UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

and

STATE OF NEW YORK,

Plaintiffs,

v.

TWIN AMERICA, LLC, *et al.*,

Defendants.

Civil Action No.
12-cv-8989 (ALC) (GWG)

PUBLIC REDACTED VERSION

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

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The Government's Complaint alleged that the Defendants merged to monopoly with a 99% market share, protected by the inability of new competitors to obtain buses, brand identity, and bus stops to enter the Government's alleged market and compete against Twin. Compl. ¶¶ 52-54. The alleged barriers on which the Government based its case have not prevented entry.

The Government cannot and does not dispute that every new entrant—GO NY, Skyline, Big Bus, and RATP—was able to obtain buses. Memo. of Law in Support of Defendants' Motion for Summary Judgment ("Mem.") at 12-13; 56.1 Stmt. ¶¶ 28-29, 38, 45-48, 68-69, 73, 78-79. Nor does the Government dispute or contend that brand blocked the ability of any of these new bus tours to compete against Twin America; the Government's own expert found that the one company with zero brand history (GO NY) captured [redacted] of the alleged antitrust market in less than two years. *See* 56.1 Stmt. ¶¶ 43, 56, 60, 74, 76, 93; Mem. 1-14. The undisputed facts also demonstrate that bus stops are not entry barriers. The Government concedes that GO NY, Skyline and Big Bus have all obtained bus stops. 56.1 Stmt. ¶¶ 35, 51, 53-55, 62-63, 67. And, the Government does not and cannot dispute that the four new entrants are taking "market share" from Twin America.

The Government asks the Court to look past the actual entry and make predictions about the future success or failure of the competing bus tours based on the location and number of bus stops approved to date. Such an unprecedented predictive exercise is unnecessary where the entrants are capturing share from the incumbent. The Government's own Merger Guidelines and cases cited by the Government are not germane because they involve cases challenging mergers before they occur (which necessarily require courts to try to predict the future). The only supportable conclusion, therefore, is that Twin America lacks the market power necessary to

support the government's antitrust claim. *See Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 97 (2d Cir. 1998); *United States v. Syufy Enters.*, 903 F.2d 659, 666-69 (9th Cir. 1990).[1]

The undisputed fact of entry by multiple hop-on, hop-off tour bus operators also vitiates the Government's claims for prospective relief. The Government cannot establish a basis for an injunction where the alleged market is at least as competitive as it was prior to the merger.

Nor has the Government met its burden to establish an award of disgorgement. The Government does not dispute that the statutes underpinning its claims do not provide the explicit right to disgorgement. Instead, the Government seeks to invoke the Court's inherent equitable powers, but there are no extraordinary circumstances to justify that. And Defendants have already agreed to create a $19 million fund for consumers (with any unclaimed amount going to the Government). Further, even if there were some legal basis for disgorgement, the fundamental flaws in the experts' analyses render the disgorgement estimates unreliable.

ARGUMENT

I. UNDISPUTED ENTRY MANDATES SUMMARY JUDGMENT

The Government posits a "presumption of illegality," based on the originally pled 99% market share, proffering that no court has granted summary judgment against the Government in this context. Opp. at 16.[2] The Government, however, is a civil litigant in this case subject to the same law and rules as any other. And in this Circuit, the "lack of significant entry barriers can

[1] While not material to the pending motion, Defendants contest the allegations in the Opposition that Defendants sought to evade antitrust scrutiny through Twin America's STB filing. *See* Opp. at 6-7. The Government cannot deny that the law required Twin America to make such a filing, and it is perverse for the Government to seek to fault Defendants for complying with their legal obligation. In any event, Twin America retained transportation counsel to make the STB filing well before it received any information regarding any antitrust investigation.

[2] The Government does not dispute that in its merger challenge in *Waste Management*, the Second Circuit held ease of entry can rebut a plaintiff's *prima facie* showing of illegality as a matter of law. Opp. at 16, n.7; *see United States v. Waste Mgmt.*, 743 F.2d 976, 981-84 (2d Cir. 1984) (ease of entry overcame any presumption from 100% market share).

defeat a monopolization claim, even in the [face] of a defendant's high market share" ***on a motion for summary judgment***. *Emigra Group, LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 362 (S.D.N.Y. 2009) ("Even if" defendants have "the market share necessary to give rise to an inference of market power" the "abundant, unrebutted evidence of lack of barriers to entry and additional potential competition would require the conclusion that it had failed to raise a genuine issue of material fact as to this indispensable element of a monopolization [claim]"); *see Tops Markets*, 142 F.3d at 96-97 (affirming summary judgment, despite market share exceeding 72%, where alleged barrier did not prevent new entry).[3]

Courts, moreover, have granted summary judgment to defendants even where, as here, the parties dispute ease of entry. *See id.*; *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 57-59 (2d Cir. 1997) (affirming summary judgment for defendant on Sherman Section 1 claim "even if" defendant had 70% or over 90% market share despite alleged entry barriers because challenged agreement did not restrict entry); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 855 (9th Cir. 1995) (affirming summary judgment for defendants on Sherman Section 1 claim); *Barr Labs.Inc. v. Abbott Labs.*, 978 F.2d 98, 112-15 (3d Cir. 1992) (Sherman Section 2 claim).

Because there is no dispute about the fact of entry and its effect on Defendants' alleged market share, the Government seeks to avoid summary judgment with hypothetical arguments about the timeliness and sufficiency of the entry. These arguments, however, do not apply in a case where actual entry has occurred on the scale the undisputed facts demonstrate here.

[3] *H & R Block*, one of the Government's own cases, explains exactly this point: "To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7." *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 73 (D.D.C. 2011) (citing *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990).

A. The Timing of Entry Does Not Defeat Summary Judgment

The Government's reliance on cases imposing the two-year deadline in the Government's own Horizontal Merger Guidelines to support its contention that entry occurred too late (*i.e.*, in 2012 rather than 2011), Opp. at 18, is misplaced. As an initial matter, "timeliness" is used to assess the threat of entry; once entry has in fact occurred, there is no need for a prediction as to the possibility of future entry. *See, e.g., Areeda & Hovenkamp, Antitrust Law*, ¶941 (2014). ("While the Merger Guidelines treatment of entry as discussed in [Areeda, ¶941(g) regarding timeliness of potential entry] speaks of the disciplining effect of post-acquisition entry, the references are predictive. . . . Of course, if the merger challenge occurs after the merger has been consummated, then an actual historical record may exist concerning the extent and sufficiency of entry.") In any event, there is no rule that entry must occur within two years of a merger. Even if the Guidelines were not self-created policies that the antitrust agencies publish to explain their own forward looking administrative review of ***prospective*** mergers,[4] the Government ***removed*** the two-year provision from its Merger Guidelines in 2010.

Even if the Court were to consider the Guidelines on this point for any reason, they focus on the ***capability*** to enter the market. In this case, the undisputed fact that GO, Skyline, Big Bus, and RATP actually entered the alleged market shows that these companies could have entered earlier. There is thus no need to apply a hypothetical, predictive "two year" test (or any

[4] Thus, the cases cited by the Government for its two year entry requirement, Opp. at 18, n.9, 21, involved predictions about future entry in challenges ***before*** the merger occurred. *See H&R Block, Inc.*, 833 F. Supp. 2d at 72-76; *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1035 (W.D. Wis. 2000). *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001) did not assess actual entry, as no new company had entered the general purpose credit card network market since Discover in 1985. The court in *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1065 (D. Del. 1991) also engaged in a predictive inquiry into a merger's potential effects. The only "actual entry" the court assessed there was a company that, prior to the deal, tried to enter and failed. *Id.* at 1080-82. At the time of the deal, that company still had not

predictive test). The Court can measure and assess actual, substantial entry by four new companies. And, telling, no court has ever held that a company had market power simply because the actual entry occurred one year beyond the Government's (now defunct) administrative Guidelines. Moreover, challenges such as this by the Government are cases in equity where the purpose is to restore competition. Where, as here, the record shows that such competition already exists, no action by the Court is necessary.

B. Differences in Bus Stops Do Not Defeat Summary Judgment

The Government next contends that the actual entry by four new companies is not "sufficient," because none of the new entrants have the same number of buses or bus stops as Twin America. Opp. at 21. That is not the correct antitrust analysis. Sufficiency does not require that entry replicate Twin America's stops or tours. Rather, it is sufficient if the entry or threat of entry prevents the incumbent from exercising market power, and the loss of market share is dispositive on this issue. *United States v. Bazaarvoice, Inc.,* No. 13–CV–00133-WHO, 2014 WL 203966, at *72 (N.D. Cal. Jan. 8, 2014) ("In post-merger cases, evidence of actual entry of new firms which renders the merged entity unable to maintain its market share can rebut a prima facie showing."); *Syufy*, 903 F.2d at 665 (actual entry rebutted presumption of Clayton Act violation because entry prevented defendant from maintaining its market share).[5]

Here, the Government does not dispute that by 2013, GO and Skyline had achieved at least [redacted] share in the alleged market. 56.1 Stmt. ¶¶ 93-94. At that time, Big Bus and RATP

started operations, and thus the court did not have the benefit, as here, of assessing actual successful entry. *Id.*

[5] *Bazaarvoice*'s outcome is driven by a much different case than the one the Government has here: (i) none of the competitors identified by the defendant "has achieved any meaningful level of commercial success"; and (ii) there were significant barriers to entry specific to the market for ratings and reviews platforms. 2014 WL 203966, at *39, 49. Here, by contrast, the alleged

had not started their competing services, and thus Defendants engaged an independent firm to observe current ridership. Those observations show that by June 2014, GO, Skyline, Big Bus, and RATP captured 35 to 40% of ridership. *Id.* ¶¶ 99-103. The Government offers no contrary evidence suggesting that the entrants have gained any lesser share of the alleged market in 2014.[6] The Government, of course, could have conducted its own observations or requested joint discovery from the other operators, but elected not to do so. Absent such an effort, it is undisputed that Twin America's share has declined by at least [redacted] and likely 40%, establising that Twin America faces competitive pressure from the new entrants.[7]

The Government points to no case finding that new entry commensurate with [redacted] to 40% market share is insufficient. And the cases the Government does cite, Opp. at 15, 21, are of

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barriers to entry have not prevented four double decker tour companies from entering and capturing [redacted] 40% of the alleged antitrust market.

[6] The Government's attacks do not undermine the observations. *See* Opp. at 22-23. The observations are factual evidence that does not require validation by an expert witness. There is no dispute that Battery Park is a key stop for all the companies (near the World Trade Center), and the Government provides no reasons that it is not representative of buses and ridership throughout the city. It is not illegal to stop at Battery Park, which, like many other places in the city, has common transit stops where operators such as double-decker sightseeing buses may stop to unload passengers. *See* 56.1 Stmt. 249. And the suggestion more generally that certain operators may be using "unapproved bus stops or violat[ing] their permitted frequencies," Opp. at 13, is easily rejected. As an initial matter, there is no allegation that Big Bus is operating illegally. *See* 56.1 Stmt of Gov't. Facts. ¶¶ 238-39, 251, and 261-65. In any event, the Government offers no evidence that the other bus tour operators are not successful or have not captured substantial share.

[7] The Government's citation to "failed entrants" Trans Express and Circle Line does not negate or create a disputed fact regarding the capability to enter. What is important is that ***some*** entrants have succeeded, not that others might have failed. In any event, Trans Express was a three-person operation that allowed months and even a full year to pass without communication to the NYCDOT. *Id.* ¶ 222. Four of the six requests for stops by that company violated NYCDOT's explicit instruction. *Id.* ¶ 219. [redacted] 56.1 Stmt. 205. Circle Line also submitted several bus stop requests to NYCDOT that violated the city's zoning regulations. Wagner Decl. Ex. 76. Moreover, contary to the Government's claim, Circle Line has a stop in Times Square. 56.1 Stmt of Gov't. Facts. ¶215.

no help. The unremarkable proposition of the cases in the commercial banking industry, *Marine Bancorp* and *Phillipsburg National Bank*, that government regulations ***can*** be a barrier to entry does not detract from the conclusion that bus stops are not a barrier ***here***. Morever, that industry is highly regulated, due to "this country's bitter experience with failed banks in the Great Depression," where regulations are designed to make entry difficult—and in fact prohibit new entry entirely in particular markets—because "ease of entry into a market presumes ease of exit," potentially leading to another financial collapse. *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 628-29 (1974); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 367, n.44 (1963). And, those cases involved predictive inquiries about unconsummated mergers. *Marine*, 418 U.S. at 616-17; *Phillipsburg*, 399 U.S. at 378-79; *Philadelphia*, 374 U.S. at 357-65.

McCaw Personal Communications., Inc. v. Pacific Telesis Group, 645 F. Supp. 1166 (N.D. Cal. 1986), likewise adds nothing. The court there engaged in a predictive analysis about an unconsummated merger, concluding that it would be too costly for a new entrant to build required facilities. Unlike *McCaw*, nothing about the quality of the new bus tour stops triggers an insurmountable monetary expense. The cost of buses and real estate remains the same; investments of GO, Skyline, Big Bus, and RATP have proved they are not barriers.[8]

The Government's argument that new entrants who have already captured between [redacted] and 40% of the alleged market need particular bus stop locations is precisely the argument the Second Circuit rejected in *Tops Markets*. The Second Circuit expressly held geographic location was not a barrier to entry in that case because it did not prevent the new entrant from capturing

[8] All entrants have real estate space for garage and maintenance facilities. 56.1 Stmt. of Gov't Facts ¶¶ 267-68.

26% market share in one year. 142 F.3d at 97.[9] And, the Government agrees that the "unrebutted evidence" in *Tops Markets* (*i.e.*, Wegmans' 26% market share) "showed that there was ample land available to build a competing market and that competitors had, in fact, acquired such land." Opp. at 19-20. Similarly, the "unrebutted evidence" of GO and Skyline's [redacted] share shows there are "ample" bus stops "available to build a competing" double decker bus tour company "and that competitors had, in fact, acquired such" bus stops. *See id.* The Government neither disputes nor distinguishes these facts. 56.1 Stmt. 24, 93-94; Opp. at 19-20.

The steady erosion to Twin America's market share in 2014, moreover, matches the same type of evidence the Ninth Circuit in *Syufy* held was "ample basis" to find the company "lacked the power to exclude competitors." *Syufy*, 903 F.2d at 666-69 (market share numbers revealed "Roberts/UA has steadily been eating away at Syufy's market share: In two and a half years, Syufy's percentage of exclusive exhibition rights dropped 52% and its percentage of box office receipts dropped 18%.").[10] Under the case law, actual entry by four new competitors capturing

[9] The Government's criticism of Defendants' reading of *Tops Market*—that a court should not parse "quality-of-entry" arguments (Mem. at 18)—is misplaced. *See* Opp. at 19. *Tops Market* relied heavily on the fact of entry and Wegmen's 26% market share—not on the quality of store locations—to find an absence of geographic barriers that precluded the monopolization claim. *See* 142 F.3d at 97.

[10] The Government's argument that Defendants' principal cases were decided after full trials, Opp. at 16, mischaracterizes the procedural postures of those cases. The district court in *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990) dismissed the complaint, before discovery, after a hearing on the government's motion for a preliminary injunction. *See United States v. Baker Hughes Inc.*, 731 F. Supp. 3 (D.D.C. 1990). The parties in *Waste Managment* never filed motions for summary judgment; such a motion would have been futile in light of the trial court's erroneous holding that low entry barriers cannot "overcome a strong prima facie showing of concentration in the existing competitive structure." 743 F.2d at 982-983 (reversing the trial court's legal holding on the effect of low entry barriers). Finally, the trial court in *Syufy* denied defendants' motion for summary judgment because of "several unresolved material issues." *United States v. Syufy Enterp.*, 1987 WL 39931, *2 (N.D. Cal. Dec. 18, 1987). Here, by contrast, there is no material dispute that four double decker bus tour services have entered and captured [redacted] 40% of the alleged market.

from [redacted] to 40% of the alleged market is dispositive. *See Tops Markets*, 142 F.3d at 97; *Syufy*, 903 F.2d at 666-69; *Barr Labs.*, 978 F.2d at 113-14.[11]

C. Threat of Entry Mandates Summary Judgment

The Government concedes that the threat of entry can defeat market power "if entry barriers are low." Opp. at 19. The undisputed record shows that any barriers alleged by the Government are low enough for four companies to enter and capture [redacted]-40% of the alleged market. 56.1 Stmt. 92, 101-02. Defendants are entitled to summary judgment on this ground alone. *See Baker Hughes*, 908 F.2d at 988 ("If barriers to entry are insignificant, the ***threat*** of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs") (emphasis added); *Waste Mgmt.*, 743 F.2d at 979.

D. The Undisputed Record Precludes Injunctive Relief

The Government points to no case that says divestiture or dissolution may be imposed where the current state of the market is competitive.[12] The undisputed facts show that five tour bus companies are competing throughout the city. Ordering injunctive relief in a competitive market would result in the improper use of equitable remedies to impose penalties. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

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[11] *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410 (5th Cir. 2008), cited by the Government, is not to the contrary. Opp. 17-18. There was no measureable entry, and the merged company had lost no more than one contract to a new foreign entrant. 534 F.3d at 436.

[12] The cases cited by the Government, Opp. at 24, n.14, are inapposite because they imposed injunctive relief only after finding that the state of competition had ***not*** been restored to competitive levels. *See Chicago Bridge*, 534 F.3d at 441-42 ; *United Tote*, 768 F. Supp. at 1085-86; *In re Polypore Int'l, Inc.*, 2010 WL 9933413, at *31-32 (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.*, No. 3:11 CV 47, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011), *aff'd*, *ProMedica Health Sys. Inc. v. FTC*, 749 F.3d 559, 572-73 (6th Cir. 2014).

II. SUMMARY JUDGMENT SHOULD ISSUE ON DISGORGEMENT

A. The Government Is Not Entitled To Disgorgement As a Matter of Law

The Government does not dispute that it lacks explicit statutory authority to seek disgorgement. Opp. at 24, 30. The Government instead invokes the Court's inherent equitable powers but the Government has not demonstrated exceptional circumstances justifying use of the Court's equitable powers.

DOJ does not dispute that it lacks explicit statutory authority to seek disgorgement under the Sherman and Clayton Acts. *See* Opp. at 24.[13] Instead, DOJ relies principally on the only reported case in which it has sought disgorgement as a remedy for an antitrust violation, *United States v. Keyspan*, 763 F. Supp. 2d 633 (S.D.N.Y 2011). Defendants explained in their opening brief why the instant case bears no resemblance to *Keyspan*. Mem. at 29-31.[14] The reasons advanced by DOJ for a disgorgement award in this case, Opp. at 27-29, are unavailing.

First, there is nothing unique about DOJ challenging a consummated merger. Federal antitrust enforcers regularly challenge consummated mergers and do ***not*** seek disgorgement.[15]

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[13] The parties dispute whether the "prevent and restrain" language of the Sherman and Clayton Acts permits a disgorgement award. *Compare* Mem. at 25-26 *with* Opp. at 267-27. The Court need not resolve this dispute because disgorgement is not necessary or appropriate in this case.

[14] The two cases cited by the Government, Opp. at 26 n.15, are inapposite. The unreported decision in which the FTC obtained disgorgement involved a consent decree, not a litigated decision. *FTC v. Hearst Trust*, Civ. No. 01-cv-00734 (TPJ) (D.D.C. Dec. 14, 2001). The other case did not involve a challenge to a merger, and in any event, the court there ***granted*** defendants' motion to dismiss the disgorgement, even though a "disgorgement scenario ***might*** fit within the contours of § 16" of the Clayton Act. *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36-37, 40-42 (D.D.C. 1999) (emphasis added).

[15] Thus, Defendants have identified 14 government challenges to consummated mergers in the five years since the Twin America joint venture. *See, e.g.*, *Bazaarvoice* 2014 WL 203966; *United States v. Heraeus Electro-Nite Co., LLC*, No. 14-CV-00005, 2014 WL 25096 (D.D.C. Jan. 2, 2014); *In re Solera Holdings, Inc.*, No. 121-0165, Docket No. C-4415 (Oct. 22, 2013); *In re Cardinal Health, Inc.*, No. 0910136, Docket No. C-4339 (Oct. 18, 2011). The Government sought disgorgement in ***none of these cases***.

Second, DOJ's argument that the $19 million settlement with the private plaintiffs does not vitiate its right to disgorgement misses the point. Unlike *Keyspan*, consumers here not only have the ability to seek, but have already secured, compensation for the exact same conduct at issue in this case, with the ***Government*** receiving any unclaimed funds. Thus, the Government concedes, as it must, that "this Court may take the class settlement amount into account in any disgorgement award." Opp. at 29. Defendants submit that the private settlement—which, unlike this case, will deliver money to consumers—should resolve the disgorgement claim.[16]

NYAG also lacks explicit statutory authority to bring a disgorgement claim under Section 342 of the Donnelly Act and Section 63(12) of New York Executive Law. *See* Opp. at 30. The cases on which NYAG relies do not support its position. For example, *People v. Applied Card Systems, Inc.*, 894 N.E.2d 1 (N.Y. 2008) suggested in dicta that NYAG "***might*** be able to obtain disgorgement . . . of profits . . . derived from all New York consumers," but it refrained from weighing in on the question of whether disgorgement was available under the Executive Law, calling such a finding "inappropriate." *Id.* at 14 (emphasis added). And, the fraud alleged in *People v. Ernst & Young LLP*, 980 N.Y.S.2d 456 (N.Y. App. Div. 2014) was central to the court's holding. *Id.* at 457 (noting "where, ***as here***, there is a claim ***based on fraudulent activity***, disgorgement ***may*** be available as an equitable remedy") (emphasis added); *see also People v.*

[16] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450 (2d Cir. 1996), does not compel a different result. As an initial matter, the district court there gave defendants "credit for a $5 million payment they made in January 1987 to settle a class action," and reduced the amount of disgorgement awarded to the SEC by that amount. *Id.* at 1461. In any event, unlike here, the claims and allegations at issue in the *First Jersey* private action were ***not*** coextensive with the government's action. The government's action involved transactions in six securities, *id.* at 1456, while the private action involved transactions in only three. *SEC v. First Jersey Sec., Inc.*, 890 F. Supp. 1185, 1211 n.35 (S.D.N.Y. 1995) (settlement involved a subclass of members with transactions in three securities) (overruled on other grounds). Moreover, unlike here, the government had evidence of exact profits made on the specific securities subject to the fraudulent conduct. *Id.* at 1211.

Greenberg, 43 Misc. 3d 1229(A), at *1-2 (N.Y. Sup. Ct. May 28, 2104) (awarding disgorgement where defendants had participated in ***fraudulent*** aspects of two schemes) (emphasis added).

Here, NYAG has admitted that Defendants did not engage in repeated fraudulent acts or demonstrate persistent fraud, so it claims that disgorgement is available under the "repeated illegality" prong. Opp. at 31. But, all of the cases on which NYAG relies for its right to seek disgorgement involve fraud. *See id.* at 30-31. These cases should not be the basis for a finding that NYAG has a right to seek disgorgement in this antitrust case, particularly where the state's highest court has not decided whether Executive Law permits disgorgement.

NYAG's disgorgement claim under Executive Law 63(12) is also barred by the three-year statute of limitations. NYAG knew about the merger more than three years before it filed suit, having issued subpoenas to the Defendants in July 2009. Wagner SJ Decl., Exs. 57-59. Neither a six-year statute of limitations nor equitable estoppel salvage the Executive Law claim.

First, a three-year statute of limitations applies because common law fraud has not been alleged. *See People v. Pharmacia Corp.*, 895 N.Y.S.2d 682, 686 (N.Y. Sup. Ct. 2010) ("An examination of plaintiff's complaint reveals that the State's allegations fall well short of alleging fraud actionable at common law. . . . Under these circumstances, plaintiff's Executive Law § 63(12) claim is governed by the three-year limitations period set forth in CPLR 214 (2)."). And given the absence of analysis in *State v. Feldman*, 2003 WL 21576518, at *4 (S.D.N.Y. July 10, 2003), the Court should look instead to state court cases, cited above, holding that, absent fraud, Executive Law claims are subject to a three-year statute of limitations.[17]

[17] *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, No. 02-1486-PJH, 2007 WL 2517851 (N.D.Ca. Aug. 31, 2007), also provides no support. *DRAM* noted that under N.Y. C.P.L.R. § 214(2), actions based on statutes are normally subject to a three-year limitation period unless "the statute upon which an action is based had a common law precedent." *Id.* at *11. The *DRAM* court, however, relied, incorrectly in Defendants' view, on *Judd v. Harrington*, 34 N.E. 790. 791 (N.Y. 1883), for its belief that an antitrust claim was "recognized at common law." *Id.*

Second, NYAG has not met its burden to show the type of extraordinary circumstances required to consider application of equitable estoppel. *See Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001) (overruled on other grounds); *Bennett v. United States Lines, Inc.*, 64 F.3d 62, 65 (2d Cir. 1995).[18] NYAG does not dispute that it was aware of all of the factual circumstances necessary to establish a right of action as early as March 2009, when the merger was consummated. While Defendants sought "antitrust review and clearance" from the Surface Transportation Board ("STB")—the federal entity charged with regulating interstate and intercity transportation services, *see* http://www.stb.dot.gov/stb/ about/overview.html—Twin America's STB application did not deprive the Government of its the ability to file a lawsuit under the Sherman, Clayton, or Donnelly Acts. Nor does NYAG provide any basis to support its suggestion that the Defendants could dictate to the State the scope of its jurisdiction. *See* Opp. at 33. The State and the courts—not the Defendants—are the arbiters of NYAG's jurisdiction.[19]

According to a leading antitrust treatise, "the common law did ***not*** permit damage actions by purchasers from cartels or competitors who were not the targets of boycotts. The importance of this change is underestimated by those who suggest that the Sherman Act 'adopted' the common law, with the relatively minor distinction that arrangements that had been unenforceable at common law became positively illegal-that is, actionable by third parties or the state." *Areeda & Hovenkamp, Antitrust Law* ¶104a (2014) (emphasis added). And the Donnelly Act, which the State asserts "codifies" common law, Opp. at 32 n.23, does not permit an award of disgorgement.

[18] The cases cited by the NYAG, Opp. at 33, are inapposite. *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506 (2d Cir. 2002), involved an ERISA claim that was subject to specific administrative exhaustion requirements. *Higgins v. New York Stock Exchange, Inc.*, 942 F.2d 829 (2d. Cir. 1991), expressly disagreed with the notion that "parties may 'toll' the limitations period at their own option by instituting administrative proceedings."

[19] The statute of limitations of the Donnelly Act is irrelevant because there is no basis to award disgorgment under that statute. NYAG concedes that it has no statutory basis under the language of the Donnelly Act. And even though it claims that this "court sitting in equity possesses the authority to order disgorgement," NYAG does not cite a single case that awarded disgorgement under the Donnelly Act (and Defendants have been unable to find one).

B. The Government Is Not Entitled To Disgorgement As a Matter of Fact

The Government bears the burden to establish that the disgorgement amount sought is a reasonable approximation of the profits earned as a result of the allegedly unlawful conduct. *See* Opp. at 33-34. Until the Government proffers a reasonable approximation of the allegedly ill-gotten gains, the burden does not shift to Defendants. Defendants identified a number of fatal flaws in the analyses of NYAG's disgorgement experts, Dr. Ben-Ishai and Mr. Sumanta Ray, that preclude a finding that their estimates are reasonable approximations of the "ill-gotten gains." Indeed, their estimates in the [redacted] million range defy common sense given that they are more than double the dollars earned by the joint venture from the $5 price increases on hop-on, hop-off bus tour tickets cited in the Complaint. Among their many flaws, NYAG's experts include profits from ***all*** of Twin America's business lines, not just the sales of hop-on, hop-off bus tickets in New York City. In fact, the experts do not even attempt to "distinguish legal and illegally derived profits." For these and the additional reasons set forth in Defendants' opening and reply briefs in support of the *Daubert* motions, the Government has not met its burden to provide a reasonable approximation of Defendants' alleged "ill-gotten gains" attributable to the conduct the Government is challenging. Summary judgment on disgorgement should issue on this ground alone.[20]

[20] Contrary to the Government's claim, Opp. at 34 n.26, *SEC v. Jones*, 476 F. Supp. 2d 374, 386 (S.D.N.Y. 2007), did include some evidence of ill-gotten gains—*i.e.*, sworn testimony related to the Defendant's compensation—but the court found the evidence insufficient. And the court in *People v. My Service Center, Inc.*, 836 N.Y.S.2d 487, 487 (N.Y. Sup. Ct. 2007) denied plaintiffs' petition for restitution because plaintiffs had not tendered any "invoices or receipts," which suggests that evidence supporting disgorgement must be based on some specific harm to individual consumers and cannot simply be estimated, as the Government has done here.

CONCLUSION

For the foregoing reasons and those in the opening brief, Defendants request that the Court grant Defendants' motion for summary judgment on all counts.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 1, 2014, I caused a true and correct copy of Defendants' Reply Memorandum in support of their Motion for Summary Judgment to be served via electronic mail on all parties.

s/Andrew D. Lazerow
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