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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 is to advise the Board that Justice Ramos of the New York State Supreme Court issued the attached decision on September 14, 2010 dismissing all of the antitrust claims of Continental Guest Services Corporation (“CGSC”) against Twin America, LLC; International Bus Services, Inc. and CitySights Twin, LLC. The decision thus dismisses the claims, around which CGSC built its representations to the Board in this proceeding, that Twin America and its related co-defendants have attempted to monopolize the motorcoach sightseeing business in New York City, finding as a matter of law that CGSC had failed to state a claim under New York’s antitrust statute.<sup>1</sup>

In the course of reaching its decision to dismiss the claims, the Court refused to stay the case pending a ruling from this Board, finding that “the Bus Companies did not file with the STB until after this proceeding had commenced.” The record is quite clear, however, that Twin America and its co-applicants filed their application with the Board on August 19, 2009, well before CGSC initiated its New York lawsuit on March 12, 2010. As the Board is aware from

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<sup>1</sup> The Court’s decision allows CGSC an opportunity to re-file a single claim against Twin America and its other motorcoach defendants for tortious interference.

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prior filings, CGSC chose not to file comments with the Board on the Twin America application, but rather to circumvent the Board process by filing a lawsuit in New York.

The Court also observed in connection with its denial of the request to stay, that while Twin America (and the other motorcoach defendants) "appear to have authority to conduct interstate charter services" they did not allege before the Court that they actually provide such services. In fact, Twin America did present testimony to the Court concerning its active interstate charter business (*e.g.*, its operation of charter buses between New York City and Atlantic City), just as it has before this Board. Moreover, the Board's jurisdiction under 49 U.S.C. § 14303 over the transaction forming Twin America is not "optional" (as the Court suggests); Twin America and its co-applicants were required by that statute to seek Board approval for their transaction forming a new interstate passenger motor carrier.

Twin America urges the Board to act promptly to approve the Twin America transaction.

Respectfully submitted,



David H. Coburn  
Attorneys for Applicants Stagecoach Group  
plc; Stagecoach Transport Holdings plc.;  
SCUSI Ltd.; Coach USA Administration,  
Inc.; Coach USA, Inc.; International Bus  
Services, Inc.; CitySights Twin, LLC; Mr.  
Zev Marmurstein; and Twin America, LLC

cc: All parties of record  
Mark A. Berman, Esq.

**E-FILE**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
CONTINENTAL GUEST SERVICES CORPORATION,

Plaintiff,

-against-

Index No. 600643/10

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 35<sup>TH</sup> STREET HGI, ON THE AVE HOTEL, THE PARAMOUNT HOTEL NEW YORK, PARK CENTRAL HOTEL (DE), LLC, THIRTY EAST 30<sup>TH</sup> 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.  
-----X

**Charles Edward Ramos, J.S.C.:**

Motion sequence number 001 and 004 are consolidated herein for disposition.

This matter concerns alleged anticompetitive actions and policies of the defendants, in alleged violation of the Donnelly Act (General Business Law § 340), in order to dominate the vertical market for sales of sightseeing tour tickets through the distribution channel of New York hotel concierge desks, and to protect their alleged horizontal monopoly on such sightseeing tours in New York.

As of March 12, 2010, this Court issued a temporary restraining order, pending adjudication of these motions and the application for a preliminary injunction.

Plaintiff Continental Guest Services Corporation (CGSC), is an independent, family-owned, sightseeing and hospitality company based in New York, that sells tickets for some of the defendants'

bus tours through concierge desks located, among other places, in defendants' hotel lobbies.

The first group of defendants are International Bus Services, Inc. d/b/a Gray Line New York (IBS), City Sights Twin, LLC d/b/a City Sights New York (City Sights), and Twin America, LLC (Twin America) (together, Bus Companies). By agreement, IBS and City Sights, who had once been competitors in the tour bus sightseeing market, joined forces to form Twin America.

The second group of defendants are independent hotels and the hotels as a group: Battery Park Hotel Management, LLC, Hampton Inn Times Square North, Hilton Garden Inn Times Square, New York West 35<sup>th</sup> Street HGI, On The Ave Hotel, The Paramount Hotel New York, Park Central Hotel (DE), LLC, Thirty East 30<sup>th</sup> Street Owner, LLC, Times Square Hotel Operating Lessee LLC, Lexington Hotel, LLC, and W2001 Metropolitan Hotel Operating Lessee, L.L.C. (Together, Hotels). The Hotels are part of the hotel group Highgate Hotels, L.P. (Highgate). The Bus Companies and the Hotels are collectively referred to herein simply as "Defendants."

The complaint alleges that the Bus Companies have engaged in a concerted plan to: (i) take over, control, and horizontally monopolize the double-decker sightseeing bus tour market in New York City; and (ii) then vertically monopolize such markets' alleged primary distribution channel of ticketing, which comprises the hotel concierge desks located in Hotels throughout New York City. CGSC complains that such anticompetitive and

unfair competition is putting it out of business.

More specifically, alleging a violation of the Donnelly Act (General Business Law § 340), the complaint states that through the recent formation of Twin America, which controls some 90% of the market, the Bus Companies are attempting to completely control, dominate, and curtail competition, and prevent the free exercise of choice in the double-decker sightseeing tour bus market in New York City (the Tour Bus Market).

In addition, the complaint alleges that in order to impede competition and to create a monopoly in another market - the sale of sightseeing tour bus tickets in New York City (the Ticket Sales Market) - and to prevent any new entities from entering into the Ticket Sales Market, the Bus Companies are engaged in, and continue to engage in, illegal predatory conduct with the intent of monopolizing the distribution channel for the sale of their double-decker sightseeing tour bus tickets.

Moreover, the complaint states that with their horizontal control of the Tour Bus Market, the Bus Companies have allegedly raised prices, lowered commissions, and otherwise used their monopoly to gain financial advantages, and harm the public, including companies like CGSC.

The complaint seeks, as against the Bus Companies: (i) permanent injunctive relief preventing them from entering the market for sales of their own tickets, and/or interfering with CGSC's control of 45% of the distribution channel for such sales; (ii) damages for monopolization of the Tour Bus Market; (iii)

damages for attempting to monopolize the Tour Bus Market; (iv) damages for attempted monopolization of the Ticket Sales Market; (v) damages for unlawful restraint of trade of the Tour Bus Market; (vi) damages for unlawful restraint of trade of the Ticket Sales Market; (vii) together with the Hotels, damages for common-law unfair competition; and (viii) damages for tortious interference with the contracts CGSC has with the Hotels.

In motion sequence 001, the Hotels move, upon documentary evidence, to dismiss the complaint for failure to state a cause of action. In motion sequence number 004, the Bus Companies move to dismiss the complaint on the grounds that the court does not have jurisdiction, CGSC lacks legal capacity to sue, and for failure to state a cause of action.

I. Motion to Dismiss by the Hotels (Sequence Number 001)

CGSC claims that it has written agreements with the Hotels to operate concierge desks at the respective Hotel locations, and that as a result of the "conspiratorial efforts" of the Bus Companies, the Hotels wrongfully cancelled those agreements. CGSC draws particular attention to four of the eleven alleged agreements that only provide for termination "for cause," and no cause was alleged. However, unconfuted evidence has been provided that the notices given under the four subject agreements have all been rescinded. See Jacob Affidavit, ¶ 3.

The remaining seven agreements are, allegedly, and neither the complaint nor the moving papers state otherwise, all terminable "without cause." The agreements all allegedly state

that "[a]nything in this agreement to the contrary notwithstanding, either party may, without cause, at any time terminate this Agreement upon delivery to the other party of sixty (60) days prior written notice." See Jacob Affidavit, Exhibit B.

When a contract affords a party the right to terminate the contract without cause, that right "is absolute and will be upheld in accordance with its clear and unambiguous terms." *Red Apple Child Development Center v Community School Dists. Two*, 303 AD2d 156, 157 (1<sup>st</sup> Dept), lv denied (2003). Nor will this court inquire as to "conspiratorial" incentives, or ulterior motives. *Big Apple Car v City of New York*, 204 AD2d 109, 111 (1<sup>st</sup> Dept 1994).

With regard to the seventh cause of action for common-law unfair competition against the Hotels and the Bus Companies, the court discerns no allegations in the complaint that would sustain it.

New York recognizes only two forms of common-law unfair competition: palming off and misappropriation. *Electrolux Corp. v Val-Worth*, 6 NY2d 556, 567-568 (1959). Neither "palming off" (sale of the goods of one company as those of another (*Shaw v Time-Life Records*, 38 NY2d 201, 206 [1975])), nor misappropriation, using the results of the skill, expenditures, and labors of a competitor (*Electrolux Corp.*, 6 NY2d at 567-568) have been sufficiently pled against the Hotels.

Finally, the eighth cause of action against the Bus

Companies, for tortious interference with the contractual and business relations between CGSC and the Hotels must also be dismissed.

First, there can be no tortious interference without a breach of contract, which has not been sufficiently alleged. *NBT Bancorp Inc. v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 (1996). Second, to sustain an action for tortious interference with business relations, the complaint must allege that the Bus Companies acted with the "sole purpose" to injure CGSC, or utilized "wrongful means." *Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004).

CGSC has alleged that the purpose of the Bus Companies' actions were, for instance, to "take over control of all the hotel Concierge Desks in New York City." Complaint, ¶ 66. This economic motivation negates the necessary allegation that the intention was solely to injure CGSC. *M.J. & K. Co. v Matthew Bender and Co.*, 220 AD2d 488, 490 (2<sup>nd</sup> Dept 1995)).

Moreover, "wrongful means," include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 (1980); see also *Bank Leumi Trust Co. of New York v Samalot/Edge Assocs.*, 202 AD2d 282, 283 (1<sup>st</sup> Dept 1994). There are no allegations satisfying that definition in the complaint. Therefore, the complaint, as against the Hotels, is dismissed. In addition, the seventh and eighth causes of action are dismissed.

II. Preliminary Injunction and Motion to Dismiss (Sequence Number 004)

The remaining causes of action, the first through sixth, all derive from the alleged violation of the Donnelly Act by the Bus Companies. However, there are threshold objections to the jurisdiction of the court, and the standing of CGSC, that must be overcome in order for the application for a preliminary injunction to be considered.

Jurisdiction

Based upon 49 USC § 14303 (f), the Bus Companies question the jurisdiction of this court to hear the antitrust challenge to the formation of Twin America, or the causes of action for violation of the Donnelly Act. After the commencement of this action, the Bus Companies submitted an application governed by 49 USC § 14303 to the Surface Transportation Board (STB)<sup>1</sup> seeking approval for the creation of Twin America.

Under federal law, certain transactions involving motor carriers may be carried out only with the approval of the STB. Specifically, the Bus Companies rely on the provision that "[c]onsolidation or merger of the properties or franchises of at least 2 carriers into one operation for the ownership, management, and operation of the previously separately owned properties" requires approval of the Surface Transportation Board. 49 USC § 14303 (a) (1). The effect of such approval would be that the Bus Companies,

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<sup>1</sup>STB Docket No. MC-F-21035.

"may carry out the [creation of Twin America], own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority [and be] exempt from the [Donnelly Act, to the extent] necessary to let [them] carry out the transaction, hold, maintain, and operate property, and exercise control or [sic] franchises acquired through the transaction."

49 USC § 14303 (f).

While it is apparent that eventual permission for the formation of Twin America by the STB would have a direct impact on the claims of CGSC, there is no particular indication that such permission would be granted.

To wit, 49 USC § 13501 provides that "[t]he Secretary and the Board have jurisdiction ... over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier ... between a place in ... a State and a place in another State, [or] a State and another place in the same State through another State."

Although the Bus Companies appear to have the authority to conduct interstate charter services (see Marmurstein Reply Aff., ¶ 24), they have made no allegation of activity, or intended activity, herein that would seem to be contemplated by 49 USC § 14303. However, that matter is not properly before this court.

Nonetheless, before this court is the fact that the Bus Companies did not file with the STB until after this proceeding had commenced. It would be improper to stay this action to allow the Bus Companies to collaterally attack these proceedings based on their mere allegation of protection under 49 USC § 14303. See

*Liker v Grossman*, 175 AD2d 911, 912-913 (2<sup>nd</sup> Dept 1991), *app denied* 80 NY2d 755 (1992). Such conduct is at odds with the public policies of promoting judicial efficiency and discouraging forum shopping. See e.g. *Matter of Empire Ins. Co. v Eagle Ins. Co.*, 4 Misc 3d 25, 28 (App Term, 2d Dept 2004).

In addition, there is no requirement for the Bus Companies to continue their application to the STB in the event that this action be dismissed. This would be especially improper as this action includes aspects focusing on the monopolization of the Ticket Sales Market, which would not be the subject of the STB deliberations, in addition to the aspects dealing with the efficacy of the merger with regard to the Tour Bus Market.

The Bus Companies rely on the participation of the New York Attorney General in the STB proceedings as a reason for this Court to find that it lacks jurisdiction. However, the fact that the Attorney General has filed opposition to the prospective merger at the STB cannot be deemed to confer exclusive jurisdiction on that administrative body.

"This court will not abdicate its responsibility nor surrender its jurisdiction to an administrative agency where the regulatory statute does not provide for adequate or similar relief under the Sherman Act." *State of New York v McBride Transp.*, 56 Misc 2d 90, 97 (Sup Ct, NY County 1968).

Finally, while this court has the general discretion to grant a stay of proceedings upon such terms as may be just (CPLR 2201), "a motion for the stay of an action pending the

determination of another action is primarily addressed to the discretion of the court." *Pierre Assocs. Inc. v Citizens Cas. Co. of N.Y.*, 32 AD2d 495, 496 (1<sup>st</sup> Dept 1969). In its discretion, this court retains jurisdiction over this matter, and declines to stay this action due to the Bus Companies' pending, optional application to the STB.

Standing

The defendants argue that CGSC has no standing to bring an antitrust claim with regard to the alleged actions because it is a commissioned seller, and not a competitor or consumer in the Tour Bus Market. Damages barely in the zone of injury, and damages impossible to calculate are generally not recoverable under the Donnelly Act. *Ho v Visa U.S.A.*, 16 AD3d 256, 257 (1<sup>st</sup> Dept), *lv denied* 5 NY3d 703 (2005). Nonetheless, to sustain an antitrust cause of action, plaintiff must only show that defendant's illegal restraint of trade proximately caused damage to plaintiff's business or property (*Van Dussen-Storto Motor Inn v Rochester Tel. Corp.*, 63 AD2d 244, 252 [4<sup>th</sup> Dept 1978]).

Although CGSC is not a participant in the Tour Bus Market, as a participant in the Ticket Sales Market, CGSC may have standing to challenge the alleged intentions of Twin America to use its horizontal dominance in the Tour Bus Market to vertically infiltrate the Ticket Sales Market by taking over the alleged full-service concierge business of CGSC, should the Ticket Sales Market be properly defined. The requirement for standing is not strictly status as a competitor or consumer in the market in

which the antitrust injury allegedly occurred,<sup>2</sup> but rather that the injury suffered is "inextricably intertwined" with the injury the violators of the antitrust regulations sought to inflict.

*Blue Shield of Virginia v McCready*, 457 US 465, 484 (1982).

The complaint states that the Bus Companies have the specific intention of putting CGSC out of business using their control over 90% of the Tour Bus Market by vertical aggregation of their horizontal market power to occupy the Ticket Sales Market. Such allegations, if true, and alleged with respect to relevant markets, would be sufficient to confer standing. Thus, that part of the motion to dismiss that seeks to challenge the standing of CGSC is denied.

*Preliminary Injunction and Opposing Motion to Dismiss*

CGSC ultimately seeks permanent injunctive relief restraining and enjoining the Bus Companies from: (i) monopolizing, attempting to monopolize, or unlawfully restraining trade in the Ticket Sales Market; (ii) interfering and preventing

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<sup>2</sup>The Bus Companies rely on *Barton & Pittinos v SmithKline Beecham Corp.* (942 F Supp 235 [ED Pa, 1996], *affd* 118 F3d 178 [1997]) to assert that this status is dispositive of standing. However, this case actually sets forth many other factors to also be considered, and warns that "the directness of the injury must be at the forefront of an analysis of an antitrust standing claim." *Id.* at 236-237. "The five factors are: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages." *Id.* at 236.

CGSC from selling the Bus Companies' products and services and, in particular, double-decker sightseeing tour tickets and otherwise restraining them from not changing the current terms and conditions of the sale of such products and services; or (iii) interfering with hotel concierge desk agreements that plaintiff has entered into with hotels.<sup>3</sup>

The Bus Defendants, cross-move to dismiss the complaint because the Donnelly Act: (i) does not cover unilateral actions by a single entity like Twin America; (ii) does not provide a private right of action for attempted monopolization; (iii) does not apply to the alleged markets; and (iv) does not restrict the distribution channels that Twin America may utilize. For the following reasons, the complaint is dismissed.

In order to obtain a preliminary injunction, CGSC must demonstrate a likelihood of success on the merits of its Donnelly Act claim, irreparable harm in the absence of the injunctive relief, and a balancing of the equities in its favor. See e.g. *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 (1990). Here, CGSC has failed to demonstrate any of the required elements.

#### Irreparable Harm

CGSC claims that it is "[u]ndisputed that ninety-five percent of CGSC's business comes from its concierge desks.

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<sup>3</sup>CGSC also seeks to enjoin the Hotels from terminating CGSC's concierge desk agreements in order to enter in an agreement with the Bus Companies. However, as noted above, this request for an arbitrary restraint of free trade, and interference with the freedom of the Hotels to enter into, and terminate, contracts is not viable.

Similarly, CGSC points out that defendants are unable to contest the fact that, based on their own documents, the hotels where CGSC operates and sells such tickets control approximately forty-five percent (45%) of the hotel rooms in New York City." On this basis, CGSC contends that it has demonstrated irreparable harm. Memorandum in Further Support, at 5.

The Court rejects this argument. First, control of the concierge desks serving 45% of the hotel rooms in New York would not constitute a monopoly, or even a majority of the control. Second, CGSC has repeatedly indicated that it is a "full-service" concierge. Indeed, the Hotels, with which CGSC has concierge agreements, aver that CGSC's services "include providing theater tickets, transportation, tickets for tourist attractions and dinner reservations to hotel guests." Jacob Aff., ¶ 5 & Exh. A.

The complaint states that "CGSC is the largest operator of hotel Concierge Desks in New York City and is, among other things, the largest single source of ticket sales for double-decker sightseeing tours in New York City." Complaint, ¶ 7 (emphasis added). It follows that the fact that 95% of CGSC's business comes from its concierge desks in no way reveals what amount is ascribable to the Ticket Sales Market. See e.g. Trans. of March 12, 2010 Hearing ("[o]ur client average revenues run into the tens of millions of dollars a year. They sell millions of dollars worth of tickets"); compare Marmurstein Reply Aff., ¶ 32 ("from April 2009 through February 2010, CGSC sold approximately \$6,734,427 worth of Twin America tickets").

What is more, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm." *EdCia Corp. v McCormack*, 44 AD3d 991, 994 (2<sup>nd</sup> Dept 2007). Therefore, these allegations are insufficient to support an inference of irreparable harm.

To demonstrate the possibility of irreparable harm, CGSC was required to submit financial statements of some sort in support of their allegations: failure to submit any "financial statement or other evidence to substantiate these claims and the conclusory allegations contained in their supporting affidavits are insufficient to demonstrate irreparable injury." *Rockland Dev. Assocs. v Village of Hillburn*, 172 AD2d 978, 979 (3<sup>rd</sup> Dept 1991).

Other statements offered to demonstrate irreparable harm, for instance, that 58% of CGSC's *sightseeing* sales comes from the Ticket Sales Market (see Zhang Aff. ¶ 35), do not carry any analytical weight. For instance, there is no indication in that conclusory allegation of how much of CGSC's sales are *hospitality-related* versus *sightseeing-related*. See Complaint, ¶ 16 (CGSC "has been an independent, family-owned and operated *sightseeing and hospitality* company that has been based in New York" [emphasis added]); see also March 12, 2010 Hearing ("[o]ur client will do theater tickets and sporting good tickets. And sporting event tickets, restaurants ... we're a full service concierge tour and travel company"). As such, "58% of *sightseeing sales*" is a meaningless number.

CGSC also argues that if it cannot sell tickets for the Bus

Companies' tours, the Hotels will terminate their agreements with CGSC. However, there is no allegation that supports the suggestion that CGSC will be unable to sell tickets to customers. All the parties agree that tickets are available from many sources, including the Internet. Thus, the basis of CGSC's argument appears to be that the Bus Companies will discontinue or reduce the payment of commissions for the sales of tickets.

However, the court finds no law that requires a company to pay, or continue to pay commissions, absent an agreement. If there is an agreement for commissions, that agreement governs. While an adjustment or discontinuation of commissions may cause monetary damage, the suggestion that this loss of profit connotes irreparable harm is purely illusory. See *EdCia Corp.*, 44 AD3d at 994.

Finally, CGSC alleges many expected actions of Twin America should an injunction not issue. These conclusory allegations about what Twin America might do are insufficient, as a matter of law, to obtain a preliminary injunction. See *Genesis II Hair Replacement Studio v Vallar*, 251 AD2d 1082, 1083 (4<sup>th</sup> Dept 1998); Siegel, NY Prac § 328 (4<sup>th</sup> ed) ("[m]ere apprehensions do not suffice; the injunction will issue only upon a showing that the defendant's wrongful acts are occurring or are threatened and reasonably likely to occur").

#### Likelihood of Success on the Merits

In order to show a likelihood of success on the merits of a

claim for violation of the Donnelly Act,<sup>4</sup> CGSC must identify and define the relevant product market, allege a conspiracy or a reciprocal relationship between two or more legal or economic entities, describe the nature and effect of the alleged conspiracy, and the manner in which the economic impact of that conspiracy restrains trade in the market. *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 111 (1<sup>st</sup> Dept 2009), lv denied 15 NY3d 703 (2010); see also *Capitaland United Soccer Club v Capital Dist. Sports & Entertainment*, 238 AD 2d 777, 779 (3<sup>rd</sup> Dept 1997); *Anand v Soni*, 215 AD2d 420, 421 (2<sup>nd</sup> Dept 1995).

CGSC attempts to identify two markets in the complaint: the Tour Bus Market, and the Ticket Sales Market. The Tour Bus Market is described by CGSC as one that allows "passengers to board and [alight] buses at short intervals along a tour route of historical sites, monuments, and other places of interest/sights, and allow passengers to board any bus at any interval along the tour route for the sightseeing tour that was purchased." Complaint, ¶ 36. CGSC describes the second market as "the hotel Concierge Desk distribution channel for the sale of tickets to passengers for the double-decker sightseeing tours in New York City ... ." *Id.*

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<sup>4</sup> The Donnelly Act prohibits any agreement or arrangement by which a monopoly is established or competition is restrained. "[T]he Donnelly Act - often called a 'Little Sherman Act' - should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." *Anheuser-Busch v Abrams*, 71 NY2d 327, 335 (1988); see also *People v Liberty Mut. Ins. Co.*, 52 AD3d 378, 379-380 (1<sup>st</sup> Dept 2008).

Here, the definition of the Ticket Sales Market, of which CGSC is a part, in terms of the distribution channels for the sale of tickets indicates an improper attempt to define the market from "the product out." This is an inadequate market definition that cannot support antitrust-violation claims.

In *Belfiore v New York Times Co.* (654 F Supp 842, 846 [D Conn 1986], *affd* 826 F2d 177 [2<sup>nd</sup> Cir 1987], *cert denied* 484 US 1067 [1988]), it was established that "[t]he natural monopoly every manufacturer has in the production and sale of its own product cannot be the basis for antitrust liability."<sup>5</sup> See also *Theatre Party Assocs. v Shubert Org.*, 695 F Supp 150, 155 (SD NY 1988); *Gregoris Motors v Nissan Motor Corp. in USA*, 630 F Supp 902, 909 (ED NY 1986). As such, the Bus Companies are entitled to manage the production and sales of tickets to ride their busses, and there is no basis for a broker, an agent, or a distribution network, to interfere with those rights on an antitrust basis.

In addition, CGSC's argument that the Bus Companies are vertically integrating into distribution of their own tickets is also without impact. As established in *Belfiore* (654 F Supp at

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<sup>5</sup>This principle also arose in a parallel case originating in the Eastern District of New York, *Alpert's Newspaper Delivery Inc. v New York Times Co.* (1988 WL 95146, 1988 US Dist LEXIS 10213A [ED NY 1988], *affd* 876 F2d 266 [2<sup>nd</sup> Cir 1989]). The Second Circuit noted the similarities to *Belfiore* (654 F Supp at 846), and reiterated the principles established therein. See *Alpert's Newspaper Delivery Inc. v New York Times Co.*, 876 F 2d 266, 267 (2<sup>nd</sup> Cir 1989); see also *Anheuser-Busch*, 71 NY2d at 335 (Donnelly Act interpretation is to be conducted in accordance with federal precedent).

847), unreasonable, anti-competitive actions must be distinguished from valid exercise of business judgment in an effort to protect investments. Vertical integration into distribution by a monopolist does not, in and of itself, violate antitrust principles. *Accord Alpert's Newspaper Delivery Inc.*, 876 F2d at 266. The Bus Companies' participation in the Ticket Sales Market cannot be randomly circumscribed.

CGSC argues that the Bus Companies are abusing their horizontal monopoly to place themselves in direct competition with participants in the Ticket Sales Market. On this basis, CGSC maintains that this vertical integration policy is no more than a leveraging device to expand the monopoly from one market to another. In order to avoid this result, CGSC asks that this Court prohibit the Bus Companies from controlling the distribution of their own tickets, and that this court force the Bus Companies, not only to do business with CGSC, but to pay commissions at specified rates.

However, neither the Bus Companies, nor this Court, are required to arrange subsidization for, or guarantee the profitability of, CGSC. "The antitrust laws were enacted for the protection of competition not competitors." *Brunswick Corp. v Pueblo Bowl-O-Mat*, 429 US 477, 488 (emphasis added) (internal quotation marks and citation omitted), cert denied by *Treadway Cos. v Brunswick Corp*, 429 US 1090 (1977).<sup>6</sup> Consequently, "[w]e

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<sup>6</sup>*Brunswick Corp.* (429 US 477) has been abrogated only to the extent that variations on the issue of treble damages have been suggested by state law. See *Sperry v Crompton Corp.*, 8 NY3d 204,

must always be mindful lest [antitrust law] be invoked perversely in favor of those who seek protection against the rigors of competition." *Berkey Photo v Eastman Kodak Co.*, 603 F2d 263, 273 (2<sup>nd</sup> Cir 1979), cert denied 444 US 1093 (1980).

At best, CGSC's claims for violation of the Donnelly Act are premised upon defendants' alleged attempt to monopolize. However, the Donnelly Act does not provide CGSC with a private right of action for attempted monopolization. *Bevilacqua v Ford Motor Co.*, 125 AD2d 516 (2d Dept 1986).

As the Ticket Sales Market is not a relevant or properly defined market for antitrust purposes, the Court need not address the remaining objections to the complaint based upon CGSC's alleged failure to plead interchangeability and cross-elasticity of demand.

#### Balance of the Equities

"There is no greater or more carefully guarded prerogative of the individual in American concept or right than the one giving to every individual, natural or legally created, irrespective of color, race[,] or situation, the unqualified right to control his property in every respect, including the right to choose or select to whom to sell." *Lucomsky v Palmer*, 141 Misc 278, 280 (Sup Ct, NY County 1931).

While there are firm prohibitions against two or more persons conspiring to prevent one another from engaging in lawful trade, there is no automatic prohibition against the right of

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212 (2007).

companies to select their sales and distribution methods based solely on their magnitude. Here, the Bus Companies have elected to participate in distribution of their own tickets, and it is their right to do so.

Moreover, for the purposes of the distribution of tickets, and in the Ticket Sales Market, the Bus Companies are not "two or more persons," but have become one entity. That there are individually identifiable subsidiaries of Twin America does not change the principle that "[a] parent corporation and its wholly-owned subsidiaries are considered a single entity under antitrust principles and, therefore, cannot engage in anticompetitive acts." *North Atlantic Utilities v Keyspan Corp.*, 307 AD2d 342, 343 (2<sup>nd</sup> Dept), *lv denied* 1 NY3d 503 (2003); *see also Copperweld Corp. v Independence Tube Corp.*, 467 US 752, 769-771 (1984); *Barnem Circular Distribs. v Distribution Sys. of Am.*, 281 AD2d 576, 577 (2<sup>nd</sup> Dept 2001) ("[a] parent corporation and its wholly-owned subsidiary are incapable of conspiring with each other").

Moreover, sister subsidiary corporations, such as IBS and City Sights, as wholly-owned by the same parent corporation, Twin America, are also legally incapable of conspiring with each other. *See Gucci v Gucci Shops*, 651 F Supp 194, 196-197 (SD NY 1986); *North Atlantic Utils.*, 307 AD2d at 343; *see also Copperweld Corp.*, 467 US at 758. For these reasons, CGSC has failed to demonstrate that the balance of the equities favors it. Therefore, the application for a preliminary injunction is

denied.

### III. Conclusion

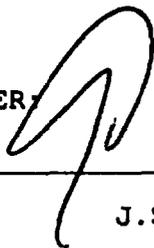
CGSC has failed to demonstrate irreparable harm, likelihood of success on the merits, or that the balance of the equities favors their position. As the remaining causes of action (the first through sixth) all rely upon positive violation of the Donnelly Act, they must be dismissed for failure to state a claim.

Accordingly, it is hereby

ORDERED that the motions of the defendants herein to dismiss the complaint are granted and the complaint is dismissed in its entirety as against all defendants, except that if the plaintiff is so advised, it may re-plead the eighth cause of action against the Bus Companies, for tortious interference with the contractual and business relations between CGSC and the Hotels, with costs and disbursements to the defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

Dated: September 8, 2010

ENTER



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J.S.C.

**CHARLES E. RAMOS**

**CERTIFICATE OF SERVICE**

I certify that I have this 15<sup>th</sup> day of September 2010 served a copy of the foregoing Letter of Applicants by regular mail or more expeditious means on the parties of record listed below and on counsel for Continental Guest Services Corporation:

U.S. Department of Transportation  
Federal Motor Carrier Safety Administration  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590

U.S. Department of Justice  
Antitrust Division  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

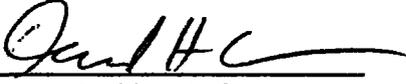
U.S. Department of Transportation  
Office of the General Counsel  
1200 New Jersey Avenue, S.E.  
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