alleged existed at common law. *State v. Cortelle Corp.*, 341 N.E.2d 223, 226-27 (N.Y. 1975); *State v. Danny's Franchise Sys., Inc.*, 517 N.Y.S.2d 157, 158 (App. Div. 1987) ("CPLR 214(2) only governs liabilities which would not exist but for a statute . . . [I]t does not apply to liabilities existing at common law which have been recognized or implemented by statute."). Because antitrust liability analogous to the claims asserted in the instant case existed at common law,[23] New York's cause of action under Section 63(12), which is predicated on Defendants' antitrust law violation, is not subject to the three-year period in 214(2), but rather the six-year period pursuant to the default rule in CPLR 213(1). *See, e.g., State v. Feldman*, 2003 WL 21576518, at *4 (S.D.N.Y. July 10, 2003) (applying six-year statute of limitations to Section 63(12) claim based on antitrust violation); *In re DRAM Antitrust Litig.*, 2007 WL 2517851, at *11-12 (N.D. Cal. Aug. 31, 2007) (six-year period applied to antitrust claim under Section 63(12) because "like the fraud claim in *Cortelle*, an antitrust claim was also recognized at common law").[24]

Although the statute of limitations for NYAG's Section 63(12) claim is six years, even if it were found to be three years, the court should apply equitable estoppel, which bars Defendants from asserting a statute of limitations defense where it was Defendants' own misconduct that caused the delay in filing suit. *See Bennett v. United States Lines, Inc.*, 64 F.3d 62, 65 (2d Cir. 1995) (granting equitable estoppel where defendant misrepresented that plaintiff's "cause of

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[23] It has long been understood that the Donnelly Act is "little more than a codification of the common law upon the subject," *In re Davies*, 61 N.E. 118, 120 (N.Y. 1901), and is "construed with reference to the common law," *In re Jackson,* 107 N.Y.S. 799, 800 (Sup. Ct. 1907).

[24] Defendants' reliance on *New York v. Daicel Chem. Indus.*, 840 N.Y.S.2d 8 (App. Div. 2007) and *People v. Pharmacia Corp.*, 895 N.Y.S.2d 682 (Sup. Ct. 2010), is misplaced. In neither case did the court address the limitations period under Section 63(12) for Donnelly Act violations. As the *DRAM* court explained, the discussion of the statute of limitations in *Daicel* did not reach the Donnelly Act claim. *In re DRAM Antitrust Litig.*, 2007 WL 3034369, at *1 (N.D. Cal. Oct. 16, 2007). And *Pharmacia* did not involve a Donnelly Act claim at all.

action was subject to a bankruptcy stay and could not be prosecuted"). Here, Defendants filed at the STB after consummating their joint venture instead of prior to closing in violation of statutory requirements, in a move the STB suggested was "to avoid the inquiry by [NYAG]"; had they followed the law, NYAG's cause of action could not have accrued until *after* the STB proceeding. Moreover, Defendants repeatedly took the position that the STB was the exclusive forum where the joint venture could be adjudicated and contended that "the [NYAG] has no jurisdiction over *any element of the Twin America transaction*." (¶ 170.) Then, after STB rejected the joint venture, Defendants chose to spin off nominal interstate assets rather than dissolve the joint venture, a move the STB explained would "place the transaction within the authority of the [NYAG]" and divest the STB of jurisdiction. (¶¶ 171, 173.) Under such circumstances, equitable principles should estop Defendants from relying on their own delay to bar NYAG's cause of action under Section 63(12). *Cf. Ross v. Louise Wise Servs., Inc.*, 868 N.E.2d 189, 197-98 (N.Y. 2007).[25]

c. Calculation of the Appropriate Disgorgement Amount Raises Disputed Issues of Fact that Cannot Be Resolved on Summary Judgment

Lastly, Defendants' claim that Plaintiffs' disgorgement claim suffers from a "failure of proof" is meritless. (*See* Def. Mem. at 32.) It is settled law that "[t]he amount of disgorgement . . . need only be a reasonable approximation of profits causally connected to the violation," *First Jersey*, 101 F.3d at 1475 (internal quotation marks omitted), and that once the plaintiff has "met the burden of establishing a reasonable approximation . . . the burden shifts to the defendant to

[25] Analogous principles require equitable tolling for the duration of the STB proceedings because the NYAG acted with "reasonable diligence" when it vigorously participated in the STB proceeding after Defendants chose that forum, and resumed its investigation immediately after Defendants divested the STB of jurisdiction. *See Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506, 512 (2d Cir. 2002). Unlike the decision in *Higgins v. New York Stock Exchange, Inc.*, 942 F.2d 829, 833-34 (2d Cir. 1991) (denying equitable tolling where plaintiff first brought an SEC administrative proceeding and then sought to file an antitrust suit), here, it was Defendants that initiated the administrative proceeding, and the NYAG merely acquiesced to Defendants' choice of forum and fully disclosed its antitrust concerns in the proceeding, only to have Defendants seek to change forum after losing before the STB. *Cf. id.* at 834 (focusing on plaintiff's failure to "put the adversary on notice").

show that his gains were 'unaffected by his offenses,'" *SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013) (internal quotation marks omitted). Given that separating legally from illegally derived profits can be a "near-impossible task," *id.*, a plaintiff must only show that its measure of disgorgement is "reasonable," and "any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* Applying this standard, courts have routinely accepted agencies' approximations of profits connected to underlying violations. *See, e.g.*, *Razmilovic*, 738 F.3d at 35; *SEC v. Patel,* 61 F.3d 137, 140 (2d Cir. 1995); *SEC v. Anticevic*, 2009 WL 4250508, at *5 (S.D.N.Y. Nov. 30, 2009); *SEC v. Svoboda*, 409 F. Supp. 2d 331, 344-45 (S.D.N.Y. 2006).[26]

Here, Plaintiffs have done exactly what the law requires: offered a reasonable approximation of profits arising out of the illegal formation of Twin America in March 2009. In support of their disgorgement calculation, Plaintiffs have offered expert evidence from the NYAG's chief economist and a chartered financial analyst that quantifies the increased profit attributable to Twin America's formation – the illegal act giving rise to the entitlement to disgorgement – while *specifically accounting for* profits that would have been derived in its absence. These profit calculations, which [redacted] million, include illicit profits obtained through Defendants' early 2009 fare increases – an amount that even Defendants' expert calculates as totaling [redacted] million (*i.e.*, [redacted] million *more* than Defendants have agreed to pay the class plaintiffs) – as well as other profits that are attributable to Twin America's formation and would not have been earned "but for" the joint venture. (¶¶ 272-78.) In

[26] Defendants cite four cases where plaintiffs' disgorgement claims were dismissed due to a failure of proof. (Def. Mem. at 32-33.) Three are New York state law cases where *no evidence* was submitted to approximate ill-gotten profits. *See People v. My Serv. Ctr., Inc.*, 836 N.Y.S.2d 487, 487 (Sup. Ct. 2007); *People v. Wever Petroleum, Inc.*, 827 N.Y.S.2d 813, 816-17 (Sup. Ct. 2006); *People v. Appel*, 685 N.Y.S.2d 504, 505 (App. Div. 1999). Similarly, the fourth, a federal case, was also one where the court found that the SEC was "unable to set forth any evidence of specific profits subject to disgorgement." *SEC v. Jones*, 476 F. Supp. 2d 374, 386 (S.D.N.Y. 2007).

opposition, Defendants have offered an expert report from Dr. John H. Johnson IV that criticizes Plaintiffs' methodologies. Dr. Johnson's various critiques, which are repackaged in Defendants' summary judgment motion, are not only off the mark (Plaintiffs rebut each one in their rebuttal reports and *Daubert* briefs), but, for purposes of summary judgment, are beside the point. Because Plaintiffs have put forward a reasonable approximation of ill-gotten profits, they have satisfied their burden on summary judgment.

CONCLUSION

For all of the aforementioned reasons, Defendants' motion for summary judgment should be denied.

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Respectfully submitted,

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