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October 9, 2012

**VIA ELECTRONIC FILING**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**Re: MC-F-21047, Frank Sherman, FSCS Corporation, TMS West Coast, Inc., Evergreen Trails, Inc. and Cabana Coaches, LLC – Acquisition and Consolidation of Assets – American Charters, Ltd., American Coach Lines of Jacksonville, Inc., American Coach Lines of Miami, Inc., American Coach Lines of Orlando, Inc., CUSA ASL, LLC, CUSA BCCAE, LLC, CUSA CC, LLC, CUSA FL, LLC, CUSA GCBS, LLC, CUSA GCT, LLC, CUSA K-TCS, LLC, and Midnight Sun Tours, Inc.**

Dear Ms. Brown:

On June 4, 2012, motor passenger carriers Evergreen Trails, Inc. (“Evergreen”) and Cabana Coaches, LLC (“Cabana”), as well as related non-carrier applicants (collectively “Applicants”) filed an application (“Application”) under 49 U.S.C. § 14303 and the Surface Transportation Board’s (“Board”) regulations at 49 C.F.R. Part 1182 to acquire the assets (including business good will and permits) of 12 separate interstate motor passenger common carrier subsidiaries of non-carrier Coach America Holdings, Inc. (Coach America). As relevant here, the entities from which these assets were acquired included CUSA K-TCS, LLC (“K-TCS”), Midnight Sun Tours, Inc. (“Midnight Sun”) and American Coach Lines of Miami, Inc. (“ACL Miami”). On September 6, 2012, the STB issued a decision approving the acquisition of

control of the Coach America assets by Applicants. *Frank Sherman, FSCS Corporation, TMS West Coast, Inc., Evergreen Trails, Inc. and Cabana Coaches, LLC – Acquisition and Consolidation of Assets – American Charters, Ltd., et al.* STB Docket No. MC-F-21047 (served September 6, 2012) (“September 6 Decision”). The transaction approved by the Board was thereupon consummated on September 12, 2012 and the assets and motor carrier businesses that the Board authorized Evergreen and related entities to control are now being managed and operated by Evergreen.

This letter is to inform the Board of two business decisions Applicants have made since filing the application regarding the consolidation and operation of the acquired assets. As explained further below, although Applicants initially indicated that Evergreen did not have definitive plans regarding the operations in Nevada, after further consideration Evergreen determined that it will conduct certain operations in Nevada with the assets and permits that this Board authorized Evergreen to control. Further, Applicants have decided to consolidate the assets acquired from Midnight Sun and ACL Miami into Evergreen and not into its sister company Cabana, as had been contemplated at the time that the Application was filed.

**A. Nevada Operations**

The Application filed with the Board made clear at several points that the Applicants “intend to acquire” the assets of CUSA K-TCS, the Coach America carrier based in Las Vegas, NV. See Application at pages iii; 2 fn. 2; 5 fn. 4. The Application also described that Coach America company in the list of entities whose assets were being acquired, including its approximately 22 buses and intrastate operating permits. Application at 11. The Application further noted that K-TCS has terminated operations due to Coach America’s financial problems and stated what was correct at the time, namely that Evergreen “does not plan to resume

operations previously offered by [K-TCS].” Application at 5 n. 4. At that time, Evergreen did not have definitive plans to conduct operations in Nevada. However, Evergreen obviously was still open to the possibility of conducting operations of some sort at a future date in Nevada as indicated by Applicants’ clear statements that they were seeking to acquire the assets of the carrier, including the Nevada intrastate operating authority held by K-TCS which was specifically identified in the Application. *See* Application at 16 & n. 8. Indeed, the Board’s September 6 Decision notes that the transaction approved by the Board included the transfer of intrastate operating authority from K-TCS to Evergreen. September 6 Decision at 5. If Evergreen had completely rejected the idea of operating in Nevada, Evergreen obviously would not have purchased the intrastate authority and other assets of K-TCS (as it did when the transaction was consummated) or sought Board approval for the control of those assets.

Following the filing of the Application, Evergreen identified certain business opportunities in Nevada and decided it would use the motorcoach assets and Nevada intrastate operating authority obtained pursuant to the Board’s decision, as well as its own federal interstate operating authority, to conduct operations there. Although the Application suggested that the Applicants did not intend to operate the K-TCS business (which had closed prior to the Application being filed), nothing in the Application foreclosed the possibility that Applicants might reconsider their Nevada plans. The fact that they very clearly sought permission to acquire the K-TCS intrastate authority and other assets speaks for itself in that regard

Applicants are advising the Board of their planned Nevada operations because on September 26, 2012 the Livery Operators Association of Las Vegas (“LOA”) filed a protest with the Nevada Transportation Authority, the state’s motor carrier regulatory agency, regarding the Board-authorized transfer of intrastate authority from K-TCS to Evergreen. *See* Exhibit 1.

Applicants will be vigorously opposing this protest. In the protest LOA argues, among other things, that Applicants intentionally misled the Board regarding their intentions with respect to operations in Nevada so that the Board would not conduct a detailed analysis of the transportation market in Nevada and would approve the application more quickly. The notion that Applicants were attempting to mislead the Board to avoid an analysis of the Nevada market is absurd on its face. As demonstrated by the Board's September 6, 2012 decision, the Board does not conduct a detailed analysis of individual transportation markets when determining whether to approve transactions such as the one at issue here. Further, any definitive plans to conduct operations in Nevada would only have strengthened the Application. Because K-TCS had ceased all operations, any operations conducted by Evergreen would represent an increase in competition and services available to the public and add to the number of employees that would be employed by Applicants as a result of the transaction. These factors would only make the Application that much more compelling.

There was no plainly advantage in terms of timing or otherwise to be gained by misleading the Board as to Applicants' Nevada plans. As noted above, a statement by Evergreen indicating that it was certain to conduct operations in Nevada would not have led the Board to conduct a detailed, time-consuming analysis of the transportation market in Nevada. Indeed, Evergreen and its co-applicants indicated that they intended to continue the operations of ten other carriers and yet the Board issued a decision within days following Evergreen's reply to public comments. More importantly, as explained above, the statements made in the Application were accurate and indicated that Applicants were keeping their options open with respect to operating in Nevada.

Further, should the need arise, Applicants will seek a determination from the Board that any effort to interfere with Evergreen's exercise of its rights under the transferred Nevada intrastate operating rights would be preempted under 49 U.S.C. § 14303(f). That statute very clearly provides that a party to a motor carrier control transaction approved by the Board under that statute may carry out the transaction, and exercise control of assets and franchises acquired in the transaction, without the approval of a state authority.<sup>1</sup>

**B. Florida Operations**

The other decision made by Applicants following the filing of the Application relates to Midnight Sun and ACL Miami. In the Application, Applicants stated that the assets of Midnight Sun and ACL Miami would be consolidated into Cabana and that Cabana would conduct the operations previously conducted by these two carriers. However, upon further analysis, Applicants have decided, primarily for insurance reasons, that it would be more efficient and cost effective to consolidate the assets of Midnight Sun and ACL Miami into Evergreen rather than Cabana.

Evergreen and Cabana share the same owners. Thus, this change does not affect the ultimate control of the assets. Rather, it simply represents a change in the specific corporate entity under which the assets will be operated from that described in the Application. Nonetheless, in the interests of full disclosure, Applicants wanted the Board to be aware of this change.

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<sup>1</sup> While Evergreen therefore did not require Nevada's approval for the acquisition of the K-TCS assets or permits, Evergreen provided timely notification of its acquisition of control to the Nevada TSA, which is now in the process of formalizing the transfer of the intrastate certificates to Evergreen. LOA's protest was filed in the context of that transfer proceeding.

Respectfully submitted,



David H. Coburn  
Christopher G. Falcone

Attorneys for Frank Sherman, FSCS  
Corporation, TMS West Coast, Inc.,  
Evergreen Trails, Inc. and Cabana Coaches,  
LLC

cc: Kimberly Maxson-Rushton, Esq.  
Cooper Levenson  
6060 Elton Avenue, Suite A  
Las Vegas, Nevada 89107  
Counsel for Livery Operators Association of Las Vegas

James Day, Esq.  
Nevada Transportation Authority  
2290 S. Jones Boulevard, Suite 110  
Las Vegas, Nevada 89146

# **Exhibit 1**

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**BEFORE THE NEVADA TRANSPORTATION AUTHORITY**

In re Petition of Evergreen Trails, Inc. for Adoption of Transfer )  
of Certificates of Public Convenience and Necessity to Provide ) Docket No. 12-09019  
Charter Bus Service, CPCN 2016.2 and CPCN 2115 )

**LIVERY OPERATORS ASSOCIATION OF LAS VEGAS**  
**PROTEST TO EVERGREEN TRAILS, INC. APPLICATION/PETITION**  
**FOR ADOPTION OF TRANSFER OF CERTIFICATES OF**  
**PUBLIC CONVENIENCE AND NECESSITY 2016.2 AND 2115**

COMES NOW, Livery Operators Association of Las Vegas (“LOA”), by and through their counsel, Kimberly Maxson Rushton, Esq. of the law firm of Cooper Levenson, Attorneys at Law, and submits the following Protest to Evergreen Trails, Inc. (“Evergreen” or the “Applicant”) Application/Petition for adoption of transfer of Certificates of Public Convenience and Necessity to provide common motor carrier services pursuant to CPCN 2016.2 and CPCN 2115 (the “Adoption of Transfer of the Nevada CPCNs”).

As will be set forth more fully below, this Protest is filed pursuant to Nevada Administrative Code (“NAC”) 706.397, as an objection to the Nevada Transportation Authority’s (“NTA”) Adoption of Transfer of the Nevada CPCNs to Evergreen.

The legal basis for the objection is that:

- (1) in obtaining its instant approvals from the Surface Transportation Board (“STB”), Evergreen specifically represented to the STB that it will not resume the services authorized pursuant to CPCN 2016.2 and CPCN 2115, which was a specific basis for the STB’s approval;
- (2) the recent notice of this matter through the NTA has resulted in a denial of the LOA’s due process rights; and



1 (3) the LOA has significant doubts regarding the STB's jurisdiction, in so far as CPCN  
2 2016.2 and CPCN 2115 relate to a relatively small operator's solely *intrastate* operation.

3 Based on the foregoing significant concerns, the LOA respectfully requests that the NTA  
4 either deny or, at a minimum, delay its Adoption of Transfer of the Nevada CPCNs, until all  
5 interested parties, including the LOA, has had an appropriate opportunity to study these issues.  
6

7 All notices, pleading documents and correspondence pertaining to this proceeding should  
8 be directed to the following individual:

9 Kimberly Maxson-Rushton, Esq.  
10 Cooper Levenson, Attorneys at Law  
11 6060 Elton Avenue, Suite A  
12 Las Vegas, Nevada 89107  
13 krushton@cooperlevenson.com

14 **I.**  
15 **FACTS**

16 1. Effective September 6, 2012, the STB approved the transfer of assets applications  
17 of twelve (12) separate interstate motor passenger common carrier subsidiaries (the "Federal  
18 Application"). See STB Decision Docket No. MCF 21047 (Sept. 6, 2012).

19 2. Such approval for the transfer of assets under the Federal Application also  
20 included CUSA K-TCS, LLC d/b/a CoachAmerica ("CoachAmerica") and CUSA K-TCS, LLC  
21 d/b/a Gray Line Airport Shuttle ("Grey Line"). See id.

22 3. In Nevada, Coach America holds CPCN 2016.2; Grey Line holds CPCN 2115  
23 (collectively, the "Nevada CPCNs"). See NTA Order 2016.2 (Oct. 2, 2009); see also NTA  
24 Order 2115 (Nov. 14, 2006).

25 4. Under their Nevada CPCNs, CoachAmerica and Grey Line are solely restricted to  
26 Nevada *intrastate* operations. See id.  
27  
28

1           5.     The Nevada CPCNs are also subject to suspension and revocation for failure to  
2 follow Nevada Revised Statutes (“NRS”) 706 and NAC 706 and cannot be transferred without  
3 the NTA’s approval. See id.

4           6.     In its Federal Application, Evergreen stated that “[CoachAmerica and Grey Line]  
5 discontinued operations in April 2012. *The assets of these companies will be consolidated into*  
6 *Evergreen, but Evergreen does not plan to resume the services previously offered by these*  
7 *companies.* See STB Decision Docket No. MCF 21047 (Sept. 6, 2012) at Page 3, Note 4  
8 (emphasis added).  
9

10           7.     These representations and background facts served as a direct basis for the STB’s  
11 decision and Order. See id. at Pages 2,3, 6, and 7.  
12

13           8.     In sharp contrast to its Federal Application, in its present application letter to  
14 NTA, and Evergreen now states that Evergreen “*will operate using the same . . . [Nevada*  
15 *CPCNs] assigned to . . . [CoachAmerica and Grey Line], who services Evergreen will continue*  
16 *to operate post-closing.*” Application Letter from David H. Coburn, Esq. to James Day, Esq.,  
17 (August 13, 2012) (emphasis added).  
18

19           9.     Accordingly, Evergreen’s representations to the STB, which allowed it to gain its  
20 instant approval from the STB for the Federal Application, were entirely different than its  
21 present representations to the NTA in connection with its application for the NTA’s Adoption of  
22 Transfer of the Nevada CPCNs.  
23

24           10.    Presumably, Evergreen has done such contrasting representations to the STB  
25 versus the NTA for two reasons.

26           11.    First, in granting its approval, the STB undertakes an examination of the  
27 “adequacy of transportation to the public” in all the relevant markets, related to which its  
28 approval is granted. See STB Decision Docket No. MCF 21047 (Sept. 6, 2012).

1 12. By stating that Evergreen will not resume operations in Nevada, Evergreen  
2 apparently hoped to “fast track” its approval before the STB, by avoiding the examination of the  
3 unique conditions of the Nevada market.

4 13. As a result of Evergreen’s apparent misrepresentation to the STB, STB did not  
5 undertake an examination of the “adequacy of transportation to the public” in the current Nevada  
6 market. See id.

7  
8 14. Second, by failing to properly advise the STB of its Nevada plans, Evergreen  
9 apparently also hoped that industry participants would not have to be properly noticed.

10 15. As a result of Evergreen’s apparent misrepresentation to the STB, industry  
11 participants, including LOA, were not properly noticed. See id.

## 12 II.

### 13 ARGUMENT

#### 14 A. The NTA should deny the proposed Adoption of Transfer of the Nevada CPCNs, 15 based on Evergreen’s apparent false representations to the STB regarding its 16 plans for Nevada.

17 To be proper for all impacted markets, the STB approval must *inter alia* examine the  
18 “effect of the proposed transaction on the adequacy of transportation to the public.” 49 U.S.C. §  
19 14303(b)(1) (1996).

20  
21 Here, in its Federal Application, Evergreen stated that “[CoachAmerica and Grey Line]  
22 discontinued operations in April 2012. *The assets of these companies will be consolidated into*  
23 *Evergreen, but Evergreen does not plan to resume the services previously offered by these*  
24 *companies.* See STB Decision Docket No. MCF 21047 (Sept. 6, 2012) at Page 3, Note 4  
25 (emphasis added).  
26

27 As a result of Evergreen’s apparent misrepresentation to the STB, STB did not undertake  
28 an examination of the “adequacy of transportation to the public” in the current Nevada market.

1 See STB Decision Docket No. MCF 21047 (Sept. 6, 2012). If Evergreen was forthcoming with  
2 the STB, the impact on the Nevada market would have been a key factor in the approval and  
3 would have likely delayed the application. Instead, Evergreen apparently chose to “fast track” its  
4 application, by misrepresenting such key specifics in its application to the STB.

5 Accordingly, Evergreen’s STB approval is based on such apparent misrepresentation and  
6 cannot be applied to the Nevada market. Therefore, the NTA should deny Evergreen’s proposed  
7 Adoption of Transfer of the Nevada CPCNs.  
8

9 **B. Evergreen’s apparent false representations and recent notice of this matter**  
10 **through the NTA also resulted in a denial of the LOA’s due process rights.**

11 In all proceedings, procedural due process requires meaningful “notice” and proper  
12 “opportunity to be heard.” Maiola v. State, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004); see also  
13 Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy, 305 F.3d 943, 952  
14 (9th Cir. 2002).

15  
16 Here, by failing to properly advise the STB of its Nevada plans (indeed, in an apparent  
17 misrepresentation of such plans), Evergreen apparently also hoped that industry participants  
18 would not have to be properly noticed as to such plans. As a result of Evergreen’s apparent  
19 misrepresentation to the STB, industry participants, including LOA, were not properly noticed.  
20

21 Indeed, the first time that the LOA heard of this matter was just days before the presently  
22 planned hearing before the NTA.

23 Accordingly, given Evergreen’s apparent misrepresentation and the short notice time  
24 created as a result, there was no proper notice and no opportunity to be heard whatsoever that a  
25 brand new entity from the other side of the country will now set up operations in Nevada.  
26 Especially, since such operator previously represented to the STB that it had no such plans for  
27 Nevada.  
28

1 Therefore, the NTA should deny the Evergreen's proposed Adoption of Transfer of the  
2 Nevada CPCNs.

3 **C. Given the size of CoachAmerica and GreyLine and their Nevada CPCNs being**  
4 **limited solely to intrastate operations, LOA also does not believe that STB would**  
5 **have had jurisdiction with regard to entering an order for their Nevada CPCNs.**

6 Significant questions regarding the STB's jurisdiction as to the STB's ability to  
7 specifically order the transfer of Nevada CPCNs of CoachAmerica and Gray Line abound.

8 First, 49 U.S.C. § 14303(g) provides that "[STB's jurisdiction does] not apply to  
9 transactions involving carriers whose aggregate gross operating revenues were not more than  
10 \$2,000,000 during a period of 12 consecutive months ending not more than 6 months before the  
11 date of the agreement of the parties." Id.

12 Here, CoachAmerica and Grey Line were solely restricted to Nevada intrastate operations  
13 with relatively small operations. As such, the propriety of STB's jurisdiction as to these entities  
14 should be examined.

15 Second, federal jurisdiction does not normally extend to purely intrastate matters. See  
16 e.g., Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,  
17 et al., 531 U.S. 159 (2001).

18 Here, under their Nevada CPCNs, CoachAmerica and Grey Line are solely restricted to  
19 Nevada intrastate operations, which were conducted intrastate. The Nevada CPCNs are also  
20 subject to suspension and revocation for failure to follow Nevada Revised Statutes ("NRS") 706  
21 and NAC 706 and cannot be transferred without the NTA's approval. In its Federal Application,  
22 Evergreen stated that "Evergreen does not plan to resume the services previously offered by . . .  
23 [CoachAmerica and Grey Line in Nevada]."

24 In short, while the Nevada CPCNs were approved for intrastate operations, Evergreen  
25 represented that it would not participate to in Nevada operations if approved by the STB.  
26  
27  
28

1 For these reasons, the propriety of STB's jurisdiction as to these entities' and their  
2 Nevada CPCNs should also be examined, especially, since it was not even the basis for  
3 consideration in the STB decision.

4 Given this factual and legal framework, the NTA should deny the Evergreen's proposed  
5 Adoption of Transfer of the Nevada CPCNs at this juncture.

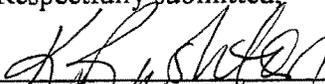
6  
7 **III.**

8 **CONCLUSION**

9 For the foregoing reasons, the Adoption of Transfer of the Nevada CPCNs should be  
10 denied by the NTA or, at a minimum, delayed, until all of these issues can be examined by all  
11 interested parties, including the LOA.

12 DATED this 26 day of September, 2012.

13  
14 Respectfully submitted,

15 

16 **KIMBERLY MAXSON-RUSHTON, ESQ.**

17 Nevada Bar No. 5065

18 **LOUIS V. CSOKA, ESQ.**

19 Nevada Bar No. 7667

20 **COOPER LEVENSON**

21 **ATTORNEYS AT LAW**

22 6060 Elton Avenue, Suite A

23 Las Vegas, Nevada 89107

24 Counsel for the Petitioner,

25 **LIVERY OPERATORS ASSOCIATION**

26 **OF LAS VEGAS**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 26<sup>th</sup> 2012, I served a copy of the above and foregoing LIVERY OPERATORS ASSOCIATION OF LAS VEGAS PROTEST TO EVERGREEN TRAILS, INC. APPLICATION/PETITION FOR ADOPTION OF TRANSFER OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE CHARTER BUS SERVICE, CPCN 2016.2 AND CPCN 2115 via U.S. Mail, postage prepaid, upon the following:

David W. Newton, Esq.  
Senior Deputy Attorney General  
Office of the Attorney General  
555 East Washington Avenue, Suite 390  
Las Vegas, Nevada 89101

Nevada Transportation Authority  
Applications Manager  
2290 South Jones Boulevard, Suite 110  
Las Vegas, Nevada 89146

David Coburn, Esq.  
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Cooper Levenson, Attorneys at Law