

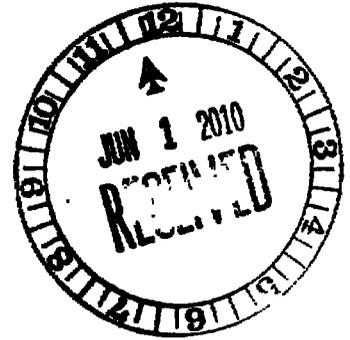
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May 28, 2010

BY FEDERAL EXPRESS

Cynthia T. Brown, Esq.
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 "E" Street S.W.
Washington, D.C. 20423-001

**ENTERED
Office of Proceedings**

JUN 01 2010

**Part of
Public Record**

Re: MC-F 21035, Stage Group plc and Coach USA, Inc., et al.
Acquisition of Control – Twin America LLC

Dear Ms. Brown:

As you know, we represent Continental Guest Services Corporation ("CGSC") in connection with the above-referenced proceeding. I write in response to Applicants' counsel's letter to the Surface Transportation Board ("STB"), dated May 25, 2010.

We take umbrage at Applicants' new position that it is "unfair" for the STB to review CGSC's papers filed in its state court antitrust action that is asserted against certain of the Applicants entitled Continental Guest Services Corp. v. International Bus Services, Inc., et al., Index No. 600643/10 (Sup. Ct. N.Y. Co.) (the "State Action"), and that such papers should not be "credited" by the STB.

It speaks volumes that Applicants did not take such position during the oral argument held before the STB on April 27, 2010, where the STB permitted me to speak on behalf of CGSC. We submit that Applicants now are taking such a position because CGSC has raised dispositive antitrust violations that we respectfully believe will cause the STB to deny Applicant's application. CGSC believes that, upon a review of all submissions, the STB will make the appropriate determination and deny the subject Application.

In addition, on May 25, 2010, Applicants provided the STB with copies of the papers they filed in the State Action. We note that Applicants amended their memorandum of law filed in the State Action on May 26, 2010 due to their violation of

GANFER & SHORE, LLP

Cynthia T. Brown, Esq.
May 28, 2010
Page 2

the Court's rules in the State Action regarding page limitations, and have not provided you with a copy of such revised filing. Accordingly, we enclose a copy of such amended filing.

We further note that oral argument on the parties' motions in the State Action took place on May 27, 2010, and we will be providing the STB with a copy of the transcript of such proceeding.

Finally, we attach CGSC's response to the motion filed by one of the Applicants, International Bus Services, Inc. ("IBS"), in the State Action seeking to seal CGSC's papers, which was filed two weeks after Applicants became aware they we possess a copy of Exhibit 1 to the Chan Declaration that had been obtained from the STB's public website. It should be noted, however, that IBS only moved for relief in the State Action by Notice of Motion, and not by Order to Show Cause seeking a temporary restraining order, which is the procedure required if one is "truly" concerned about protecting the purported confidentiality of a document and seeks its immediate sealing. Having not done so, Exhibit 1 remains today available to the public in the paper and electronic court file. Moreover, if there was a "true" concern about the confidentiality of such document, counsel would have objected to it being quoted during the oral argument that took place yesterday, May 27th, in the State Action, but they did not. Instead, because certain of the Applicants failed to produce any discovery in the State Action in violation of the Court's rules, the Court ordered them to produce their documents (including, but not limited to, Exhibit 1) within five business days of May 27th.

Accordingly, it is respectfully submitted that the STB should take into consideration the positions asserted by CGSC and deny Applicants' Application.

Respectfully,



Mark A. Berman

Enclosures

cc: David H. Coburn, Esq. (by federal express w/o enclosures)
Karen Fleming, Esq. (by federal express w/o enclosures)
James Yoon, Esq. (by federal express w/o enclosures)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BELKIS MARTINEZ, being duly sworn, deposes and says:

1. I am over 18 years of age, am not a party to this action, and reside in New York State.

2. On the 28th day of May, 2010, I served true copies of the within letter from, Mark A. Berman, to Cynthia T. Brown, Esq., dated May 28, 2010, without enclosures, upon:

David H. Coburn, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue NW
Washington, DC 20036

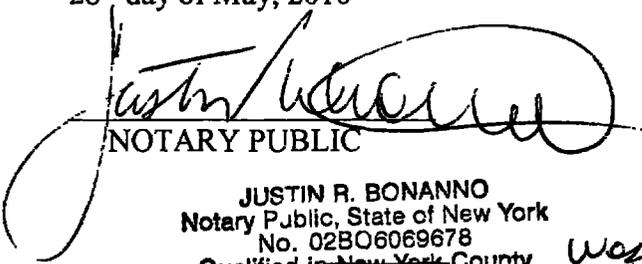
Karen Fleming
Transport Workers Union of America
AFL-CIO, Local 225
10 Banta Place, Suite 108
Hackensack, New Jersey 07601

James Yoon, Esq.
120 Broadway
Suite 26C
New York, New York 10271

3. Service was effectuated by delivering same to all of the above by Federal Express courier for standard overnight delivery, Airbill Nos. 8717 8319 5540, 8717 8319 5573 and 8717 8319 5584, respectively.

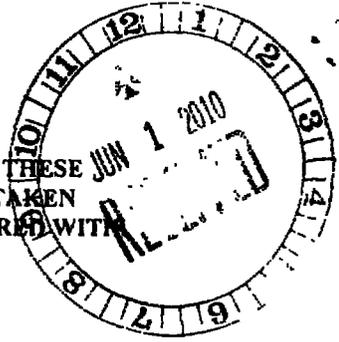

BELKIS MARTINEZ

Sworn to before me this
28th day of May, 2010


NOTARY PUBLIC

JUSTIN R. BONANNO
Notary Public, State of New York
No. 02BO6069678
Qualified in ~~New York~~ Westchester County
Commission Expires February 11, 20 14

BY ORDER OF JUSTICE RAMOS, THESE
MOTION PAPERS MAY NOT BE TAKEN
APART OR OTHERWISE TAMPERED WITH



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CONTINENTAL GUEST SERVICES
CORPORATION,

Plaintiff,

- against -

INTERNATIONAL BUS SERVICES, INC. D/B/A
GRAY LINE NEW YORK, CITY SIGHTS TWIN,
LLC D/B/A CITY SIGHTS NEW YORK, TWIN
AMERICA, LLC, BATTERY PARK HOTEL
MANAGEMENT, LLC, HAMPTON INN TIMES
SQUARE NORTH, HILTON GARDEN INN TIMES
SQUARE, NEW YORK WEST 35TH STREET HGI,
ON THE AVE HOTEL, THE PARAMOUNT HOTEL
NEW YORK, PARK CENTRAL HOTEL (DE), LLC,
THIRTY EAST 30TH STREET OWNER, LLC, TIMES
SQUARE HOTEL OPERATING LESSEE LLC,
LEXINGTON HOTEL, LLC, W2001
METROPOLITAN HOTEL OPERATING LESSEE,
L.L.C, and HIGHGATE HOTELS, L.P.,

Defendants.

Index No. 600643/10

I.A.S. Part 53

Justice Charles E. Ramos, J.S.C.

Motion Seq. No. 5

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT INTERNATIONAL BUS SERVICES, INC.'S
MOTION TO SEAL CERTAIN MATERIALS FILED BY PLAINTIFF**

GANFER & SHORE, LLP
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New York, New York 10017
(212) 922-9250
(212) 922-9335 (facsimile)
Attorneys for Plaintiff

Continental Guest Services Corporation ("CGSC" or "Plaintiff") submits this Memorandum of Law in opposition to the motion of Defendant International Bus Services, Inc. ("IBS") for an order filing under seal: (i) the Affidavit of Betty Zhang, sworn to on May 3, 2010 (the "Zhang Affidavit"); and (ii) Plaintiff's Memorandum of Law In (a) Further Support Of Its Application For A Temporary Restraining Order And Preliminary Injunction, (b) Opposition To The Motion/Cross-Motion To Dismiss Filed By Defendants, and (c) Opposition To The Motion To Stay Discovery Filed By The Bus Company Defendants ("Plaintiff's MOL").

PRELIMINARY STATEMENT

As Plaintiff previously stated in its Memorandum of Law in opposition to the prior motion of IBS and Defendants Twin America, LLC ("Twin America") and City Sights Twin, LLC ("City Sights") (collectively, the "Bus Company Defendants") for an order permitting them to file documents they would use in opposing Plaintiff's motion for a preliminary injunction under seal, it is well-established that the presumption of public access to all court filings is expansive in New York State, and IBS has offered nothing to this Court in its second Moving Memorandum of Law ("Moving Mem.") to justify altering this presumption.

Indeed, the Bus Company Defendants wasted this Court's time and resources with their prior motion (currently returnable on June 10, 2010) to file any such documents under seal because they never did use any "confidential" documents in their motion papers. No doubt, they did not use any because to do so would expose their duplicity when, at the same time, they refused to produce discovery on the basis that they had moved to dismiss Plaintiff's Complaint (the "Complaint"), even though their refusal violated this Court's rules.

For the reasons set forth herein, IBS seeks to further drain this Court's time on yet another unfounded motion to seal.

Notably, CGSC filed the Zhang Affidavit and Plaintiff's MOL on May 7, 2010 – several weeks ago – and so it has been and remains publicly available via the website of the New York Unified Court System since such date. Upon being apprised of such filing, the Bus Company Defendants still did not move this Court, let alone move by order to show cause, to seal such documents. Rather, the Bus Company Defendants sent letters to CGSC and the United States Surface Transportation Board (the "STB") on May 10 and 12, 2010 requesting that the STB, *inter alia*, redact and keep confidential a single document within an exhibit to the Zhang Affidavit and all references to such document in Plaintiff's MOL. It was only after CGSC sent responsive letters to the STB on May 11 and 12, 2010 illuminating, *inter alia*, that if CGSC's court papers raised any "real" confidentiality issues or if the Bus Company Defendants were "truly" concerned about the public obtaining access to the Zhang Affidavit and Plaintiff's MOL, then the Bus Company Defendants would have made a motion to this Court to address such concerns. Apparently, our "bait" forced IBS to finally make such motion two weeks later. (Copies of the Bus Company Defendants' and CGSC's letters of May 10, 11, and 12, 2010 are collectively annexed hereto as Exhibit "A".) The lack of true concern about the purported confidentiality of such document is evidenced by the fact that, even during the oral argument held on May 27, 2010, the Bus Company Defendants raised no objection to its use when Plaintiff's counsel specifically referred to and quoted from the document in open court.

Any sealing of court filings should not be permitted here, as there are few subjects of greater public interest than the prevention of illegal horizontal and vertical monopolies in violation of the Donnelly Act. As set forth more fully in the Complaint and Plaintiff's motion papers in support of its application for a preliminary injunction (which is currently *sub judice*), the Bus Company Defendants' monopolistic practices have, *inter alia*: (i) resulted in the increase

of the price of a product available to the public; (ii) stymied and will continue to stymie competition in New York City; and (iii) already caused the New York State Attorney General (the "Attorney General") to: (a) institute an investigation into such improper conduct, (b) publicly issue two reports that the Bus Company Defendants' monopolistic conduct is violative of the Donnelly Act, and (c) go on the record during oral argument before the STB¹ that IBS and City Sights, through the formation of Twin America, had engaged in monopolistic, predatory, and anti-competitive conduct that harmed the public.

ARGUMENT

IBS' MOTION TO SEAL SHOULD BE DENIED IN ITS ENTIRETY

As an initial matter, while Section 216.1(a) of the Uniform Rules of the New York State Trial Courts permits a court to seal records for "good cause," such "good cause" must be shown through a sworn statement by the client itself. See, e.g., Grande Prairie Energy LLC v. Alstom Power, Inc., 5 Misc. 3d 1002(A), 2004 WL 2295660, at *2 (Sup. Ct. N.Y. Co. Oct 4, 2004) (Ramos, J.) (sealing denied where the court was not provided with an "affidavit from a person with knowledge explaining why the file or certain documents should be sealed"). Here, the Court has not been provided with a sworn statement from IBS – a fact which is self-evident from a cursory review of IBS' motion papers and such defect requires no further elaboration. Accordingly, the Bus Company Defendants' motion is procedurally defective and must be denied. Grande Prairie, 2004 WL 2295660 at *2.

IBS' motion should also be denied on the following substantive grounds. The First Department has "authorized sealing only in strictly limited circumstances," and such

¹ The Attorney General apparently issued subpoenas and commenced an investigation of the Bus Company Defendants for their alleged violations of the Donnelly Act, which the Attorney General asserted in his papers filed before the STB that IBS and City Sights sought to stop by seeking to register their joint venture, Twin America, with the STB. The Attorney General has unequivocally taken the position that the Bus Company Defendants have "tried to evade antitrust scrutiny" through their application to the STB

circumstances do not and cannot exist here due to the public interest involved in the subject dispute. See Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V., 28 A.D.3d 322, 325, 814 N.Y.S.2d 110, 113 (1st Dep't 2006) (the public's entitlement to access court proceedings is, among other things, "firmly grounded in common-law principles"). Indeed, Section 216.1(a) of the Uniform Rules of the New York State Trial Courts affirmatively requires that, in determining whether "good cause" exists, a court "shall consider the interests of the public".²

Notably, the antitrust laws were "conceived primarily as 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws and giv[ing] the injured party ample damages for the wrong suffered" and "New York's GBL § 340 is intended to further this protection to citizens of the New York State". Lennon v. Philip Morris Companies, Inc., 189 Misc. 2d 577, 582-83, 734 N.Y.S.2d 374, 379 (Sup. Ct. N.Y. Co. 2001) (Ramos, J.) (internal quotations and citations omitted). Here, where the Bus Company Defendants have, *inter alia*, recently raised consumer prices and created barriers to entry to new competitors, the public interest mandates that the papers that CGSC submitted in furtherance of its motion for a preliminary injunction *not* be permitted to be filed under seal.

As set forth above, the Zhang Affidavit and Plaintiff's MOL have been available to the public for a number of weeks (since May 7, 2010) and continue to be so. If IBS or any of the other Bus Company Defendants sincerely were concerned about the purported confidentiality of such documents, they immediately would have filed an order to show cause with a temporary restraining order preventing the public from viewing the documents. However, it speaks

² The public's interest in the Bus Company Defendants' monopolistic practices is well-established here, as the Attorney General is investigating the Bus Company Defendants and recently stated at the approval hearing before the STB that IBS' and City Sights' formation of Twin America violates the Donnelly Act because such combination, *inter alia*, "harms competition, harms employees, and...it is not in the public interest.... We've already seen that the prices have gone up....it's about ten percent. And the services – we've heard from the unions, that the – that they've lost wages, lost hours."

volumes that IBS and the other Bus Company Defendants did not do so and only filed the instant motion after CGSC demonstrated to the STB the inherent contradictions of their stance on this issue; *to wit*, seeking relief from the STB, but not seeking relief from this Court. (see Ex. A, page 1 of CGSC's letter of May 12, 2010). Hence, it appears that IBS is only making this motion to "save face" with the STB, and not because of any alleged confidentiality issues.

IBS has also sought to file under seal the *entire* Zhang Affidavit and the *entirety* of Plaintiff's MOL (see IBS' notice of motion). However, conspicuous in its absence from the Affirmation of Christopher Provenzano, executed on May 21, 2010 (the "Provenzano Aff.") and the Moving Mem. is any reason as to why all of Plaintiff's court papers should be sealed when, admittedly, the only purportedly confidential information would be a single document within an exhibit to the Zhang Affidavit and the references to it. It therefore appears that the relief requested is as improper as the reasoning for it.

Specifically, the purported confidential document – Exhibit 1 to the Reply of Dr. Kitty Kay Chan filed by the Attorney General in the proceeding before the STB (the "Chan Reply") that comprises the last page of Exhibit "C" to the Zhang Affidavit – is anything but confidential. Although IBS alleges that Exhibit 1 had been designated as "confidential" by the STB and the Attorney General's public filing of documents that contained such exhibit was, according to IBS, taken down by the STB from its website on March 15, 2010 after receiving an objection to its posting from IBS, *CGSC obtained the Attorney General's filing that contained Exhibit 1 by accessing the STB public website on the morning of April 15, 2010* – well after such date. Exhibit 1 obviously had been re-posted by the STB to make it publicly available, and we believe it remained so for another three weeks until around May 10, 2010. Indeed, the entire document that CGSC downloaded from the STB's public website (that included Exhibit 1) was labeled

“PUBLIC VERSION” on its cover page.

IBS even acknowledges that Exhibit 1 now has been become a "public" document. It was posted on the STB website (see Provenzano Aff. ¶ 5), CGSC "obtained a copy of Exhibit 1 from the STB website" (see Provenzano Aff. ¶ 6), and Exhibit 1 "became available publicly in the Court's files and online through the NYSCEF system" (see Provenzano Aff. ¶ 7).

Further, IBS and the other Bus Company Defendants admit that Exhibit 1 was both referenced, identified, and discussed by IBS' and the other Bus Company Defendants' expert, Dr. Robert D. Willig, in a non-confidential Declaration filed by them with the STB on November 17, 2009 – even after purportedly designating the *entire document* as "confidential" in its production to the Attorney General. Because the Bus Company Defendants disclosed information from Exhibit 1, IBS cannot now unilaterally obstruct the use of information taken from such exhibit by others and cause it to be sealed. Accordingly, because the confidentiality of Exhibit 1 has been eliminated by the admitted disclosure of information taken from such exhibit by the Bus Company Defendants' expert, such document is now appropriately publicly disclosed and cannot appropriately be the subject of any sealing order.

IBS' argument that Plaintiffs court papers should be filed under seal because the STB purportedly had designated Exhibit 1 as confidential under a protective order issued by the STB is also without merit. First, this Court is not subject to the jurisdiction of the STB or a protective order issued by the STB, just like the STB is not subject to the jurisdiction of this Court. Second, CGSC was not asked to nor offered to opine on whether the purported designation of Exhibit 1 as "confidential" was proper in the first place. Third, to-this-day, IBS and the other Bus Company Defendants have refused to execute Justice Ramos' standard Confidentiality Stipulation and Order.

IBS' self-serving motion to seal is emblematic of it and the other Defendants' conduct where they had refused to produce any documents whatsoever in clear violation of Commercial Rule 11d, which provides that a motion to dismiss, as Defendants have made in this action, does not stay discovery (see Point III of CGSC's Memorandum of Law in Further Support and in Opposition). In fact, Justice Ramos stated during oral argument on May 27, 2010 that, as a result, discovery should have been produced and ordered all Defendants to produce their discovery "within five business days [of May 27, 2010]."

The weakness of IBS' position seeking sealing is demonstrated by its misplaced reliance upon Mancheski v. Gabelli Group Capital Partners, 39 A.D.3d 499, 835 N.Y.S.2d 595 (2d Dep't 2007), where the Second Department "*refused* to seal certain exhibits that were already "made public"" and found that there is a "presumption that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system". *Id.*, at 501, 835 N.Y.S.2d at 597 (emphasis added). Further, although the parties in Mancheski entered into a "So Ordered" confidentiality stipulation that any documents deemed confidential would be kept as such, the court determined that only certain documents would be sealed. Here, Exhibit 1 has already been made public for no less than six weeks (three weeks on the STB website and an additional three weeks and counting in this Court's paper file and on the Court System's website) and has been the source of public discussion by IBS and other Bus Company Defendants. Moreover, the public's interest (as shown by the Attorney General) in preventing illegal monopolies (such as the Bus Company Defendants' monopoly) could not be greater.

IBS' further reliance on the decision in Banna v. Lynch, No. 60311107, 2007 WL 4352724 (Sup. Ct. N.Y. Co. Nov. 13, 2007), is similarly misguided, where again the court there *denied* sealing "the entire file in this action", and only sealed "internal brokerage firm

compliance manuals" because they contained information "for which great lengths are taken to keep it confidential among members of the organization". *Id.* Here, however, Exhibit 1 is not a brokerage firm manual, has been in the public eye for at least six weeks without any action by IBS, and has been "outed" by IBS' own expert.

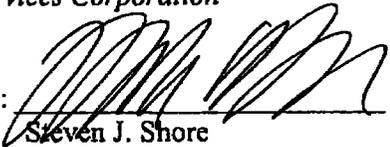
On the other hand, the Zhang Affidavit and Plaintiff's MOL are the types of documents that the public should be able to see, especially where a monopolistic power seeks to, among other things, raise prices, create barriers of entry, and protect its horizontal monopoly through the vertical control of its primary distribution channel. It is axiomatic that substantial and dispositive public concern is present here.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that IBS' motion should be denied in its entirety.

Dated: New York, New York
May 28, 2010

GANFER & SHORE, LLP
*Attorneys for Plaintiff, Continental Guest
Services Corporation*

By: 

Steven J. Shore

Mark A. Berman

Gabriel Levinson

360 Lexington Avenue

New York, New York 10017

(212) 922-9250

EXHIBIT A

STEPTOE & JOHNSON LLP
ATTORNEYS AT LAW

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Washington, DC 20036-1795
Tel 202 429 3000
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steptoe.com

May 10, 2010

Mark Berman
GANFER & SHORE, LLP
360 Lexington Avenue
New York, NY 10017

**Re: *Continental Guest Services Corp. v. International Bus Services, Inc.*, Index
No. 600643/10**

Dear Mr. Berman:

The Surface Transportation Board ("STB") issued a Protective Order in its proceeding, *MC-F-21035, Stagecoach Group plc and Coach USA, Inc., et al. – Acquisition of Control – Twin America LLC*. Pursuant to this Protective Order, Twin America LLC (and other applicants in the STB proceeding) designated certain non-public, commercially sensitive information and documents – including Exhibit 1 to the Declaration of Dr. Kitty Kay Chan – as confidential. Although the New York Attorney General failed to redact Exhibit 1 to Dr. Chan's Declaration in its submission to the STB, the STB removed the document from its website when it was notified by Twin America LLC (and other applicants) on March 15, 2010, that the document was commercially sensitive and confidential. See attached letter of Applicants to STB.

As you know, in this litigation, Plaintiff included Exhibit 1 to Dr. Chan's Declaration as part of Exhibit C to the Affidavit of Betty Zhang submitted in support of its Memorandum of Law in (A) Further Support of its Application for a Temporary Restraining Order and Preliminary Injunction, (B) Opposition to the Motion/Cross-Motion To Dismiss Filed by Defendants, and (C) Opposition to the Motion to Stay Discovery Filed by the Bus Company Defendants.

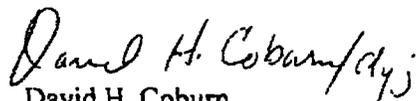
Given that Exhibit 1 to Dr. Chan's Declaration was designated as confidential under the Protective Order issued in the STB proceeding, please take appropriate steps to keep this document confidential in this litigation, any submissions to the STB, and in any other venue. Further, please similarly retain as confidential any quotations from, or discussion of, that document, such as appear at paragraph 56 of the Zhang Affidavit. We are advising the STB of this matter and asking that they not post on the STB website the confidential material.

Mark Berman
May 10, 2010
Page 2

STEPTOE & JOHNSON LLP

Thank you for your attention to this matter.

Sincerely,


David H. Coburn

cc: Michael Cohen, Esq.
Richard Steuer, Esq.
Alan Katz, Esq.
Alan Zuckerbrod, Esq.

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May 11, 2010

BY E-MAIL AND FEDERAL EXPRESS

Cynthia T. Brown, Esq.
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 "E" Street S.W.
Washington, D.C. 20423-001

Re: MC-F 21035, Stage Group plc and Coach USA, Inc., et al.
Acquisition of Control – Twin America LLC

Dear Ms. Brown:

We represent objectant Continental Guest Services Corporation ("CGSC") in connection with the above-referenced proceeding.

We write in response to the letter sent to the Surface Transportation Board ("STB"), dated May 10, 2010, from counsel for the Applicants, contending that a certain Exhibit 1 annexed to the Reply of Dr. Kitty Kay Chan ("Chan Reply") filed by the New York State Attorney General (the "Attorney General") in opposition to the Applicants' application that was annexed by CGSC in the court papers it filed in its antitrust action commenced against, *inter alia*, certain of the Applicants, should: (i) be kept confidential in any submissions to the STB; (ii) neither be referenced nor discussed in the court papers that CGSC filed in its antitrust action; and (iii) be removed (along with any references to it) from those court papers CGSC has publicly filed in such antitrust action.

Counsel for the Applicants indicates in his letter that Exhibit 1 had been designated "non-public, commercially sensitive" by the Applicants and the Attorney General's filing that contained such exhibit was taken down, at the Applicant's request, from the STB's public website when the STB was notified of same on March 15, 2010. However, we obtained the Attorney General's filing that contained Exhibit 1 by accessing the STB public website **on the morning of April 15, 2010** – well after such date. Indeed, we attach the entire document that we downloaded from the STB's public

GANFER & SHORE, LLP

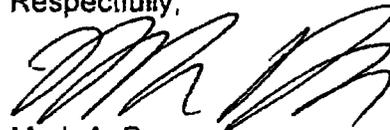
Cynthia T. Brown, Esq.
May 11, 2010
Page 2

website, labeled "PUBLIC VERSION" on its cover page (and its includes certain redactions), and note that the Chan Reply is, likewise, labeled "PUBLIC VERSION" (also containing certain redactions), but further make clear that the subject Exhibit 1 annexed to Dr. Chan's public Reply is annexed in its entirety *without* redaction (while other exhibits annexed to such filing we note are missing because it was determined that they should not be made public).

We further note that Exhibit 1 was both referenced and discussed by the Applicants' expert, Dr Robert D. Willig, in a non-confidential Declaration filed in this proceeding on November 17, 2009 (see generally the bottom of page 2 of the Applicants' counsel's letter to the STB, dated March 15, 2010). Hence, the Applicants have relied upon such purportedly "confidential" document in a public document that they contend they had designated as "confidential," and thus, notwithstanding such disclosure, is now not appropriate for public disclosure

Accordingly, CGSC respectfully requests that the STB deny Applicants' request not to, among other things, post CGSC's court papers on the STB website

Respectfully,



Mark A. Berman

Attachment

cc: David H. Coburn, Esq. (by e-mail and federal express)
Karen Fleming, Esq. (by federal express)
James Yoon, Esq. (by e-mail and federal express)

STEPTOE & JOHNSON LLP
ATTORNEYS AT LAW

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May 12, 2010

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-21035, Stagecoach Group plc and Coach USA, Inc., et al.—
Acquisition of Control — Twin America, LLC**

Dear Ms. Brown:

This will respond on behalf of Applicants to the May 11, 2010 letter submitted by counsel for Continental Guest Services Corporation (“CGSC”) concerning the confidential document and other materials attached to CGSC’s May 7, 2010 filing with the Supreme Court of the State of New York, a copy of which CGSC has now submitted to the Surface Transportation Board in this docket. Specifically, Applicants submit that CGSC has improperly included a confidential document within Exhibit C to the Betty Zhang Affidavit. That Exhibit consists of the Kitty Kay Chan Declaration submitted to the Board by the New York State Attorney General. The document at issue is Exhibit 1 to that Chan Declaration, which is a document that Applicant Coach USA, Inc. voluntarily submitted to the NYSAG and designated as confidential under the terms of the Protective Order issued in this proceeding.

CGSC is not a party to this proceeding. It did not file comments when initial or supplemental comments were due under the procedural orders issued by the Board and has made no written representations to the Board on the merits of the pending control application. Instead, CGSC has submitted to the Board filings that it has made to the New York State Supreme Court in a proceeding that it has brought challenging, among other things, the same transaction that is the subject of the application that is the subject of this proceeding. CGSC has thus effectively ignored the Board’s processes, and chosen to fight its battle in a different forum. There, it relies on the representations made in this proceeding by the New York State Attorney General, and essentially ignores the contrary evidence and arguments submitted by Applicants. Applicants

Cynthia T. Brown
May 12, 2010
Page 2

will address the implications of CGSC's decision to proceed outside of the Board's jurisdiction in a separate letter, but here will focus on the confidentiality issue raised by CGSC's most recent filing with the Board.

The confidentiality issue arises because, apparently inadvertently, the Board at some point posted a "public" version of the NYSAG's February 1, 2010 Sur-Reply on its website even though that public version contained a document (Exhibit 1 to the Chan Declaration) that Applicants had designated as confidential. Counsel for CGSC claims to have located that filing on the Board's website and attached the document at issue to the version of the Chan Declaration attached to CGSC's New York court filing, a copy of which CGSC has now submitted to this Board.

The designation of the Exhibit 1 document as confidential was made in a January 30, 2010 message from counsel for Applicants to NYSAG designating all documents and information produced to the NYSAG as confidential under the Protective Order (other than information disclosed in Applicants' prior submission to the STB). The designation of that specific document as confidential was reiterated in a March 9, 2010 letter from counsel for Applicants to the NYSAG, a copy of which was submitted to the Board as an attachment to Applicants' March 15, 2010 letter drawing the Board's attention to the deficient redactions in the NYSAG's Sur-Reply, including the Chan Declaration.

Curiously, apart from the failure to redact Exhibit 1, the version of the Chan Declaration itself used in CGSC's recent court filing (see Exhibit C to the Zhang Affidavit) contained the appropriate redactions (which were previously made by Applicants) to the Chan Declaration, including redactions to references in the body of the Declaration to Exhibit 1. That version was *not* the same as the version that had apparently inadvertently appeared on the Board's website and on which counsel for CGSC now claims to have relied in his May 11 letter. One need only compare the version of the Chan Declaration that appears at Exhibit C to the May 7 Zhang Affidavit submitted by CGSC with the differently (and inadequately) redacted version of that Declaration submitted by CGSC counsel to the STB with his May 11 letter. As relevant here, both versions of the Chan Declaration submitted by CGSC improperly fail to redact Exhibit 1, notwithstanding that Applicants have designated this Exhibit as confidential.

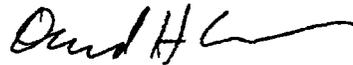
The confidential nature of the Exhibit 1 document is beyond question. As explained in Applicants' March 15, 2010 letter to the Board, this is a commercially sensitive document prepared by a Coach USA official specifying the potential benefits of the transaction from that Applicant's perspective. It was never intended for public disclosure. Further, CGSC's assertions aside, the fact that Dr. Willig relied on a single point from the document does not amount to a waiver of confidentiality for the entire document. Applicants' are entitled to identify some information from the document (the savings estimate) as non-confidential, even while designating the remainder of the document as confidential. If NYSAG or other parties to this

Cynthia T. Brown
May 12, 2010
Page 3

proceeding seek to challenge the confidentiality designation for that document, the protective order provides an appropriate procedure for doing so.

For these reasons, Applicants' submit that the Board should not post on its public website the relevant portions of the CGSC court filing, or the version of the Chan Declaration attached to CGSC's May 11 letter to the Board. Further, to the extent that its filing is accepted at all, CGSC should be directed to redact not only the confidential Exhibit 1 document, but all references and quotations to that document which appear in other portions of the CGSC filing, *e.g.*, at paragraphs 56 and 73 of the Zhang Affidavit. For the same reasons, the NYSAG should be directed to re-submit its February 1, 2010 Sur-Reply in a redacted version consistent with the views set forth in Applicants' March 15 letter and the attachments thereto.

Respectfully submitted,



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May 12, 2010

BY FEDERAL EXPRESS

Cynthia T. Brown, Esq.
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 "E" Street S.W.
Washington, D.C. 20423-001

Re: MC-F 21035, Stage Group plc and Coach USA, Inc., et al.
Acquisition of Control – Twin America LLC

Dear Ms. Brown:

As you know, we represent Continental Guest Services Corporation ("CGSC") in connection with the above-referenced proceeding. I write in response to the Applicants' counsel's letter to the Surface Transportation Board ("STB") of today's date, and respectfully submit that the entirety of the relief requested by the Applicants should be denied.

It speaks volumes that, while mounting a furious protestation of the STB's posting of portions of CGSC's court papers (which includes the Reply of Dr. Kitty Kay Chan filed by the New York State Attorney General (the "Chan Reply") and Exhibit 1 to the Chan Reply) on its public website, the Applicants have not made a motion before Justice Charles E. Ramos, who is the presiding judge over the state antitrust action, to strike any portion of CGSC's court papers, as such documents are publicly available via the website of the New York State Unified Court System.¹ It therefore stands to reason that if CGSC's court papers raised "real" confidentiality issues or if the Applicants were "truly" concerned about the public obtaining access to Exhibit 1, the Applicants would have already moved before Justice Ramos to address such concerns.

¹ The Applicants have also refused to execute Justice Ramos' standard Confidentiality Stipulation and Order that is found on the website of the Commercial Division of the Supreme Court of the State of New York.

GANFER & SHORE, LLP

Cynthia T. Brown, Esq.
May 12, 2010
Page 2

The subject manufactured tussle about Exhibit 1 is emblematic of the Applicants' conduct where they had refused to produce any documents whatsoever in the state antitrust action in clear violation of Justice Ramos' practice rules, which provide that a motion to dismiss, as certain of the Applicants have made in such action, does not stay discovery (see Point III of CGSC's Memorandum of Law in Further Support and in Opposition).

It is therefore ironic for the Applicants to carp that CGSC has purportedly "ignored the Board's processes." Notably, the STB chose to accept CGSC's court papers and permit CGSC the right to speak during the oral argument on the Applicants' acquisition of control of Twin America, LLC ("Twin America"). It thus appears that the Applicants seek to circumvent the STB's decision to allow CGSC to present its position to the STB. However, because the STB has already determined that it would hear CGSC, the Applicants' attempt to re-argue the STB's decision should be rejected.

With respect to the Applicants' implication that CGSC has not been candid² with the STB or Justice Ramos with its use of the Chan Reply, such assertion is without merit. It is not disputed that there are two different versions of the Chan Reply: one that was submitted by the Applicants and posted on the STB's website, as they would like the public to view it; and another that was determined by the STB to be accessible to the public and posted on its website, and which counsel for CGSC downloaded on April 15, 2010. It is evident from an examination of CGSC's court papers that CGSC provided the STB and Justice Ramos with each referenced portion of any version of the Chan Reply that CGSC relied upon in its court papers, and which documents were each obtained from the STB's public website (see Exs. B and C to the Affidavit of Betty Zhang, sworn to on May 3, 2010).³

With respect to the Applicants' misplaced request to the STB not to post portions of CGSC's court papers from its website, we note that the Applicants have not set forth any reason why "relevant portions" of CGSC's court papers should not be posted. CGSC's court papers are relevant to the instant application as they shed much needed light on the monopolistic and anti-competitive practices of the Applicants, *to wit*, the harm caused to the public resulting from the parties' joint venture.

² To the extent the Applicants' claim that CGSC "ignores the contrary evidence and arguments submitted by Applicants" in its state court filings, we are confident that the Applicants will address same on May 21, 2010, which is the date by when they are required to file their reply papers in further support of their motion to dismiss, and will provide the STB with copies thereof. Thus, the Applicants' assertion has no place in their letter of today other than to divert the STB from the issues before it.

³ CGSC will continue to provide the STB with copies of its papers filed in the antitrust action – another example of CGSC's full transparency.

GANFER & SHORE, LLP

Cynthia T. Brown, Esq
May 12, 2010
Page 3

The Applicants next contend that Exhibit 1 is confidential, even though they admittedly referenced, discussed, and "identify[ed] some information from the document" in a **non-confidential** Declaration filed in this proceeding on November 17, 2009. The crux of the Applicants' argument is that their expert only disclosed "some", and not all, of the information taken from Exhibit 1. Such argument is without merit because the Applicants should not be permitted to "cherry-pick" which information from a single document is confidential and which information from such document is not confidential, especially after purportedly designating the *entire document* as "confidential." However, because the Applicants disclosed information from Exhibit 1, they cannot now unilaterally obstruct the use of information taken from such exhibit by others. Accordingly, because the confidentiality of Exhibit 1 has been eliminated by the admitted disclosure of information taken from such exhibit by the Applicants' expert, such document is now appropriately publically disclosed.

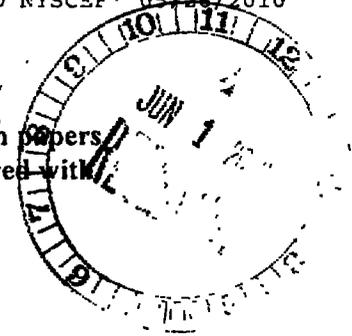
For the foregoing reasons and for the reasons provided in my letter of May 11, 2010, CGSC respectfully requests that the STB deny the relief requested by the Applicants.

Respectfully,



Mark A. Berman

cc: David H. Coburn, Esq. (by federal express)
Karen Fleming, Esq. (by federal express)
James Yoon, Esq. (by federal express)



By order of Justice Ramos, these motion papers may not be taken apart or otherwise tampered with.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

CONTINENTAL GUEST SERVICES CORPORATION,

Plaintiff,

- against -

**INTERNATIONAL BUS SERVICES, INC. d/b/a GRAY
LINE NEW YORK, CITY SIGHTS TWIN, LLC d/b/a
CITY SIGHTS NEW YORK, TWIN AMERICA, LLC,
BATTERY PARK HOTEL MANAGEMENT, LLC
HAMPTON INN TIMES SQUARE NORTH, HILTON
GARDEN INN TIMES SQUARE, NEW YORK WEST
35TH STREET HGI, ON THE AVE HOTEL, THE
PARAMOUNT HOTEL NEW YORK, PARK CENTRAL
HOTEL (DE), LLC, THIRTY EAST 30TH STREET
OWNER, LLC, TIMES SQUARE HOTEL OPERATING
LESSEE LLC, LEXINGTON HOTEL, LLC, W2001
METROPOLITAN HOTEL OPERATING LESSEE, LLC,
and HIGHGATE HOTELS, LP,**

Defendants.

Index No. 600643/10

Justice: Charles E. Ramos, J.S.C.

Commercial Division of the Supreme
Court of the State of New York

**REPLY MEMORANDUM OF LAW IN SUPPORT OF BUS
DEFENDANTS' MOTION TO DISMISS AND OPPOSITION TO MOTION FOR
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. CGSC HAS COMPLETE ACCESS TO TWIN AMERICA TICKETS AND HAS NEITHER PLED NOR PRESENTED CLEAR AND CONVINCING (OR ANY) PROOF OF IRREPARABLE HARM.....	5
II. CGSC’S CLAIM THAT TWIN AMERICA WILL “LOCK OUT” COMPETITION THROUGH A VERTICAL MONOPOLY IS ALL BUNK.....	7
A. CGSC’s “Vertical Monopoly” Theory Makes No Sense When 90% Of Twin America Bus Tickets Are Sold On The Street And Over The Internet.....	7
B. It Is CGSC’s Burden To Plead Interchangeability For Its “Hotel Distribution” And “Double-Decker Tour” Markets.....	9
III. CGSC’S CLAIM THAT TWIN AMERICA IS A MONOPOLY: THE CASE BEFORE THE STB.....	14
IV. CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ansell Inc. v. Schmid Labs.</i> , 757 F. Supp. 467 (D.N.J.), <i>aff'd mem.</i> , 941 F.2d 1200 (3d Cir. 1991).....	12
<i>Arnold Chevrolet LLC v. Tribune Co.</i> , 418 F. Supp. 2d 172 (S.D.N.Y. 2006)	10
<i>B.V. Optische Industrie de Oude Delft v. Hologic, Inc.</i> , 909 F. Supp. 162 (S.D.N.Y. 1995)	10
<i>Bayer Schera Pharma AG v. Sandoz, Inc.</i> , Nos. 08-CIV-03710 & 08112, 2010 WL 1222012 (S.D.N.Y. Mar. 29, 2010).....	11
<i>Belfiore v. N.Y. Times Co.</i> , 654 F. Supp. 842 (D. Conn. 1986), <i>aff'd</i> , 826 F.2d 177 (2d Cir. 1987).....	8
<i>Benjamin Kurzban & Son, Inc. v. Bd. of Educ.</i> , 129 A.D.2d 756, 514 N.Y.S.2d 749 (2d Dep't 1987).....	6
<i>Bodie-Rickett & Assocs. v. Mars, Inc.</i> , 957 F.2d 287 (6th Cir. 1992)	8
<i>Chapman v. N.Y. State Div. for Youth</i> , 546 F.3d 230 (2d Cir. 2008), <i>cert. denied</i> , 130 S. Ct. 552 (2009).....	9
<i>Columbia Broad. Sys., Inc. v. FTC</i> , 414 F.2d 974 (7th Cir. 1969)	12
<i>Conte v. Newsday, Inc.</i> , No. 06-CV-4859, 2010 U.S. Dist. LEXIS 28502 (E.D.N.Y. Mar. 25, 2010).....	10
<i>E & L Consulting, Ltd. v. Doman Indus. Ltd.</i> , 472 F.3d 23 (2d Cir. 2006)	8
<i>FTC v. Staples</i> , 970 F. Supp. 1066 (D. D.C. 1997).....	12, 13
<i>GFI Sec. LLC v. Tradition Asiel Sec. Inc.</i> , No. 601183/08, 2008 WL 4559921 (Sup. Ct. N.Y. Co. July 28, 2008), <i>aff'd</i> , 61 A.D.3d 586, 878 N.Y.S.2d 689 (1st Dep't 2009).....	7
<i>Gianna Enters. v. Miss World (Jersey) Ltd.</i> , 551 F. Supp. 1348 (S.D.N.Y. 1982)	11

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Global Disc. Travel Servs., LLC v. TWA</i> , 960 F. Supp. 701 (S.D.N.Y. 1997)	9, 14
<i>Henry v. Chloride, Inc.</i> , 809 F.2d 1334 (8th Cir. 1987)	12
<i>Kramer v. Pollock-Krasner Found.</i> , 890 F. Supp. 250 (S.D.N.Y. 1995)	12
<i>Lopresti v. Mass. Mut. Life Ins. Co.</i> , No. 12719/04, 2004 WL 2364916 (Sup. Ct. Kings Co. Oct. 19, 2004), <i>aff'd</i> , 30 A.D.3d 474, 820 N.Y.S.2d 275 (2d Dep't 2006)	10
<i>Mathias v. Daily News, L.P.</i> , 152 F. Supp. 2d 465 (S.D.N.Y. 2001)	13, 14
<i>McCagg v. Marquis Jet Partners, Inc.</i> , No. 05-CV-10607, 2007 WL 2454192 (S.D.N.Y. Mar. 29, 2007)	9
<i>Omega Envtl., Inc. v. Gilbarco, Inc.</i> , 127 F.3d 1157 (9th Cir. 1997)	9
<i>Pepsico, Inc. v. Coca-Cola Co.</i> , 315 F.3d 101 (2d Cir. 2002)	9
<i>Photovest Corp. v. Fotomat Corp.</i> , 606 F.2d 704 (7th Cir. 1979)	12
<i>Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ., Inc.</i> , 812 F. Supp. 387 (S.D.N.Y. 1993)	10
<i>Rockland Dev. Assocs v Vill. of Hillburn</i> , 172 A.D.2d 978, 568 N.Y.S.2d 490 (3d Dep't 1991)	6
<i>Smith & Johnson, Inc. v Hedaya Home Fashions, Inc.</i> , No. 96 Civ. 5821, 1996 WL 737194 (S.D.N.Y. Dec. 26, 1996), <i>aff'd mem</i> , 125 F.3d 844 (2d Cir. 1997)	10
<i>Steiner v. Lozyniak</i> , 1997 N.Y. Misc. LEXIS 738 (Sup. Ct. N.Y. Co. June 19, 1997)	7
<i>Theatre Party Assocs. v. Shubert Org., Inc.</i> , 695 F. Supp. 150 (S.D.N.Y. 1988)	14

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>United States v. E.I. du Pont de Nemours & Co.</i> , 351 U.S. 377 (1956)	14
<i>Wider v. Heritage Maint., Inc.</i> , 14 Misc. 3d 963, 827 N.Y.S.2d 837 (N.Y. Sup. Ct. 2007).....	11

STATUTES

15 U.S.C. § 15	8
15 U.S.C. § 26	8
Clayton Act § 4.....	8

OTHER AUTHORITIES

N.Y. Comp. Codes R. & Regs, tit. 22, § 202.8	11
--	----

Plaintiff's entire argument for irreparable harm and indeed its entire theory of this case rests on *access* to Twin America bus tickets. So it goes: *if* Twin America does not give Continental Guest Services Corporation ("CGSC") access to double-decker bus tickets, 43 New York City hotels will terminate their concierge agreements with CGSC putting it out of business, leaving Twin America with the potential to monopolize hotel distribution and a prophesized ability to block any new double-decker bus transportation tour company from starting a competing tour service in New York City. The "spigot" to Twin America tickets is the sole basis for plaintiff's claim to irreparable harm. It is the only asserted basis behind Twin America's hypothetical ability to monopolize a theoretical market for hotel distribution of double-decker transportation tour tickets. It is the only imminent threat CGSC asserted to secure a Temporary Restraining Order ("TRO") on March 12 and since.

But the house of cards CGSC has invented collapses from two fatal, uncontested facts. First is access itself. *CGSC has never been without access to Twin America tickets, nor can it ever be without access to Twin America tickets.* CGSC can provide Twin America tickets to hotel patrons to its heart's delight. Twin America would love nothing more and has never asked for anything different. It can arrange and print ticket vouchers for hotel guests directly from the Internet at any of its desks at any hotel in the city, as can any concierge at any of the hundreds of other New York City hotels that CGSC does not "control."

CGSC utterly fails to rebut this essential point, because CGSC is really complaining about the commission payment it currently receives to sell tickets, not access to the tickets. Indeed it would be interesting to see whether double-decker bus transportation tours would be in the "independent best interests" of CGSC hotel guests, as Ms. Zhang testifies, if CGSC did not receive a sales commission for the tickets. Notably CGSC does not even attempt to state a case

for irreparable harm based on the commissions, because the CGSC commissions at stake for the seven hotels in question in this case are estimated to be approximately \$370,000 – nowhere close to 95% of the “tens of millions” of revenues CGSC asserted it earns at the hearing on the Temporary Restraining Order.

For this reason CGSC notably fails to plead that loss of the Twin America sales commissions will ruin it, let alone support such pleading with clear and convincing proof of financials required by the case law. CGSC has the Twin America tickets. It can always have the tickets and will never be without the tickets. CGSC has not and cannot be irreparably harmed under its own theory of the case in any way. But it is not entitled to a commission for the tickets, based on any contract or any law or any argument proffered in this case.

The second silver bullet is the fact that *more than 90% of Twin America sales occur through ticket agents on the street, visitor centers, Internet sites, travel agents and other third parties, NOT HOTELS*. (The largest single source of ticket sales is the union employee street ticket sellers CGSC describes as untrusted “hawkers.”) (See Nov. 17, 2009 Willig ¶ 61; Apr. 8, 2010 Marmurstein Affirm. ¶ 22.) At the Temporary Restraining Order hearing CGSC created and allowed this court to labor under the misimpression that hotels were the primary outlet for Twin America tickets. Nothing could be further from the truth. This uncontested fact exposes the CGSC theory that Twin America is trying to take over New York City hotel concierge desks to lock out double-decker tour bus competition for exactly what it is: bunk.

Regardless of how many hotel rooms CGSC asserts it controls (independent reports put the figure at 37% not the 45% CGSC claims), neither CGSC nor hotels are essential to a double-decker or any other transportation tour service. CitySights itself started its double-decker tour business in 2005 without CGSC hotels, which exclusively marketed Gray Line for the first two

years CitySights was in business. Once CGSC did agree to carry CitySights tickets, it accounted for *less than 5%* of CitySights sales in 2007 and 2008 and of Twin America sales from April 2009 through today (See May 18, 2010 Marmurstein Affirm. ¶ 13; see also Apr. 8, 2010 Marmurstein Affirm. ¶ 22.)

The fact that nearly all NY tourists who ride Twin America buses purchase their tickets from street sellers, travel agents, visitor centers, other third parties and the Internet also unwinds CGSC's allegation that hotels are a unique antitrust distribution market. Presumably these visitors to New York stay in hotels, and the fact that 90% of them walk right past the hotel concierge desk and purchase their tickets somewhere else (or purchased the tickets somewhere else before they arrived in New York) means that the "somewhere elses" have to be included in the distribution market. The market definition test focuses on the interchangeability of the outlets where passengers purchase the tickets – the very pleading and proof failure CGSC commits.

CGSC is right about one thing – Twin America is not 100-years old and does not have market power over concierge desks, in fact it does not have any concierge desks. The Twin America story instead is one of remarkable innovation and efficiency. It is the story of a start-up called CitySights that in four years grew from eight to seventy buses operating double-decker transportation tours. That growth occurred through marketing innovations and route innovations that allowed CitySights to serve more passengers with greater frequency operating fewer buses. When this nation's economy took one of its worst turns in history, CitySights brought these same innovations and efficiencies to its merger with Gray Line. That efficiency is not conjecture but a proven case – it is the very case Twin America has presented to the federal Surface Transportation Board ("STB") under that agency's exclusive jurisdiction to decide the propriety

of the merger.

To that end, unlike Dr. Kitty Kay Chan (“Chan”), the agricultural economist the New York State Attorney General (“NYSAG”) employs full time and presented in its STB filings, Twin America put into evidence two independent expert reports by Princeton University Professor Robert D. Willig, Ph.D. Dr. Willig is the former Deputy Assistant Attorney General for the United States Department of Justice Antitrust Division, where he led a team of more than 50 professionals evaluating the competitive impacts of mergers. He has experience evaluating dozens of transportation industry mergers in particular.

Looking at the actual effects of the merger from its actual operations over the past year, Dr. Willig concluded the merger has resulted in substantial cost savings, increased service and frequency of service to passengers using fewer buses. Dr. Willig concluded the merger presents no danger to competition because there are no entry barriers to starting a competing double-decker transportation tour service, as the story of CitySights conclusively demonstrates. And he noted the myriad market factors that constrain prices for double-decker bus tours, explaining Dr. Chan failed to follow the test for defining an antitrust market. Because CGSC rests its entire challenge to the Twin America merger on the NYSAG’s comments and Dr. Chan’s economic report in the STB proceeding, Twin America attaches Dr. Willig’s expert reports to this reply for the court’s full consideration if needed. (*See* Nov. 17, 2009 Willig, attached as Exhibit A; Mar. 10, 2010 Willig, attached as Exhibit B.)

The very fact, moreover, that CGSC is attempting to re-litigate the merger in this court through filings made over the last year at the STB makes the very point Twin America raised in its motion to dismiss. The propriety of the Twin America merger is before the STB, a federal agency with exclusive jurisdiction to approve the transaction. The STB conducted a hearing on

April 27. Both the NYSAG and CGSC participated in that hearing, acknowledging that the STB has the authority to decide its own jurisdiction over the matter. The merger of Twin America is a question entirely and exclusively before the STB.

There is no monopoly in this case. There is no “vertical monopoly” in this case – not now and it is not possible by any stretch of economic logic. And there is no threat of imminent, irreparable harm to the universal access to Twin America tickets that CGSC has always had and so emphatically claims it needs. The only threat to CGSC is a new competitor that seeks to translate its innovations, technologies and successes starting a bus tour company to a new concierge business. The last thing CGSC wants is competition, innovation and new ideas in the 100-year franchise it claims to have locked up. This case is about CGSC’s attempts to block new competition to protect an incumbent – itself. The relief CGSC requests and to date has secured is adversely impacting competition not protecting it. This court should end this case now.

I. CGSC HAS COMPLETE ACCESS TO TWIN AMERICA TICKETS AND HAS NEITHER PLED NOR PRESENTED CLEAR AND CONVINCING (OR ANY) PROOF OF IRREPARABLE HARM

CGSC’s sole claim of “irreparable harm” rests entirely on access to Twin America tickets. It claims that “without the ability to sell double-decker sightseeing tour bus tickets, CGSC would no longer be a ‘full service’ concierge, and the obvious and inevitable result will be Plaintiff’s termination.” (Pl. Opp. Mem. at 4; *see* Transcript of TRO Hearing 10:11-13 (“Right now we are here on a TRO, preliminary injunction. We don’t want them to shut off the sales of these tickets”); *id.* 12:24-26 (“What I want is to ensure that they continue to permit us to sell their double decker sightseeing tour tickets.”)).

CGSC has never lacked the ability to provide hotel guests with Twin America tickets. The tickets are ubiquitous – they are available instantly on the Internet, through street ticket sellers and Twin America visitor centers. (*See* Apr. 8, 2010 Marmurstein Affirm. ¶¶ 12, 22.)

Any hotel concierge desk in New York City can offer Twin America bus tours to hotel guests, either by directing the guest to a location where double-decker tickets are sold or by purchasing the tickets over the Internet right there at the concierge desk. (*Id.*) CGSC is not now, never has been and cannot be foreclosed from access to double-decker bus tour tickets.

Fatally conceding the point, CGSC now asserts that obtaining a “purchase confirmation” off the Internet is not the equivalent of providing a patron with a Twin America ticket. (*See* May 7, 2010 Zhang Aff. ¶¶ 93-96.) CGSC is wrong. Printed Internet vouchers are precisely the same as the vouchers CGSC (and other hotels) currently use – both must be taken to a Twin America visitor center (or a Twin America ticket agent on the street) and exchanged for a bus ticket. (*See* May 18, 2010 Marmurstein Affirm. ¶ 11; CGSC Voucher, attached as Exhibit C; Apr. 8, 2010 Marmurstein Affirm ¶ 14.)

In short, CGSC obtained a TRO based on a false pretense it can no longer perpetrate and in fact now concedes. It had, has and will have full instant anytime access to Twin America tickets. CGSC’s cause for injunctive relief thus disappears. Notably it has not asserted any continued right to sales commissions for Twin America tickets, nor can it.

Stripped of its access argument, CGSC’s bus tour ticket sales commissions for the seven Highgate hotels in question are completely quantifiable: based on estimated commission on actual sales made by CGSC for the period April 2009 through February 2010, apportioned pro rata to each of CGSC’s 43 hotels, CGSC would have received approximately \$370,000 in sales commissions at the seven hotels in question. And CGSC has not presented a single “financial statement or other evidence” to substantiate a claim that \$370,000 in lost sales commissions would force it into bankruptcy. *Rockland Dev. Assocs. v. Vill. of Hillburn*, 172 A.D.2d 978, 979, 568 N.Y.S.2d 490, 491 (3d Dep’t 1991); *see Benjamin Kurzban & Son, Inc v. Bd. of Educ.*, 129

A.D.2d 756, 757, 514 N.Y.S.2d 749, 750 (2d Dep't 1987) (absent financial statements or other evidence, plaintiff's claim that it "would be forced to go out of business" was insufficient to establish irreparable harm); *GFI Sec. LLC v. Tradition Asiel Sec. Inc.*, No. 601183/08, 2008 WL 4559921, at *9 (Sup. Ct. N.Y. Co. July 28, 2008) (holding no irreparable harm because "the amount of commissions [is] calculable"), *aff'd*, 61 A.D.3d 586, 878 N.Y.S.2d 689 (1st Dep't 2009); *Steiner v. Lozyniak*, 1997 N.Y. Misc. LEXIS 738, at *6 (Sup. Ct. N.Y. Co. June 19, 1997) (Ramos, J.) ("Where money damages can provide adequate remedy, the injury is not irreparable.").

II. CGSC'S CLAIM THAT TWIN AMERICA WILL "LOCK OUT" COMPETITION THROUGH A VERTICAL MONOPOLY IS ALL BUNK

A. CGSC's "Vertical Monopoly" Theory Makes No Sense When 90% Of Twin America Bus Tickets Are Sold On The Street And Over The Internet

CGSC's "vertical monopoly" theory is that Twin America will take over hotel concierge desks in order to block a new competitor from selling bus tickets. At the hearing on the Temporary Restraining Order, CGSC created a misimpression with the court that hotel concierge desks are "the primary manner in which these tickets get out to the public." (Transcript of TRO Hearing 16:23-24.) Nothing could be further from the truth.

Hotels comprise only 9.6% of total Twin America sales. (Apr. 8, 2010 Marmurstein Affirm. ¶ 22; *see also* May 18, 2010 Marmurstein Affirm. ¶ 13 (CGSC percentages are far less, below 5%)). The largest single source of Twin America's ticket sales are street ticket sellers – the hard-working union employees CGSC describes as untrustworthy "aggressive 'hawkers'" who are "sully[ing] the reputation of New York City and off putting to patrons." (Nov. 17, 2009 Willig ¶ 61; May 7, 2010 Zhang Aff. ¶¶ 84-85.)

Hotels are not necessary to start a double-decker sightseeing tour bus business. CitySights itself makes the point. CitySights began operations with eight double-decker buses

and six motorcoaches. (Apr. 8, 2010 Marmurstein Affirm. ¶ 3.) CGSC refused to sell CitySights tickets for the first two years of its start-up operation. (*Id.* ¶ 4.) CitySights grew its business by selling tickets through street ticket sellers, international travel agents, tour operators, strategic through-ticket arrangements with other transportation carriers like Peter Pan Bus Lines and various international airlines, and over the Internet. (*Id.* ¶¶ 4-5.) Simply put, hotel sales are not necessary – and were never necessary – to compete. CGSC’s entire theory is premised on this nonsensical assumption that has been undeniably refuted.

Lacking any credence to its “lock out” theory, CGSC’s Donnelly Act claims fall apart. And CGSC entirely fails to address, let alone distinguish, case law holding a supplier does not harm competition by entering a downstream business and selling its own products. *See E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 29 (2d Cir. 2006) (no harm to competition from dealer termination because vertical arrangement provides an alleged monopolist with “no monopolistic benefit . . . it does not already enjoy” and arrangement would not harm competition if alleged monopolist “established its own in-house distribution system”); *Belfiore v. N.Y. Times Co.*, 654 F. Supp. 842, 847 (D. Conn. 1986) (“vertical integration into distribution,” even “by a monopolist . . . does not, without more, offend Section 2 of the Sherman Act”), *aff’d*, 826 F.2d 177 (2d Cir. 1987). The relief CGSC requests would restrain, not preserve competition.

Relatedly, CGSC’s general recitation of standing requirements under Clayton Act Section 4, 15 U.S.C. § 15, and Section 16, 15 U.S.C. § 26 does not address the substance of the cases Bus Defendants have cited. *See Bodie-Rickett & Assocs. v. Mars, Inc.*, 957 F.2d 287, 291 (6th Cir. 1992) (broker/sales agent lacked antitrust standing). In fact, the Clayton Act provides that no person has standing to sue for injunctive relief “against any common carrier subject to the jurisdiction of the Surface Transportation Board” 15 U.S.C. § 26. Twin America is a

licensed common carrier subject to STB jurisdiction. (*See* Twin America’s Common Carrier Certificate, attached as Exhibit D). And of course by filing this lawsuit in state court, CGSC consciously avoided federal antitrust statutes, likely because under the Clayton Act, there is no “market foreclosure” when a supplier can reach customers through alternate distribution channels. *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997) (exclusive dealing arrangements could not foreclose from competition any part of the relevant market “[i]f competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution”); *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110 (2d Cir. 2002) (same). Since 90% of Twin America’s tickets reach the market in ways other than through hotel sales, CGSC could never satisfy this test.

B. It Is CGSC’s Burden To Plead Interchangeability For Its “Hotel Distribution” And “Double-Decker Tour” Markets

CGSC asserts that “Bus Company Defendants have provided no affidavit evidence demonstrating that Plaintiff’s market definitions are in any way improper[.]” (Pl. Opp. Mem. at 22) (emphasis omitted). But it is the plaintiff’s affirmative duty to “define its market by reference to the rule of reasonable interchangeability.” *Global Disc. Travel Servs., LLC v. TWA*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997); *see McCagg v. Marquis Jet Partners, Inc.*, No. 05-CV-10607, 2007 WL 2454192, at * 5 (S.D.N.Y. Mar. 29, 2007) (“Antitrust plaintiffs are required to define the market according to the rules of ‘interchangeability’ and ‘cross-elasticity’”).

Contrary to CGSC’s assertion that market definition cannot be determined on a motion to dismiss, New York state and federal courts routinely dismiss antitrust complaints for failing to plead interchangeable or substitute products. *See Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 238-39 (2d Cir. 2008) (affirming dismissal on grounds proposed relevant market did not encompass all interchangeable substitute products), *cert. denied*, 130 S. Ct. 552 (2009);

Conte v. Newsday, Inc., No. 06-CV-4859, 2010 U.S. Dist. LEXIS 28502, at *37 (E.D.N.Y. Mar. 25, 2010) (courts dismiss antitrust cases involving a “failure even to attempt a plausible explanation as to why a market should be limited in a particular way”) (citation omitted); *Smith & Johnson, Inc. v. Hedaya Home Fashions, Inc.*, No. 96 Civ. 5821, 1996 WL 737194, at *6 (S.D.N.Y. Dec. 26, 1996) (“Nowhere in the complaint [did] plaintiff explain why afghans are not interchangeable with other similar products, e.g., quilts, spreads, blankets and comforters, and why afghans constitute their own market”), *aff’d mem.*, 125 F.3d 844 (2d Cir. 1997); *Re-Alco Indus., Inc. v. Nat’l Ctr. for Health Educ., Inc.*, 812 F. Supp. 387, 391 (S.D.N.Y. 1993) (“If a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand, as the complaint here fails to do, a court may grant a Rule 12(b)(6) motion”); *Lopresti v. Mass. Mut. Life Ins. Co.*, No. 12719/04, 2004 WL 2364916, at *3 (Sup. Ct. Kings Co. Oct. 19, 2004) (dismissing Donnelly Act claim because “retirement annuity market at Wyckoff” failed to include “the other substitute investment options available, such as stocks, bonds, or mutual funds, that may be available to Wyckoff’s employees”), *aff’d*, 30 A.D.3d 474, 820 N.Y.S.2d 275 (2d Dep’t 2006).

CGSC’s product market allegations – “the market for double-decker sightseeing tour buses” and “the hotel Concierge Desk distribution channel for the sale of tickets to passengers for the double-decker sightseeing tours in New York City” – lack any reference to the concepts of “interchangeability of use” or “cross-elasticity of demand.” (Compl. ¶ 36); *see Arnold Chevrolet LLC v. Tribune Co.*, 418 F. Supp. 2d 172, 187 (S.D.N.Y. 2006) (“the pleading is devoid of any factual allegations . . . as to why Plaintiffs’ market should be limited to ‘new automobiles’”); *B.V. Optische Industrie de Oude Delft v. Hologic, Inc.*, 909 F. Supp. 162, 172

(S.D.N.Y. 1995) (“pleadings do not refer to any reasonably interchangeable alternatives, nor do they offer an explanation for why they are defining the relevant product market in such narrow terms”).

Turning first to its “hotel Concierge Desk distribution channel” market, CGSC does not assert any facts – let alone a “theoretically rational explanation” – for its conclusion that hotel guests would only buy from the hotel concierge. *Bayer Schera Pharma AG v. Sandoz, Inc.*, Nos. 08-CIV-03710 & 08112, 2010 WL 1222012, at *4 (S.D.N.Y. Mar. 29, 2010) (citation omitted). Without these allegations, CGSC’s Complaint “bears no rational relation to the methodology courts prescribe to define a market for antitrust purposes – analyses of the interchangeability of use or the cross-elasticity of demand.” *Gianna Enters. v. Miss World (Jersey) Ltd.*, 551 F. Supp. 1348, 1354 (S.D.N.Y. 1982).¹

CGSC claims to have cured its interchangeability pleading defect through Betty Zhang’s affidavit testimony that “no one could mistake a Concierge Desk for (i) a visitor center; (ii) a travel agency; (iii) one of the ‘hawkers’ or ticket agents on the street; and (iv) an internet site.” (May 7, 2010 Zhang Aff. ¶ 88.) “Mistake” is not the test for market definition. The crucial requirement for pleading is the extent to which passengers use distribution channels interchangeably, even if the channels are different. More than 90% of Twin America’s sales occur through ticket agents on the street, visitor centers, Internet sites, travel agents and other third parties. (See Apr. 8, 2010 Marmurstein Affirm. ¶ 22.) This fact conclusively establishes that most hotel guests purchase their Twin America tickets someplace other than their hotel, and consequently vitiates CGSC’s allegation that hotels are some unique antitrust distribution market.

¹ Betty Zhang’s affidavit references to “interchangeability of use” and the Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines are no cure. (See May 7, 2010 Zhang Aff. ¶¶ 37, 51-52.) Under N.Y. Comp. Codes R. & Regs. tit. 22, § 202.8, “[a]ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law.” See also *Wider v. Heritage Maint., Inc.*, 14 Misc. 3d 963, 966, 827 N.Y.S.2d 837, 841 (N.Y. Sup. Ct. 2007).

Put simply, the “someplace elses” that hotel guests turn to for tickets must be included in any distribution market, even assuming a distribution market can be validly limited to a single branded product, which Twin America also contests. *See Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 254-55 (S.D.N.Y. 1995) (dismissing Donnelly Act and Sherman Act claims based on distribution market for “the offering and sale *at auction* of paintings by modern and contemporary artists” because “[p]otential purchasers of Pollacks have reasonable and varied alternatives to Sotheby’s and Christie’s”) (citation omitted) (emphasis in original).

The uniformity in Twin America’s ticket price across distribution channels, moreover, establishes beyond a doubt that CGSC’s distribution market is implausible and improper. The cases CGSC cites make the point. *See, e.g., Henry v. Chloride, Inc.*, 809 F.2d 1334, 1342 (8th Cir. 1987) (“[defendant] charged route customers prices different from those for sales through its fixed branch location”); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 713 (7th Cir. 1979) (“Fotomat’s prices for photo processing were approximately 20% or more above conventional forms of retailing”); *Columbia Broad. Sys., Inc v. FTC*, 414 F.2d 974, 979 (7th Cir. 1969) (“the price of records purchased through the record club is \$2.37 and the average price for records purchased through a dealer is \$2.98”); *Ansell Inc. v. Schmid Labs.*, 757 F. Supp. 467, 475 (D.N.J.) (“the prices of condoms sold at retail and those sold to GSA move differently”), *aff’d mem.*, 941 F.2d 1200 (3d Cir. 1991).

FTC v. Staples, 970 F. Supp. 1066 (D. D.C. 1997), a case heavily relied upon by CGSC, underscores CGSC’s pleading deficiency. In determining that the “sale of consumable office supplies through office supply superstores” was the appropriate relevant market, the *Staples* court focused on key “pricing evidence” showing that prices in markets where Staples faced no office superstore competition were 13% higher than in markets where Staples competes with

both Office Depot and Office Max. 970 F. Supp. at 1076-77, 1080. “The pricing evidence,” according to the *Staples* court, “indicates that non-superstore sellers of office supplies are not able to effectively constrain the superstores’ prices, because a significant number of superstore customers do not turn to a non-superstore alternative when faced with higher prices in the one firm markets.” *Id.* at 1080. Here the facts are just the opposite – passengers pay exactly the same amount for a Twin America ticket purchased through a concierge desk, street ticket agent or Visitor Center.

CGSC’s “sightseeing tour bus market” definition is equally flawed. (Compl. ¶ 36.) Here, CGSC bases its market definition entirely on the NYSAG comments submitted to the federal STB in connection with that agency’s pending review of the Twin America transaction. The NYSAG’s economist expressed her view that “double-decker tours form their own product market segment.” (Chan Decl. ¶ 16.) Twin America’s independent economist and former head economist for the U.S. Department of Justice Antitrust Division, Professor Willig, explained, however, that Dr. Chan’s market definition was both “misleading and economically flawed” because she failed to follow the test for defining an antitrust market. (Mar. 10, 2010 Willig ¶¶ 30-31.)

Zhang’s lengthy discussion of the “distinctions” between double-decker bus tours and helicopter rides, “OnBoard” tours, “Pedi-cabs” and horse drawn carriages is likewise irrelevant because it misapplies the interchangeability test. (May 7, 2010 Zhang Aff. ¶ 43.) There is no dispute that all of the transportation tours in New York City have some unique characteristics. But such distinctions “are virtually meaningless in a reasonable interchangeability analysis.” *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 482 (S.D.N.Y. 2001). The essential inquiry is

consumer substitution among sightseeing options in New York City. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

In *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 482-83 (S.D.N.Y. 2001), for example, the court rejected a product market definition of “the Daily News,” despite allegations that the Daily News had “unique local features.” The court explained:

There is no dispute that *The New York Times*, the *New York Post*, *The Wall Street Journal* and the *Daily News* differ and even compete in material ways. The essential inquiry, however, is whether the *Daily News* is a functional substitute for other newspapers. Some consumers may prefer the *Daily News* for any number of reasons. But at a basic level, the *Daily News* is a newspaper, functionally interchangeable with many others, that competes in a market for readers of the news.

Id.; see also *Theatre Party Assocs. v. Shubert Org., Inc.*, 695 F. Supp. 150, 154-55 (S.D.N.Y. 1988) (“Plaintiff has failed to explain why other forms of entertainment, namely other Broadway shows, the opera, ballet or even sporting events are not adequate substitute products”); *Global Disc. Travel Servs.*, 960 F. Supp. at 705 (“[t]ickets on TWA are reasonably interchangeable with tickets on other airlines – all tickets between city pairs get passengers to and from desired locations”). Zhang herself makes this very point: “Concierge Desks provide specialized services to hotel guests, Concierge Desk users, and consumers by being able to sit down or interact with such guests, users, and consumers [to] discuss a multitude of alternatives for sightseeing.” (May 7, 2010 Zhang Aff. ¶ 76.)

III. CGSC’S CLAIM THAT TWIN AMERICA IS A MONOPOLY: THE CASE BEFORE THE STB

CGSC’s claim that Twin America has monopolized a market for double-decker bus services is entirely premised on the NYSAG’s comments and Dr. Chan’s Declaration filed with

the federal Surface Transportation Board. This fact itself is reason enough for the Court to leave to the STB the decision pending before the STB on the evidence submitted to the STB.

In contrast to Dr. Chan, Dr. Willig explained that Dr. Chan's analysis "is both misleading and economically flawed" and that the NYSAG's comments are "inconsistent with economic logic and not reflective of accepted standard economic views of competitive effects, entry or market definition." (*See generally* Exhibit A; Exhibit B.)

IV. CONCLUSION

For the foregoing reasons, Twin America respectfully requests that this Court vacate the temporary restraining order and dismiss CGSC's complaint with prejudice.

Dated: May 26, 2010
New York, New York

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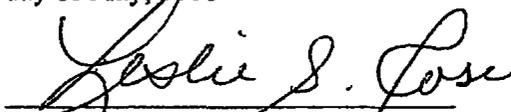
STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

Edith R. Lopez, being duly sworn, deposes and says:

I am not a party to this action, am over 18 years of age and reside in Flushing, New York. On May 26, 2010, the foregoing REPLY MEMORANDUM OF LAW IN SUPPORT OF BUS DEFENDANTS' MOTION TO DISMISS AND OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION was filed electronically and served by e-mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of this court's electronic filing system or by e-mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.


Edith R. Lopez

Sworn to before me this 26th
day of May, 2010


Notary Public

LESLIE S. ROSE
Notary Public, State of New York
No. 60-4994544
Qualified in Westchester County
Commission Expires April 6, 2014