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 **PUBLIC REDACTED VERSION**

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE CERTAIN EXPERT TESTIMONY OF DR. RUSSELL PITTMAN

JULY 18, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

RULES

MISCELLANEOUS

INTRODUCTION

The 2009 formation of Twin America halted the intense competition between Coach USA and City Sights. The combining of Coach USA ("Coach"), operating as Gray Line, and City Sights into Twin America enabled Defendants to raise prices for their hop-on, hop-off bus tours in New York City. Nothing has changed since 2009 to alter this fundamental fact. Entry or expansion in the hop-on, hop-off bus tour market since 2009 has not forced Defendants to rollback their price increases. In fact, Defendants have been able to continue raising prices even as other firms have attempted to enter the market during the past two years. Dr. Russell Pittman's economic opinions, rooted in rigorous analyses and a thorough review of the record, confirm that this is true.

In analyzing the effects of Defendants' formation of Twin America, Dr. Pittman – a highly-qualified economic expert with over 30 years of experience analyzing mergers – conducted a thorough examination of the circumstances under which Twin America was formed, the market in which it operates, and its effects on competition. Among other things, Dr. Pittman performed empirical analyses using data from Defendants and other sources, reviewed documents produced by Defendants and third parties, and read deposition testimony from Defendants' executives and executives from other industry participants. The empirical analyses, documents, and deposition testimony paint a picture of intense competition between Coach and City Sights after City Sights started its hop-on, hop-off business in 2005. The only other hop-on, hop-off bus tour company in New York City at the time, Big Taxi, a small firm with few buses and infrequent service, posed no competitive threat to either Coach or City Sights. These market conditions persisted for years, until negotiations between the owners of Coach and City Sights led to the formation of Twin America.

Several weeks before Defendants formed Twin America on March 17, 2009, Coach raised prices of its hop-on, hop-off bus tours. Coach's looming combination with City Sights freed Coach to raise prices. Dr. Pittman relied on empirical analyses to eliminate every other plausible reason, besides reduced competition, that could explain how Coach, a company locked in a fierce head-to-head battle with City Sights, could profitably raise prices. Coach's own documents and data are consistent with and confirm Dr. Pittman's analyses. A few weeks after Twin America formed, it raised City Sights's hop-on, hop-off bus tour prices as well.

From the formation of Twin America in 2009 until 2012, the hop-on, hop-off bus tour market in New York City consisted of Twin America, one company camouflaged as separate Gray Line and City Sights brands, and the fringe player, Big Taxi. In 2012, Go New York Tours ("Go NY") launched a hop-on, hop-off bus tour business; Skyline Tours ("Skyline") followed in 2013. In forming his opinion in this case, Dr. Pittman properly examined the efforts these firms undertook to enter the market. Particularly, he recognized that entrants must obtain authorizations from New York City's Department of Transportation ("NYC DOT") to pick up and drop off passengers at bus stops. The difficulties and hurdles Go NY and Skyline faced in obtaining such authorizations at popular tourist attractions hindered their ability to replace the competition lost when Coach and City Sights combined. In March 2014, an international hop-on, hop-off bus tour company, Big Bus, acquired Big Taxi and stepped into its place in the market, including inheriting Big Taxi's bus stop authorizations. Dr. Pittman appropriately considered this development, based on the available information, in forming his opinions. Despite these changes, Defendants maintained their anticompetitive 2009 price increases. In 2013, Defendants doubled down and again raised prices even though their joint venture had already been found to be anticompetitive by the federal Surface Transportation Board and

antitrust enforcers had commenced this action challenging Defendants' joint venture as anticompetitive.

Confronted by Dr. Pittman's analysis, Defendants attempt to isolate and challenge only the entry portion of Dr. Pittman's opinions. This challenge fails. On entry, as part of his overall analysis of Twin America's competitive effects[1], Dr. Pittman applied a reliable, common methodology to analyze mergers. Furthermore, he considered and relied upon sufficient, relevant facts and provided appropriate background of the case in setting out his opinions. His expert opinion far exceeds the requirements for admissibility under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Accordingly, Defendants' motion should be denied because they have not come close to overcoming Rule 702's liberal standard favoring the admission of expert testimony – a standard that courts have held particularly favors the admission of expert testimony in cases involving bench trials because there is no risk that the trier of fact will be confused or mislead by the testimony.

I. Applicable Standards

Rule 702 governs the admissibility of expert testimony. As a threshold matter, Rule 702 requires qualification by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Rule 702 permits testimony from a qualified expert if: (1) the expert's knowledge will assist the trier of fact to understand the evidence or determine a fact in issue; (2) the expert bases the testimony on "sufficient facts or data"; (3) the expert's testimony "is the product of reliable principles and methods"; and (4) "the expert has reliably applied the principles and methods to

[1] Dr. Pittman analyzed all elements of a merger that economists typically examine. Specifically, he detailed competitive effects, defined product and geographic markets, measured market shares and market concentration, and considered the impact of entry and potential entry. Dr. Pittman did not explore efficiency claims because as of the time of his initial report and his rebuttal report, Defendants had not offered any substantiated efficiency claims.

the facts of the case." *Id*. In this regard, Rule 702 incorporates the principles the Supreme Court set out in *Daubert* and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Rule 702 embodies a "liberal standard" of admissibility for expert testimony. *See, e.g.*, *Grand River Enter. Six Nations, Ltd. v. King*, 783 F. Supp. 2d 516, 526 (S.D.N.Y. 2011) (quoting *Nimely v. City of New York*, 414 F.3d 381, 395 (2d Cir. 2005)). "[T]he rejection of expert testimony is the exception rather than the rule." *Cedar Petrochems., Inc. v. Dongbu Hannong Chem. Co.,* 769 F. Supp. 2d 269, 282 (S.D.N.Y. 2011) (quoting Rule 702 advisory committee's note); *Park West Radiology v. CareCore Nat'l LLC*, 675 F. Supp. 2d 314, 327 (S.D.N.Y. 2009) (same). As the proponent of Dr. Pittman's testimony, Plaintiffs bear the burden of proving, by a preponderance of evidence, that the testimony meets the requirements of Rule 702. *See, e.g.*, *Discover Fin. Servs. v. Visa U.S.A., Inc.*, 582 F. Supp. 2d 501, 504 (S.D.N.Y. 2008) (citing *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007)). In a bench trial, there is no risk that the factfinder will be "bamboozled" so "the *Daubert* dynamic is slightly altered." *Universe Antiques, Inc. v. Vareika*, 2011 WL 5117057 at *6 (S.D.N.Y. Oct. 21, 2011) (quoting *Joseph S. v. Hogan*, 2011 WL 284330 at *2 (E.D.N.Y. July 15, 2011)).

In examining the reliability of expert testimony, the inquiry courts conduct under Rule 702 "is a flexible one". *Cohalan v. Genie Indus.*, 2013 WL 829150, at *2 (S.D.N.Y. Mar. 1, 2013) (citing *Daubert* 509 U.S. at 594). Among the factors courts may consider in examining reliability is "whether a particular technique or theory has gained 'general acceptance' in the relevant scientific community." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002) (citing *Daubert*, 509 U.S. at 593). Overall, the factors a court may consider in

determining reliability depend on the circumstances of the case.[2] *See Crown Cork & Seal Co. v. Credit Suisse First Boston Corp.*, 2013 WL 978980 at *2 (S.D.N.Y. Mar. 12, 2013). An important purpose of the reliability determination is ensuring that experts employ the same level of intellectual rigor in testifying as they would in their field outside of the courtroom. *See, e.g.*, *Kumho Tire*, 526 U.S. at 152; *Nimely*, 414 F.3d at 396.

II. Dr. Pittman Employed a Reliable Methodology in Defendants' Joint Venture

Dr. Pittman's knowledge, skill, experience, training, and education each qualify him to testify as an economic expert. He is an industrial organization economist who currently serves as the Director of Economic Research in the Economic Analysis Group of the Department of Justice's Antitrust Division. Decl. of Andrew D. Lazerow in Support of Def. *Daubert* Motion to Exclude Certain Expert Test. of Dr. Pittman ("Lazerow Pittman Decl.") Ex. 1 ¶¶ 1-2.[3] He has investigated numerous proposed mergers and supervised investigations of numerous proposed mergers by other economists in his three decade career as an economist.[4] *Id*. at ¶ 3. Defendants do not question Dr. Pittman's qualifications. Nor do Defendants challenge the admissibility of Dr. Pittman's opinions that the formation of Twin America was anticompetitive and was responsible for significant price increases.

Lacking any basis to attack Dr. Pittman's qualifications, Defendants launch an unsupportable assault on the methodology he used in forming his opinions. In doing so, Defendants incorrectly claim that Dr. Pittman's opinions "are not based on any underlying

[2] While *Daubert* sets out a list of factors courts may consider in determining if an expert's reasoning or methodology is reliable, the list is nonexhaustive. *CIT Group/Bus. Credit, Inc. v. Graco Fishing and Rental Tools, Inc.*, 815 F. Supp. 2d 673, 676–77 (S.D.N.Y. 2011) (citing *Daubert*, 509 U.S. at 593 - 94).

[3] Exhibit 1 to the Lazerow Pittman Declaration is the Expert Report of Dr. Russell Pittman, March 17, 2014.

[4] The court in *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1413 (W.D. Mich. 1989), twice rejected the defendants' attempts to exclude Dr. Pittman's testimony. In addition, the *Ivaco* Court cited Dr. Pittman's testimony several times in granting a preliminary injunction for the United States. *Id*. at 1425, 1428.

economic methodology" in analyzing entry but instead "consists of impermissible factual narratives". Mem. of Law in Support of Def. Mot. To Exclude Certain Expert Test. of Dr. Pittman 7 ("Def. Mem. to Exclude"). A review of Dr. Pittman's work debunks these claims.

A. The Analytical Approach of the *Horizontal Merger Guidelines* is a Reliable Methodology for Assessing the Competitive Effects of Mergers

The approach of the *Horizontal Merger Guidelines* of the United States Department of Justice and the Federal Trade Commission ("*Merger Guidelines*") underpins Dr. Pittman's analysis of Defendants' joint venture. Lazerow Pittman Decl. Ex 1 ¶ 11.[5] Indeed, Dr. Pittman refers to the *Merger Guidelines* no less than 20 times in his initial report and his rebuttal report. This reliance on the *Merger Guidelines* alone refutes Defendants' argument that Dr. Pittman did not base his opinion "on any underlying economic methodology". Def. Mem. to Exclude 7.

The *Merger Guidelines* and their earlier iterations articulate an economically sound method by which to analyze mergers. For example, Judge Posner has observed that the "1982 (and subsequent) merger guidelines represent the triumph of the economic approach" in merger review. Richard A. Posner, *Antitrust Law* 132 (2001). Dr. Pittman noted that "[t]he Merger Guidelines draw on insights from the economics of industrial organization and competition." Lazerow Pittman Decl. Ex. 1 ¶ 11. The most recent revision of the *Merger Guidelines*, in 2010, partly reflects "numerous thoughtful comments" Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 49, 49 – 50 (2010), from economists and economic consulting firms.[6]

[5] Dr. Pittman explained that he analyzed the joint venture as a merger because "the Twin America joint venture permanently ended all competition in the relevant market between Gray Line and City Sights." Lazerow Ex. 1 ¶ 12.

[6] Decl. of Sarah L. Wagner in Support of Pl. Mem. in Opp'n to Def. Motion to Exclude Certain Expert Test. of Dr. Pittman ("Wagner Pittman Decl.") Ex. 1 contains the list of commenters, including economists and economic consulting firms. The commenters included members of economic consulting firms such as Compass Lexicon, Charles River Associates, and NERA Economic Consulting.

The basic economic soundness of Dr. Pittman's methodology, *i.e.*, following the *Merger Guidelines*, demonstrates the reliability of his approach. *Cf. Zuchowicz v. United States*, 140 F.3d 381, 385 (2d Cir. 1998) (affirming district court's admission of expert testimony where district court found "plaintiff's experts 'based their opinions on methods reasonably relied upon by experts in their particular fields'"). Dr. Pittman's use of the *Merger Guidelines*' approach in analyzing the formation of Twin America follows his usual practice outside the courtroom and is no mere tool of convenience solely for the purposes of this litigation. Dr. Pittman explained, "[i]n my more than three decades of experience in the Antitrust Division analyzing the competitive effectives of mergers and acquisitions, I have found the Merger Guidelines approach to be both theoretically sound and practical in its application." Lazerow Pittman Decl. Ex. 1 ¶ 11. By using the same tool to evaluate Twin America as he uses to evaluate mergers outside of the current litigation, Dr. Pittman exercised "the same level of intellectual rigor" in litigation as he does in his normal work as an industrial organization economist who regularly analyzes mergers. *Cohalan*, 2013 WL 829150 at *4 (rejecting argument that expert "utilized little, if any, methodology" where expert employed same methodology she used at her professional, non-testifying job); *Liberty Media Corp. v. Vivendi Universal, S.A.*, 874 F. Supp. 2d 169, 176 (S.D.N.Y. 2012) (allowing expert testimony of "experienced M & A professional . . .because he applies the same level of rigor in his analysis that an M&A professional would apply").

The fact that courts have endorsed the *Merger Guidelines* further demonstrates the reliability of Dr. Pittman's methodology. While "the Merger Guidelines are not binding on the courts . . . they 'are often used as persuasive authority when deciding if a particular acquisition violates antitrust laws.'" *United States v. Bazaarvoice, Inc.*, 2014 WL 203966, at *70 n.18 (N.D. Cal. Jan. 8, 2014) (quoting *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 432 (5th Cir.

2008)). Accordingly, a court in this District adopted the "framework used by the Department of Justice and the Federal Trade Commission" – the *Merger Guidelines* – to evaluate the "competitive implications" of a proposed acquisition. *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 359 (S.D.N.Y. 1995). Another court found that an expert's reliance on an earlier version of the *Merger Guidelines* "buttress[ed]" its preliminary finding that the expert's methodology was reliable. *Park West Radiology*, 675 F. Supp. 2d. at 327–28. Following the *Merger Guidelines* similarly buttresses the reliability of Dr. Pittman's methodology.

B. Dr. Pittman Followed the *Merger Guidelines* in Analyzing Entry and All Other Aspects of Twin America

In attacking Dr. Pittman's methodology, Defendants fail to acknowledge that his entry analysis followed the methodology of the *Merger Guidelines*. Defendants omit any mention *at all* of Dr. Pittman applying the approach of the *Merger Guidelines*. Defendants apparently attempt to justify this omission by limiting the scope of their challenge to Dr. Pittman's analysis of entry into the hop-on, hop-off bus tour market. Def. Mem. to Exclude 1. This attempt to isolate the entry analysis, however, turns a blind eye to how the entry analysis fits into Dr. Pittman's overall analysis of Twin America.

Dr. Pittman first concluded that Defendants' 2009 price increases were anticompetitive and caused by Twin America's formation. He concluded that the price increases "resulted from the elimination of competition" between Coach and City Sights. Lazerow Pittman Decl. Ex. 3 ¶ 6.[7] He reached this conclusion by looking at the factors that can cause normal, profit-maximizing firms to raise prices. *Id*. Examining available economic evidence and using economic principles, Dr. Pittman ruled out alternative explanations for the price increases, other than a lessening of competition caused by Defendants' formation of Twin America. *Id*. at ¶ 8.

[7] Exhibit 3 to the Lazerow Pittman Declaration is the Rebuttal Report of Dr. Russell Pittman, May 12, 2014.

Among the economic evidence he considered were three analyses he conducted: a critical loss analysis, an analysis of Defendants' combined profit margins before and after Twin America formed, and a regression analysis of the demand for hop-on, hop-off bus tours. Lazerow Pittman Decl. Ex. 1 ¶¶ 58–61. The critical loss analysis allowed Dr. Pittman to determine that the elimination of competition between Coach and City Sights made it profitable for Coach to increase its price in 2009, several weeks before Twin America formed. *Id*. at ¶ 59. The analysis of Defendants' combined profit margins before-and-after Twin America's formation showed that their margins increased substantially after Twin America was formed. *Id*. at ¶ 60.[8] The regression analysis enabled Dr. Pittman to determine that Twin America's formation and the 2009 price increases reduced Defendants' output of hop-on, hop-off bus tour services in New York City. *Id*. at ¶ 61.

After determining that Defendants' 2009 price increases were caused by Twin America's formation and were anticompetitive, Dr. Pittman examined the market structure. Dr. Pittman determined the product market to be hop-on, hop-off bus tours in New York City by applying the well-established "hypothetical monopolist test" as set out in the *Merger Guidelines* and by looking at deposition testimony and business documents of the Defendants and other industry participants. Lazerow Pittman Decl. Ex. 1 ¶¶ 102–103. He calculated market shares for 2008 and summer 2013 and calculated market concentration using the Herfendal-Hirschman-Index ("HHI"), a well accepted tool that is commonly used to measure market concentration. Lazerow Pittman Decl. Ex. 1 ¶¶ 133–136, Ex. 5 and 6. Overall, Dr. Pittman concluded that the relevant market of hop-on, hop-off bus tours in New York City was highly concentrated. This "further

[8] If the 2009 price increases simply had kept pace with claimed cost increases, Defendants' margins should not have increased as much as they did. Lazerow Pittman Decl. Ex. 1 ¶ 60.

support[ed] [his] conclusion that the formation of Twin America harmed and will continue to harm consumers." Lazerow Pittman Decl. Ex. 1 ¶ 99.

Against this backdrop, Dr. Pittman analyzed "whether the anticompetitive effects flowing from the formation of Twin America are likely to be undone – or, in this case, have been undone – by entry of new firms into the market or expansion of existing firms." Lazerow Pittman Decl. Ex. 1 ¶ 140. Dr. Pittman's entry analysis was part and parcel of the other analyses he conducted, and *vice-versa*. Following the *Merger Guidelines*, Dr. Pittman focused on the sufficiency and timeliness of entry into the hop-on, hop-off bus tour market by new firms or expansion by existing firms to defeat or deter the anticompetitive harm that Twin America caused and continues to cause. Lazerow Pittman Decl. Ex. 1 ¶¶ 143–144.

The passage of five years, the entry of two firms, Go NY and Skyline, and the acquisition of uncompetitive Big Taxi by Big Bus have failed to reverse the anticompetitive effects flowing from the forming of Twin America. *Id*. at ¶ 140. Further, Dr. Pittman determined that entry or expansion will not likely roll back the anticompetitive effects in the future. *Id*. The primary reason for these conclusions is the difficulty of obtaining required bus stop authorizations from the NYC DOT at important tourist attractions with competitive frequencies.[9] Not only do these difficulties prevent Go NY, Skyline, and Big Bus from reversing Twin America's anticompetitive effects, but they prevented two other companies, Trans Express and Circle Line, from launching hop-on, hop-off bus tour businesses.

Defendants assert variants of the same basic, wrong claim about Dr. Pittman's entry analysis – that Dr. Pittman does not explain what constitutes sufficient and timely entry or

[9] Dr. Pittman explained that other reasons also played a role in the difficulties that entrants and potential entrants faced. These include obtaining bus fleets of sufficient size and finding appropriate and conveniently located garage space.

expansion and why it has not occurred here. Def. Mem. to Exclude, 8, 10, 11. These claims mischaracterize what Dr. Pittman actually did. Dr. Pittman's entry analysis is consistent with how economists evaluate entry in assessing the competitive effects of mergers, and Defendants never suggest otherwise. Rather, Defendants seek to impose new, heightened admissibility requirements for Dr. Pittman's testimony. Neither case law nor economic principles justify these heightened requirements. Even a cursory review of Dr. Pittman's reports and his deposition testimony confirms that Dr. Pittman's opinion rests on a firm foundation of economic practice and theory.

Dr. Pittman explained repeatedly that the appropriate test for sufficient entry is whether the entry would cause Twin America to rescind its anticompetitive 2009 price increases and undo other competitive harm caused by Twin America. Dr. Pittman explained this test both in his initial report and his rebuttal report. Lazerow Pittman Decl. Ex. 1 ¶¶ 142–143 ("[I]ncreases in prices and profits on the part of the merged firm or other market participants may attract entry of sufficient scope to restore competition and maintain prices and services at competitive levels, and because the prospect of such entry may deter price increases in the first place . . . . Entry must be of sufficient scale if it is to restore competition or to operate as a strong enough deterrent that the merged firm chooses not behave in anticompetitive manner in the first place."); Lazerow Pittman Decl. Ex. 3 ¶ 44 ("[Dr. Johnson's] analysis fails to show that new entry is sufficient to replace the lost competition.").

Guided by the record in this case, Dr. Pittman concluded that entry by Go NY and Skyline was not sufficient to reverse the anticompetitive effects caused by the formation of Twin America and that entry in the future was not likely to reverse those effects. In other words, the entry of Go NY and Skyline failed the sufficiency test that Dr. Pittman articulated. Dr. Pittman

reviewed the record on the limitations faced by Go NY and Skyline with a particular focus on the limitations they faced with respect to which stops they can legally use. This analysis allowed Dr. Pittman to conclude that Go NY, Skyline, and other entrants in this market are unlikely to be able to offer a product that would constrain Twin America's exercise of market power. As noted by Dr. Pittman, this is consistent with the fact that Twin America has not rolled back the anticompetitive 2009 price increase.

Dr. Pittman also outlined the appropriate way to measure timeliness of entry in this case:

> [I]t would mean that entry following the formation of [Twin America] would have been quick enough that the formation of [Twin America] would have not resulted in the price increases that we observed, or if it did, that entry would have been quick enough to force the price back down to a competitive level, or allow customers to buy the product at a competitive level from the new entrants.

Wagner Pittman Decl. Ex. 2 at 60:17–61:4.[10] As with the rest of his analysis, Dr. Pittman drew from the approach of the *Merger Guidelines* to determine how to assess timeliness of entry. Lazerow Pittman Decl. Ex. 3 ¶ 42. Timely entry did not occur here because entry was not fast enough –the first new entrant did not appear until *three years after* Defendants formed Twin America – to protect consumers from anticompetitive price increases. The entry of Go NY in 2012 and Skyline in 2013 neither prevented Defendants' anticompetitive price increases nor forced Defendants to restore prices to where they were while Coach and City Sights were fiercely competing. Instead, Dr. Pittman observed that "the protracted period without new entry was more than enough time for the joint venture to significantly harm consumers." *Id*. at ¶ 42.

Defendants' claims that Dr. Pittman did not identify proper tests to measure whether entry was sufficient or timely fall flat in the face of Dr. Pittman's explanations of how to measure both sufficiency and timeliness. Moreover, Dr. Pittman fully explained why entry here

[10] Wagner Pittman Decl. Ex. 2 is certain excerpts of Dr. Pittman's May, 28, 2014 deposition testimony.

was neither sufficient nor timely. His methods of analyzing the sufficiency and timeliness of entry more than exceed Rule 702's reliability requirement.

The reliability requirement of Rule 702 does not mandate that Dr. Pittman conduct the battery of tests Defendants suggest he *could have* conducted. Def. Mem. to Exclude 9. Defendants' proposed tests, assuming they are even possible to perform, are only indirect ways at best to explore the questions of sufficiency and timeliness that Dr. Pittman examined directly. Rule 702 does not require Dr. Pittman to conduct every possible test that Defendants can imagine in order for his opinion to be admissible. *See Cohalan*, 2013 WL 829150, at *4 (denying motion to exclude expert's testimony where expert did not perform tests that moving party argued were necessary for reliability); *In re Omeprazole Patent Litig.*, 490 F. Supp. 2d 381, 460 (S.D.N.Y. 2007) (stating reliability of expert's opinion does not require expert to "perform every possible test").

C. Dr. Pittman Appropriately Set Out Facts Upon Which He Based His Opinions

Dr. Pittman's report outlines facts about intense competition between Coach and City Sights that Twin America's formation ended and events that occurred in the aftermath of that competition ending. Facts about the hop-on, hop-off market and reduced competition in that market, including the struggles new entrants face, underlie Dr. Pittman's opinions. It is proper and appropriate that Dr. Pittman recount these facts. Federal Rule of Civil Procedure 26 mandates that Dr. Pittman's report contain the "basis and reasons" for his opinions and the "facts and data considered by the witness" in forming his opinions. Fed. R. Civ. P. 26(a)(2)(B)(i) and (ii).

As an expert, Dr. Pittman may also provide background for the case. *See, e.g.*, *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, 313 F. Supp. 2d 213, 236–237

(S.D.N.Y. 2004) (rejecting argument economic expert simply read record and rendered "verdict") (citing *United States v. Mulder*, 273 F.3d 91, 102 (2d Cir. 2001)). Applying "'standard economic methodology' to the facts at hand" – found in deposition testimony and documents – is a proper role for an expert. *Id*. What Defendants attempt to recast as an improper factual narrative is no more than Dr. Pittman following the requirements of Rule 26, plus providing background facts to which he applies economic methodology. For example, Dr. Pittman discusses the difficulties Go NY, Skyline, Trans Express, and Circle Line faced in obtaining authorized bus stops at popular tourist attractions with enough frequency that would allow them to compete with Twin America – crucial facts that go to the question of the sufficiency of entry. Lazerow Pittman Decl. Ex. 1 ¶¶ 49–50, 161. Dr. Pittman outlined the lengthy delays and low success rate each company endured as it sought bus stop authorizations from NYC DOT. *Id*. at ¶ 161. These facts provide context and help explain why the entry of Go NY and Skyline ultimately was neither sufficient nor timely. In the cases of Trans Express and Circle Line, the lengthy delays and lack of success help explain why those firms failed to enter at all. Dr. Pittman may rely on the types of qualitative evidence that Defendants label as factual narrative, such as documents and testimony from Go NY, Skyline, Trans Express, Circle Line, and NYC DOT, to form his opinions. *See Park West Radiology*, 675 F. Supp. 2d at 327 (rejecting argument that economic expert's "use of qualitative evidence" produced during litigation undermined reliability of methodology). If Defendants assert that Dr. Pittman has incorrectly recounted facts that he relies upon, the proper course for them is to cross-examine him about any perceived mistakes at trial.

III. Dr. Pittman Relied Upon Appropriate Evidence in Forming his Opinions

A. Dr. Pittman Relied on Sufficient Facts from Go NY, Skyline, and NYC DOT to Base His Opinions

After attacking Dr. Pittman for supposedly only offering facts in the form of a narrative, Defendants pivot to claim that Dr. Pittman relied on insufficient and unreliable facts and data. Def. Mem. to Exclude 15. Specifically, Defendants assert that Dr. Pittman failed to consider the growth of Go NY and Skyline in his analysis. *Id*. at 13. Defendants' own brief, however, undercuts that argument. In the very same paragraph in which they accuse Dr. Pittman of failing to consider the growth of Go NY and Skyline, they recognize that Dr. Pittman calculated Go NY's and Skyline's market shares for the summer of 2013. *Id*. Dr. Pittman found in 2013, four years after Twin America was formed and consumers started paying higher prices, Go NY had only a [redacted] share of market revenue and Skyline had only a [redacted] share. Lazerow Pittman Decl. Ex. 1 at Ex. 6.[11] Dr. Pittman's market shares for 2008, prior to the formation of Twin America, do not include Go NY and Skyline. Lazerow Pittman Decl. Ex. 1 at Ex. 5. Merely juxtaposing Dr. Pittman's market share calculations from 2008 and 2013 illustrate that Dr. Pittman accounted for changes in the market and the new roles of Go NY and Skyline.[12]

More importantly, Dr. Pittman conducted a complete review of the facts in the record, including the documents and deposition testimony of executives of Go NY and Skyline. Facts from these sources allowed Dr. Pittman to conclude that those two firms would not likely be able to constrain Twin America in the future. Dr. Pittman noted the [redacted]

[11] Defendants noted that Go NY and Skyline combined to reach [redacted] share of quantities of tickets sold in the summer of 2013 according to Exhibit 6 in Dr. Pittman's report. Dr. Pittman explained, however, that market shares based on revenues are a more appropriate measure of market shares here. Lazerow Pittman Decl. ¶ 130.

[12] Dr. Pittman explained that while market shares can be instructive, without more they often do not provide enough information to assess competition in a market. *See*, *e.g.*, Wagner Pittman Decl. Ex. 2 at 36:8– 36:18 (at 15–17) ("As the guidelines are clear, market share is only one piece of information we use to measure competition in the market.").

[redacted] and he explained that [redacted] Lazerow Pittman Decl. Ex. 3 ¶ 46. Go NY, particularly, faces limits to its ability to compete with Twin America in the future. These limits are based on Go NY's [redacted] Lazerow Pittman Decl. Ex. 1 ¶ 49. [redacted] *Id*. Dr. Pittman also reviewed documents and testimony from NYC DOT. This evidence helped Dr. Pittman conclude that firms like Go NY and Skyline are unlikely to obtain sufficient bus stop authorizations to allow them to compete effectively with Twin America. *Id*. at ¶¶ 156–61. The testimony and documents from Go NY, Skyline, and NYC DOT all provide more than a sufficient factual basis for Dr. Pittman's opinions. *See, e.g.*, *Cedar Petrochems.*, 769 F. Supp. 2d at 285 (finding that plaintiff's experts relied on sufficient facts and data because, *inter alia*, experts "based their conclusions on their own review of documents"). *Cf. Crown Cork & Seal Co.*, 2013 WL 978980, at *6, 10 (finding experts' testimony reliable because, *inter alia*, experts "thoroughly reviewed the record"); *Discover Fin. Servs.*, 582 F. Supp. 2d at 507 (rejecting challenge to objectivity of plaintiff's expert where expert relied upon testimony of plaintiff's and defendants' executives and defendants' experts). In any event, questions over whether documents and testimony from Go NY, Skyline, and NYC DOT provide a sufficient factual basis for Dr. Pittman's opinion properly "'go to weight, not admissibility.'" *Cedar Petrochems.*, 769 F. Supp. 2d at 285 (quoting *Adesina v. Aladan Corp.*, 438 F. Supp. 2d 329, 343 (S.D.N.Y. 2006)).

B. Dr. Pittman Relied on Appropriate Facts Concerning Big Bus and RATP

Defendants attack Dr. Pittman for "refusing to consider the effect of entry by Big Bus or RATP." Def. Mem. to Exclude 13. These attacks, however, again ignore what Dr. Pittman actually did. As an initial matter, Dr. Pittman identified important limitations on Big Bus's future operations. He noted "that by acquiring Big Taxi, Big Bus inherited and is thus bound by Big Taxi's inferior stopping frequencies, limited to one stop every half hour." Lazerow Pittman Decl. Ex. 3 ¶ 50.

Defendants' claim that Dr. Pittman did not account for Big Bus's predictions in its internal planning documents also ignores Dr. Pittman's work. *Def. Mem. to Exclude* 14.[13] Dr. Pittman compared [redacted] .[14] Lazerow Pittman Decl. Ex. 3 ¶ 50 n.81. [redacted] *Id.* [redacted] *Id.* [redacted]

[13] Specifically, Defendants note that "Dr. Pittman makes no mention of the . . . fact that Big Bus specifically stated that [redacted] Def. Mem. to Exclude 14. The Big Bus document from which Defendants quote is [redacted] Lazerow Pittman Decl. Ex. 8 at 54. Defendants apparently discount the fact that Big Bus's statement [redacted]

[14] [redacted]

[redacted]

Defendants also criticize Dr. Pittman because "his examination of Big Bus's entry was 'limited to' a Big Bus affidavit for NYC DOT and internal planning documents from December 2013." Def. Mem. to Exclude 15. This criticism dodges a key fact: the documents Dr. Pittman reviewed constitute the entire record of documents produced by Big Bus.[15]

Defendants' criticisms about Dr. Pittman's supposed failure to examine RATP, another international hop-on, hop-off bus tour company, reflect an even more distorted view of the record. Defendants condemn Dr. Pittman for not examining RATP and its operations in New York City. Def. Mem. to Exclude 15. Yet, they concede that RATP did not begin operating in New York City until May 14, 2014. *Id*. at 14. This was nearly two months *after* Dr. Pittman submitted his initial report on March 17th and two days *after* he submitted his rebuttal report on May 12th. Essentially, Defendants complain about Dr. Pittman failing to perform the impossible – examining RATP's operations before those operations had commenced. Moreover, notwithstanding how much they now emphasize the alleged importance of RATP in this case, Defendants inexplicably failed to subpoena RATP for documents or to depose any of its executives.

Dr. Pittman testified at his deposition that he "looked in vain for any record of [RATP] having permission from [NYC DOT] to stop at any particular locations." Wagner Pittman Decl. Ex. 2 at 46:2–46:8. Without authorized bus stops, RATP risks[redacted], that New York City authorities will prevent or restrict its ability to operate hop-on, hop-off bus tours at

[15] Big Bus produced two of the documents, the "internal planning documents," in response to a subpoena Defendants issued. Defendants presumably accepted this production as complying with their subpoena because they did not move to compel Big Bus to produce additional documents. The third document was a declaration that Big Bus provided to NYC DOT as part of Big Bus's purchase of Big Taxi. NYC DOT subsequently produced the declaration to the parties in this case.

any given moment.[16] This risk and uncertainty hampers RATP's ability to offer a real competitive alternative to Twin America in the future. Lazerow Pittman Decl. Ex. 3 ¶ 53.

While faulting Dr. Pittman for supposedly relying on insufficient facts, Defendants simultaneously fault him for failing to base his opinions on rumors. Def. Mem. to Exclude 14. Defendants note that RATP had been "reportedly" purchasing buses to enter the New York City market in October 2013 and that Big Bus was "rumored to be entering" in June 2009. *Id.* at n.11. Defendants imply that these reports and rumors should have been enough for Dr. Pittman to "attempt to analyze" this purported "threat of entry". *Id.* It would have been improper, however, for Dr. Pittman to base his opinion on rumor and speculation. *See, e.g.*, *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 213–14 (2d Cir. 2009) ("a trial judge should exclude expert testimony if it is speculative or conjectural") (citing *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2nd Cir. 1996)). Dr. Pittman should not be now faulted for declining to offer an opinion based on "rumored" entry. Rumors of entry and threats of entry did not prevent Defendants from imposing their anticompetitive price increases. Nor did rumors of entry subsequently cause Twin America to rollback those increases.

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Exclude Certain Expert Testimony of Dr. Russell Pittman should be denied.

[16] As discussed in Plaintiffs' Response to Defendants' Motion for Summary Judgment, NYC DOT has not approved any bus stop authorizations for RATP. Pls. Local Rule 56.1 Counter-Statement of Material Facts ¶ 261. Along the same lines, NYC DOT has started cracking down on RATP for stopping at unauthorized bus stops. *Id*. at ¶¶ 262 - 266.

Dated: July 18, 2014

Respectfully submitted,

/s/
Sarah L. Wagner
William H. Jones II
U.S. Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 8000
Washington, D.C. 20530
202-305-8915
sarah.wagner@usdoj.gov
Attorneys for the United States

/s/
James Yoon
Office of the Attorney General
Antitrust Bureau
120 Broadway, 26th Floor
New York, NY 10271-0332
(212) 416-8822
James.Yoon@ag.ny.gov
Attorney for State of New York