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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. MC-F-21035

**STAGECOACH GROUP PLC AND COACH USA, INC., ET AL.
— ACQUISITION OF CONTROL — TWIN AMERICA, LLC**

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**Part of
Public Record**

**PETITION FOR A STAY
PENDING PETITION FOR RECONSIDERATION
AND FOR A STAY PENDING JUDICIAL REVIEW**

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and Twin America, LLC

February 18, 2011

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Pursuant to 49 C.F.R. §§ 1115.3(f) and 1115.5(a), applicants in this control proceeding (“Applicants”) respectfully petition the Surface Transportation Board (the “Board”) to stay its decision of February 8, 2011, denying Applicants’ proposed acquisition of control of Twin America, LLC (“Twin America”). Applicants seek a stay pending the filing of a petition for reconsideration under 49 C.F.R. § 1115.3(a). In the event the Board denies reconsideration, Applicants request that the stay be issued or continued pending Applicants’ petition for review of the Board’s decision by a federal court of appeals pursuant to 28 U.S.C. §§ 2321(a), 2342(5).

Under the Board’s criteria, a stay is warranted. First, the dissolution of Twin America will inflict irreparable harm upon Applicants. Second, the Board’s decision raises a substantial question with respect to the relevant market definition and the barriers to entry. Further, the Board should consider additional views of less drastic alternatives to the ordered remedy — alternatives that could advance market competition and protect the public welfare more effectively than dissolution. Third, given the harm dissolution stands to inflict on the tour bus operations and employees, the public interest would be served by a stay that maintains the status quo while permitting the Board to consider alternative remedies.

This Petition for a Stay is supported by the record before the Board, the arguments below, and the attached verified statements of Twin America CEO Mark Marmurstein, Coach USA Vice President, CFO and Treasurer Ross Kinnear, and Princeton University Professor of Economics and Public Affairs Robert D. Willig.

FACTUAL AND PROCEDURAL BACKGROUND

Twin America was formed in March 2009 as a permanent joint venture between two carrier entities — International Bus Services (“IBS”), offering tourism and other transportation services under the Gray Line New York trade name (collectively, “Gray Line”), and CitySights Twin, LLC (“CitySights”). STB Decision (Feb. 8, 2011), at 4 (“Order”). While Twin America still operates using both the Gray Line and CitySights names, the transaction created a single entity that completely integrated Applicants’ tour bus operations and associated marketing, sales, management operations, back-office support, information technology support, and intellectual property ownership. Verified Statement of Zev Marmurstein ¶¶ 11, 17 (“Marmurstein V.S.”); Verified Statement of Ross Kinnear ¶ 4 (“Kinnear V.S.”); Verified Statement of Robert D. Willig (Mar. 10, 2010) ¶¶ 10-11 (“2010 Willig V.S.”). In essence, Twin America merged Gray Line and CitySights. 2010 Willig V.S. ¶ 9.

On August 19, 2009, Applicants applied to the Board for authorization of the merger under 49 U.S.C. § 14303, which the New York State Attorney General (“NYSAG”) opposed. Order 2, 5. The Board found jurisdiction over the transaction but denied the application because of anticompetitive effects. *Id.* at 18. The Board defined the relevant market as “double-decker, hop-on, hop-off bus tours in NYC.” *Id.* at 11. The Board concluded that this market had “unique barriers to entry” and was “mature.” *Id.* at 14-16. The Board then concluded that the efficiencies generated by the merger have not been passed on to the consumer, and that, on the contrary, the 2009 price increase was evidence of competitive harm. *Id.* at 16-17.

The Board did not hold a hearing on remedy, but nonetheless ordered “a quick and thorough dissolution of the joint venture” or, in the alternative, that Twin America “discontinue or spin off the interstate services” that gave rise to the Board’s jurisdiction.. *Id.* at 18. The Board did not specifically identify any other options, but ordered a report on compliance steps by March 25, 2011. *Id.*

ARGUMENT

In determining whether to grant a stay, the Board considers whether “(1) [petitioner] will suffer irreparable harm in the absence of a stay; (2) there is a strong likelihood that [petitioner] will prevail on the merits; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports granting the stay.” *Can. Nat’l Ry. Co. and Grand Trunk Corp. — Control — EJ&E West Co.*, STB Finance Docket No. 35087, 2009 WL 108466, at *3 (S.T.B. Jan. 16, 2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)) (citation omitted). In evaluating these factors, the agency must “balance the strengths of the requesting party’s arguments in each of the four required areas,” so that “[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citation and internal quotation marks omitted). In particular, “[p]robability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.” *Intramodal Rail Competition*, 1 I.C.C. 2d 822, 1985 WL 1127462, at *5 n.3 (S.T.B. Oct. 29, 1985) (quoting *Cuomo v. Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985)). The harm to the opposing party and

the public interest “merge when the Government is the opposing party.” *Nken v. Holder*, 129 S. Ct. 1749, 1762 (2009). Here, all the factors strongly favor a stay.¹

In its forthcoming Petition for Reconsideration, Applicants will present the Board with solid reasons why its decision warrants revision and why a remedy other than breaking up Twin America or requiring divestitures will better serve the public welfare. Breaking up a fully merged company like Twin America, or asking that it divest part of its business, is not something that should be undertaken until the legal process has fully run its course, given the ultimate irreversible ramifications to employees, operations, and consumers.

I. APPLICANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

Twin America is a fully-integrated merger that cannot be dissolved without inflicting upon Applicants “irreparable injury that is ‘both certain and great,’ ‘actual and not theoretical,’ and [that] ‘will directly result from the action’ that would be enjoined.” *Can. Nat’l Ry. Co.*, 2009 WL 108466, at *9 (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Twin America has consolidated virtually every operational function of Gray Line and CitySights, including management, call center, dispatch center, information technology, human resources, training, marketing, advertising, and sales. *Marmurstein V.S.* ¶ 11; *Kinnear V.S.* ¶¶ 2, 4. These operations cannot be merely partitioned between two trade names. *Marmurstein V.S.* ¶ 11.

Equally important, Twin America has dramatically repositioned its two brands. Given Gray Line’s broader international recognition, Twin America dedicated significant resources to developing the Gray Line brand at the expense of the CitySights brand. *Marmurstein V.S.* ¶¶ 3, 10. Twin America allocated buses from the CitySights fleet to Gray Line, and financed and

¹ Indeed, under section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, the Board has authority to stay the effective date of its orders “[w]hen [it] finds that justice so requires.”

purchased new double-decker buses for the Gray Line brand. *Id.* ¶ 3. Twin America dedicated its premier ticket sale locations in Times Square, Broadway, and the Port Authority to Gray Line, and reallocated bus stops around Times Square to Gray Line. *Id.* ¶ 4. Twin America created and promoted new tours under the Gray Line brand instead of the CitySights brand. *Id.* ¶¶ 5-9. Twin America also integrated each brand's intellectual property and trade secrets, which cannot now be "un-shared." *Marmurstein V.S.* ¶ 17; *Kinnear V.S.* ¶ 1. This seismic operational shift together with the investments and repositioning of the bus lines cannot be reversed. *Marmurstein V.S.* ¶ 10.

Nor can the integrated operations be fractured. Upon the merger, IBS ceded to Twin America complete day-to-day management and operational control over the Gray Line-branded operations. *Kinnear V.S.* ¶ 1. As a result, IBS no longer has a management team with institutional knowledge of Twin America's current operations that would be capable of running the Gray Line brand. *Id.* ¶¶ 2-3. If Twin America is dissolved, IBS would have to assemble a new management team, which would lack up-to-date knowledge about current operations and market conditions. *Id.* ¶ 2. The Gray Line brand would be at a tremendous operational disadvantage. *Id.*

IBS would also incur significant costs rebuilding its capacity to operate the Gray Line buses, including costs to re-staff management and operations departments, purchase new buses and equipment, enter into new leases, and relocate offices. *Kinnear V.S.* ¶ 5. The partitioned companies would have to negotiate new contracts with vendors and attraction operators before they could begin offering discounts and promotions. *Id.* And they would have to find ways to increase revenue to account for the lost synergies and efficiencies that resulted from the Twin America merger. *Id.*

Twin America has contracted, in its own name, with vendors for tires, fuel, maintenance, parts, and advertising. Marmurstein V.S. ¶ 12. A dissolution of Twin America puts it at a legal and economic risk of breaching these arrangements and eliminates the beneficial terms it was able to negotiate. *Id.* Twin America's vendors will likely not extend equally beneficial terms to either bus line on a stand-alone basis, thereby further impacting the economic value of any partitioned company. A dissolution would likewise eliminate bid opportunities Twin America has pursued. *Id.* ¶ 14. And unwinding the merger could trigger a default provision in Twin America's fixed-term loan agreement for its motorcoach financing. *Id.* ¶ 13.

A dissolution would also disrupt and likely cause a breakdown of Twin America's current union relations and negotiations for (a) driver dispatching, (b) Gray Line's teamsters, (c) drivers, (d) ticket sellers, and (e) tour guides. Marmurstein V.S. ¶ 15. Disrupting these ongoing negotiations could jeopardize the ability to enter new union contracts and potentially result in strikes or a complete degradation of the relationships with union employees. *Id.*

In sum, the shift in operations, investments, competitive positioning and bus tour services Twin America has achieved over the past two years cannot be simply "unwound." Marmurstein V.S. ¶¶ 10-17. This is precisely the kind of certain irreparable harm that justifies the grant of a stay. Indeed, an unwinding itself cannot be undone should the Board conclude on further consideration of additional views that a different remedy is appropriate and would better serve the public welfare. *Id.* ¶ 22. For that reason, the Board should stay any further proceedings that might result in such an unraveling of Twin America pending reconsideration, as well as any judicial review that may follow.

Applicants realize the Board has also set forth an optional divestiture remedy, but respectfully submit this option, too, would cause irreparable injury and should be stayed pending

full review and full course of the legal process. While the interstate charter services comprise a small percentage of Twin America's overall business, they are an important adjunct to its transportation tours. *Marmurstein V.S.* ¶ 23. Twin America has made significant investments in its charter service fleet, adding new motorcoaches beyond the buses originally contributed at the time of Twin America's formation. *Id.* Twin America would lose its investment and goodwill and reputation accompanying this business, including the goodwill it has built with tour groups and tour operators using the charter services. *Id.*

II. LIKELIHOOD OF SUCCESS ON THE MERITS.

The "likelihood of success" factor does not require the Board to conclude that its decision is likely to be overturned on appeal. Rather, this factor is satisfied "when [an agency] ha[s] ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Holiday Tours*, 559 F.2d at 844-45. Here, the Board has ruled on several "admittedly difficult legal question[s]" and there is the requisite "strong likelihood" that Applicants will prevail either on reconsideration or on appellate review.

First, there is a substantial question whether the Board properly limited the relevant market to "double-decker, hop-on, hop-off bus tours" in New York City. Order 11. This narrow definition limits the relevant market to Twin America's own products without testing the boundaries of substitute tours and attractions. By "exclud[ing] potential substitutes," the Board's definition "creates the illusion of market power where none may exist." *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986) (citations omitted).

The Board treated Twin America's 2009 price increase as evidence of pricing power, Order 12, but did not examine whether the price increase would have occurred in the absence of the joint venture, or disentangle the price increase from general price increases occurring throughout the transportation tour sector. There is a substantial question as to whether the Board

properly applied the Horizontal Merger Guidelines’ “hypothetical monopolist test” employed by the federal antitrust agencies — the Department of Justice and the Federal Trade Commission. See Dep’t of Justice & Federal Trade Comm’n, *Horizontal Merger Guidelines* (2010) (“HMG”). The test is designed “to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.” HMG § 4.1.1. It requires an identification of a potential *range of substitute products*. Verified Statement of Robert D. Willig ¶ 11 (“Willig V.S.”); 2010 Willig V.S. ¶ 30.

Here, the Board did not identify — much less evaluate — a candidate group of products for application of the hypothetical monopolist test, nor did the Board test whether a nontransitory price increase would be profitable, holding constant other market conditions like costs, demand, and the prices of substitute products. See Willig V.S. ¶ 12; 2010 Willig V.S. ¶ 35. The Board did not examine the key question in the hypothetical monopolist test — response to changes in price. Nor did the Board measure the actual market conditions of potential substitutes, such as availability, price, and the overall level and character of demand for these products. See, e.g., HMG § 4.1.3 (listing examples); Willig V.S. ¶ 12; 2010 Willig V.S. ¶¶ 6, 31. In fact, the prices for several tour services in New York City increased during the 2008-2010 period. Twin America’s partial price increase was *lower* than those of its competitors. Marmurstein V.S. ¶ 19; Willig V.S. ¶¶ 8-10 & n.4; 2010 Willig V.S. ¶ 35.² For all the foregoing reasons, there is a substantial question as to whether the Board’s product market analysis is contrary to that endorsed by courts and the federal antitrust agencies.

² This price increase, moreover, was largely set in place *prior* to the merger agreement. See Verified Statement of Zev Marmurstein (Mar. 10, 2010) ¶ 12; 2010 Willig V.S. ¶¶ 32-34; Marmurstein V.S. ¶ 18.

Second, the Board's conclusion that the lack of entry into the market since the merger signifies high entry barriers also raises a difficult legal question. Order 14-16. Lack of entry equally evidences a market characterized by high quality product offerings at competitive prices. Willig V.S. ¶ 18. The Board opined that the entry barriers were high because the market was more "mature" than when CitySights entered the market in 2005. Order 15-16. Yet, the tour bus market in New York City was over a decade old when CitySights entered. Verified Statement of Ross Kinnear (Nov. 17, 2009) ¶ 5.

Third, the Board did not consider alternative remedies that are less onerous than the ultimate remedy of dissolution. As the Supreme Court instructs, "the choice of remedy is as important a decision as the ... finding of a violation," and the "agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962). Where the remedy imposed by the agency is "wholly disproportionate to [the petitioner's] error," the agency exceeds its discretion and acts arbitrarily. *See, e.g., Gulf Power Co. v. FERC*, 983 F.2d 1095, 1099-102 (D.C. Cir. 1993) (vacating FERC's remedial sanction for failure to consider lesser alternatives). "[F]ederal antitrust law has not commonly used dissolution as a remedy in simple merger cases, and it would certainly be an excessive penalty for an unlawful acquisition and nothing more." 4A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 117-18 (3d ed. 2009) (citing cases); *see also* Willig V.S. ¶ 20 (describing dissolution). The Board did not consider alternative remedies, such as limited divestiture or conduct remedies designed to ensure ease of entry (including price oversight and regulation or fair dealing requirements).

Applicants respectfully submit that the Board should have conducted an evidentiary hearing on the appropriate remedy, or at least solicited the parties' evidentiary input on the issue. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 101-03 (D.C. Cir. 2001) (vacating the district court's ordered antitrust remedies for failure to hold a remedies-specific evidentiary hearing). Indeed, the Supreme Court reversed an Interstate Commerce Commission decision ordering divestiture (a remedy less drastic than dissolution) in a disapproved merger without affording the parties an opportunity to be heard on the remedy and without considering whether divestiture was the appropriate remedy. *Gilbertville Trucking Co.*, 371 U.S. at 130-31. For this reason as well, Applicants will likely succeed on the merits on reconsideration or appeal.

III. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING A STAY.

As Appellants demonstrated, and as the Board conceded, the integration of Gray Line and CitySights into Twin America resulted in considerable synergies and efficiencies. 2010 Willig V.S. ¶¶ 18-20; Order 17. The efficiencies Twin America has achieved have allowed it to expand its tour offerings and services, provide better service to passengers, and reduce prices relative to costs and market prices overall. *Marmurstein V.S.* ¶¶ 18-21; *Willig V.S.* ¶ 27. These efficiencies have benefitted the public in several ways, and Twin America *has* passed these efficiencies along to consumers. *Marmurstein V.S.* ¶ 18. Beyond adding tours and improving passenger service, Twin America's efficiencies have put downward pressure on pricing. *Willig V.S.* ¶ 27. Put simply, not only do passengers benefit from lowered prices resulting from cost savings, they also benefit from cost savings that prevent a business from increasing prices in response to increased costs. *Id.* The STB appears not to have considered this fundamental economic principle in its public welfare assessment.

CONCLUSION

Applicant's petition for a stay pending reconsideration or appeal should be granted.

Respectfully submitted,

Dated: February 18, 2011

By:



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**STAGECOACH GROUP PLC AND COACH USA, INC., et al.
– ACQUISITION OF CONTROL – TWIN AMERICA, LLC**

VERIFIED STATEMENT OF ZEV MARMURSTEIN

My name is Zev Marmurstein. I am the President and Chief Executive Officer of Twin America, LLC, and an officer and managing member of CitySights, LLC. My business address is 1430 Broadway, 5th Floor, New York, New York 10018. I offer this verified statement in support of Twin America's Petition to Stay the STB's Order Pending Reconsideration or Appeal.

1. Twin America merged the double-decker tour bus operations of International Bus Services, Inc. ("IBS") and CitySights, LLC. Since consummation of the deal, the former CitySights leadership team – myself and Paul Seeger – have been managing Twin America. IBS and Coach USA personnel have had limited involvement.

2. The level of integration and repositioning Twin America has achieved make it effectively impossible to restore the respective bus lines to their pre-merger positions. If anything, fracturing Twin America, were it attempted, would irreversibly injure the posture of both bus lines on a stand-alone basis.

Twin America Repositioned the Gray Line and CitySights Brands

3. Given the Gray Line brand's broader international recognition, Twin America has over the past two years repositioned the two bus lines, emphasizing Gray Line over CitySights, though it still operates under both names. Twin America reallocated buses from the CitySights fleet to Gray Line, and financed and purchased new double-decker buses for the Gray Line brand. Since the merger, Twin America has allocated all new buses to Gray Line. In 2009, Gray Line had 59 double-decker buses. It now has 77. Twin America has reduced the CitySights fleet, on the other hand, from 70 double-decker buses to 63.

4. Twin America has dedicated its premier Visitor Center locations to Gray Line operations, in Times Square (1560 Broadway), near Times Square at 777 8th Avenue and at the Port Authority. Twin America also reallocated bus stops around Times Square to Gray Line.

5. Twin America has substantially expanded Gray Line tour options versus the CitySights tours. For example, Twin America allocated the Ride of Fame initially developed by CitySights to its Gray Line brand. Ride of Fame, modeled after Hollywood's Walk of Fame, permanently etches a New York celebrity's image on one of Gray Line's double-decker buses, promoted by a ribbon-cutting ceremony and bus ride with the inducted celebrity. Ride of Fame inductees include Donald Trump, Rachel Ray, Whoopi Goldberg and Richard Dreyfuss. Ride of Fame has been trademarked under Twin America and utilizes the Gray Line brand.

6. Twin America developed its Freestyle New York ticket exclusively for Gray Line. The Freestyle New York ticket includes 72 hours of access to four Gray Line tours

(Downtown Loop, Uptown Loop, Brooklyn Tour and a Night Tour) and allows customers to add tickets of up to 10 additional tours and attractions from a list of 31 options, including harbor cruises, sightseeing hotspots like the Empire State Building and 30 Rock, dining and museums.

7. By way of further example, Twin America developed and branded its new Pink Bus Tour in association with Gray Line. For every passenger who takes the Pink Bus Tour, Twin America donates money to the Susan G. Komen Foundation. Twin America has branded the Pink Bus Tour with Gray Line and is in the process of finalizing the requisite licenses and agreements with third parties.

8. Additionally, Twin America has developed three walking culinary tours that it markets exclusively under its Gray Line brand: The Ultimate New York Food and Culture Tour in the Village; Tastes of Chinatown (with Dim Sum); and The Original East Village Food, Drinks and Culture Tour.

9. Twin America, moreover, shifted its multi-lingual tours, Woodbury Commons Tours and weddings services to Gray Line, reallocating to Gray Line or selling all of the CitySights motorcoaches.

10. In sum, Twin America has completely repositioned the two bus tour lines over the past two years. This repositioning cannot be reversed nor can the two bus lines be restored to their 2009 posture. It is impossible to undo Twin America's shift in the bus fleets and positioning of their respective tours, trademarks, locations, sunk costs, investments and current marketplace posture.

Operations Are Fully-Integrated and Cannot Be Split

11. Nor can Twin America partition its operations. Twin America has consolidated virtually every operational function into a single management team, call center, dispatch center, information technology department, human resources department, training department, marketing/advertising department and sales department. There is no obvious way to split these departments or functions.

12. Likewise, Twin America, in its own name, has contracted with vendors for tires, fuel, maintenance, parts and advertising. Destroying Twin America puts it at legal risk of breaching these arrangements and will eliminate these cost efficiencies for any split operations.

13. Unwinding Twin America could also trigger a default provision in Twin America's bank loan – a fixed-term loan agreement for the finance of new motorcoaches.

14. Twin America recently submitted a proposal for access to the 9/11 Memorial, which is expected to be a very popular tourist destination. Destroying Twin America will preclude Gray Line and CitySights buses from accessing the 9/11 Memorial for at least three years and possibly longer. Twin America is also currently negotiating a \$2.8 to \$3.5 million contract to conform its buses to New York City's new mandate requiring all double-decker buses to use headsets. Fracturing Twin America would forfeit this business opportunity.

15. Splitting Twin America apart, furthermore, would disrupt and likely cause a breakdown of the current union relations and negotiations that Twin America has been managing. The contracts for (a) Twin America's driver dispatching, (b) Gray Line's teamsters, (c) CitySights' drivers, (d) Gray Line's drivers, (e) Gray Line's ticket sellers,

(f) CitySights' ticket sellers, (g) Gray Line's tour guides, and (h) CitySights' tour guides are all up for renewal in 2011. Disrupting these ongoing negotiations could jeopardize the ability to enter new union contracts and potentially result in strikes or a complete degradation of the relationships with union employees.

16. Twin America has also created an additional post-merger business venture – City Experts NY, a concierge business currently operating in eight Manhattan hotels. In addition, Twin America has committed to ventures developing new tourist attractions in New York and to expand tour operations in other U.S. cities and internationally. These ventures cannot be partitioned.

17. Finally, intellectual property and trade secrets combined in Twin America cannot be merely separated, and dissolution would fundamentally change the ability of the two bus lines to resume independent competition.

Destroying Twin America Will Undo Efficiencies and Vitate Public Benefits

18. Contrary to the STB's position, Twin America's efficiencies and cost savings *have* been passed along to passengers. Notably, Twin America has not raised any double-decker bus tour price since April 2009, when CitySights – as it determined to do unilaterally before consummation of the merger – matched Gray Line's pre-merger price increase. The merger in fact has enabled Twin America to offer extensive discounts and promotions that have *decreased* the effective price that the typical passenger spends on a Twin America double-decker bus tour ticket. The tour packages Twin America offers allow passengers to buy tickets to double-decker bus tours and other tourism attractions at a lower cost than if purchased separately. For example, Twin America's CitySights \$86 three-day Super New York Tour ticket includes four bus tours together with tickets to the

Museum of the City of New York, a Circle Line 75-minute Harbor Cruise, a Statute of Liberty Ferry/Ellis Island Ferry, and either Top of the Rock Observation Deck or Empire State Building Observatory, saving the consumer \$175 on the total package ticket prices. Twin America's Gray Line Freestyle New York ticket allows a consumer to combine a double-decker All Loops Tour ticket with tickets of up to 10 attractions, which translates into savings of up to \$181. Twin America has also increased its promotional discounting throughout the year.

19. In contrast to Twin America, the prices of most competing tourism options have increased over the same period. By way of example: Big Taxi Tours increased prices more than 10%; On Location Tours increased prices by between 4.8% and 5.2%; Circle Line Sightseeing Cruises increased prices by between 47% and 64%; the Empire State Building increased prices by 5%; the Top of the Rock Observatory increased prices by 19%; and Madam Tussauds increased prices 24%.

20. Twin America, on the other hand, due to its cost savings and efficiencies, has been able to hold down prices, increase its promotions and discounting, invest in new equipment, expand its tour options and improve passenger service.

21. Splintering the merger at this stage would undo the very efficiencies that have held down Twin America's costs, allowing it to expand tours and improve service without raising price and while increasing promotions and discounting throughout the year. It will also seriously and irreversibly impair the ability of any split company to provide this array of tour options and passenger services at a profitable level on its own.

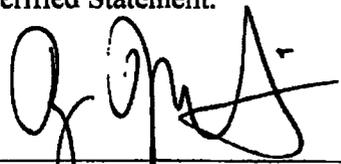
22. Splitting apart Twin America is not a reversible process. The fallout of the unwinding process – including lost synergies, lost contracts, the inability to divide

proprietary information, and the resulting loss of employees and vendor contracts – would preclude any potential to rebuild the company.

23. It would also irreparably hurt Twin America to discontinue or spin off the interstate charter services that it operates. Twin America has made substantial investments in new motorcoaches beyond those contributed at the time of Twin America's formation. And while these services account for a small percentage of Twin America's revenues, they are an important adjunct to Twin America's transportation tour services. Twin America would not only lose its investment in new buses, but it would suffer the loss of good will and reputation with this business and the groups that charter these motorcoaches were it required to terminate these services.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on: February 18, 2011



Zev Marmurstein

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**STAGECOACH GROUP PLC AND COACH USA, INC., et al.
– ACQUISITION OF CONTROL – TWIN AMERICA, LLC**

VERIFIED STATEMENT OF ROSS KINNEAR

My name is Ross Kinnear. I am Vice President, Chief Financial Officer and Treasurer of Coach USA, Inc. I am also a member of the Board of Twin America, LLC. My business address is 160 S. Route 17 North, Paramus, New Jersey 07652. I offer this verified statement in support of Twin America's Petition to Stay the STB's Order Pending Reconsideration or Appeal.

1. When International Bus Services, Inc. ("IBS") and CitySights Twin, LLC formed Twin America in March 2009 – almost two years ago – IBS ceded to Twin America complete day-to-day management and operational control over the Gray Line-branded double-decker bus and other operations in question. Since that time, IBS has had limited day-to-day involvement in the management and operations of Twin America. The merger combined CitySights' trade secrets in marketing, technology and operations management with Gray Line's internationally-recognized brand.

2. IBS involvement since the formation of Twin America has been limited to an oversight role on key decisions proposed by Twin America's management. IBS personnel previously responsible for managing Gray Line are not involved in Twin

-America's current operations. If Twin America were unwound, IBS would have to assemble a new management team, which would not be up to speed with current operations and market conditions. The Gray Line tours would be at a tremendous operational disadvantage. The business know-how in terms of successfully operating the Gray Line tours now resides with the former CitySights management team who are currently running Twin America.

3. Because IBS has been removed from all aspects of Twin America's day-to-day operations, it does not know how Twin America currently runs or manages these operations. If suddenly left with a fractured Gray Line brand, it would be extremely difficult to see how IBS would be able to step in and operate the business. IBS would be short-staffed and under-educated in the current market. Furthermore, IBS would be forced to operate Gray Line while spending considerable time and resources rebuilding the capacity to independently manage and operate the bus tours. During this process, it would be impossible for IBS to operate Gray Line with the same quality and number of services currently provided.

4. Before the merger, IBS had its own management team, call center, dispatch center, information technology department, human resources department, training department, marketing/advertising department and sales department, and it is very difficult to see how these functions could now be partitioned.

5. IBS would incur significant costs rebuilding the capacity to operate the Gray Line brand, including costs to re-staff management and operations departments, purchase new buses and equipment, enter into new leases and relocate offices. IBS would have to negotiate new contracts with vendors and attraction operators before it could begin

offering discounts and promotions. And the circumstances of the dissolution would place Gray Line in a disadvantageous position in attempting to negotiate new vendor terms. In addition, IBS may be forced to find ways to increase revenue to account for the lost synergies and efficiencies that resulted from the Twin America merger.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on: February 18, 2011



Ross Kinnear

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. MC-F-21035
STAGECOACH GROUP PLC AND COACH USA, INC., et al.
– ACQUISITION OF CONTROL – TWIN AMERICA, LLC**

**VERIFIED STATEMENT OF
PROFESSOR ROBERT D. WILLIG**

I. Qualifications and Assignment

1. I am Professor of Economics and Public Affairs at Princeton University where I have held a joint appointment in the Economics Department and at the Woodrow Wilson School of Public and International Affairs for 30 years. Also, I am a senior consultant with Compass Lexecon. I have authored some 75 articles in the economics literature and a book on competition and the theory of industrial market structure. I am the co-editor of the *Handbook of Industrial Organization*, which summarizes the state of economic thinking on the organization of, and competition among, firms. My specialization is microeconomics, with particular emphasis on industrial organization, which is the field of economics that deals with competition among firms, and is therefore the area of economics that deals most directly with antitrust issues. In my teaching, I focus on courses covering microeconomics generally and on specialized courses on regulation, antitrust, and competition policy.
2. I have extensive experience analyzing economic issues arising under the law. While on leave from Princeton, I served as the Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice from 1989 to 1991, and in that capacity served as the Division's Chief Economist. I led a group of 50 Ph.D. economists

and finance specialists, investigating competition matters such as mergers and acquisitions and possible anticompetitive behavior. I have appeared as an expert witness before Congress, federal and state courts, federal administrative agencies, and state public utility commissions on subjects involving competition, regulation, intellectual property rights, and antitrust. I also have served as a consultant to the Federal Trade Commission and the United States Department of Justice on antitrust and policy issues.

3. My curriculum vita, which includes a list of my publications and testimony were submitted previously in my verified statements dated November 17, 2009 and March 20, 2010. The opinions expressed here are based on materials submitted to the STB in this proceeding and on my knowledge and experience in antitrust economics, and on my knowledge and experience in advising clients on antitrust matters over the past 30 years. I have been assisted in a customary manner by the staff at Compass Lexecon. The opinions expressed here reflect the information and facts available to me at this time. I reserve the right to revise my opinions if additional information and facts make revisions appropriate.
4. I have been asked by counsel for the joint venture, Twin America, to consider and comment on the economic analysis set forth as the basis for the Surface Transportation Board's ("STB") decision issued on February 8, 2011.

II. Background and Summary of Conclusions

5. The STB found that the Twin America joint venture "creates a combined entity that possesses excessive market power and has the ability to raise rates without competitive restraint and otherwise conduct its operations to the detriment of consumers."¹ Finding limited benefits from the transaction, the STB concluded that the joint venture was not in the public interest and denied Twin America's application to operate the joint venture.
6. Having read the basis for the STB's decision as set forth in its published decision of February 8, 2011, I support a motion to stay this ruling so as to provide the STB with

¹ Surface Transportation Board Decision, Docket No. MC-F-21035, decided February 8, 2011, at 2.

sufficient time to reconsider its decision requiring the parties to remain separate entities. I focus my support on four primary issues:

- The STB's basis for concluding that Twin America possesses excessive market power is inconsistent with standard economic methods for assessing market power. Although the STB acknowledges that a price increase alone is not conclusive evidence, it nonetheless uses this as the sole basis for its excessive market power conclusion.
- The STB misapplies the hypothetical monopolist test in defining the relevant market, and thereby fails to recognize the competitive constraints facing Twin America.
- The STB concludes that entry barriers are high and potential entry is unable to competitively discipline the joint venture. It bases this conclusion on two factors: (1) no new entry has occurred despite a sustained price increase and (2) a natural limit exists on the number of bus stops near popular NYC attractions. The STB's analysis shows a misunderstanding of the economics of entry barriers and competitive discipline.
- The dissolution remedy, as opposed to divestiture or some other structural or conduct remedy, would adversely affect City Sights and Gray Line's ability to compete in the immediate future, and possibly, in the longer term. Moreover, the procompetitive benefits apparent from this joint venture would be lost to consumers. The STB should consider less disruptive remedies which would not threaten the competitive viability of the two parties going forward.

III. The STB's Market Power Analysis is Flawed

7. The STB concludes that Twin America has excessive market power based on its finding that Twin America was unencumbered in raising prices following the joint venture.² Although the STB asserts that a price increase alone is not conclusive evidence of market

² STB Decision at 10-11.

power, the only bases set forth in support of its excessive market power finding are the 2009 Gray Line and CitySights price increases.³

8. The relevant inquiry is whether the price increases would have occurred irrespective of the formation of the joint venture. Gray Line's price increase occurred prior to the joint venture's formation. CitySights' price increase occurred after the joint venture's formation, but CitySights has stated that it would have unilaterally taken price up had the joint venture not occurred.
9. These price increases took place in an environment in which other transportation-based tour companies were also increasing prices. As shown in Exhibit A, virtually all transportation-based tours increased prices in the 2009 to 2010 period. Some increases were larger than Twin America's price increase; others were smaller. In addition, taxi fares in New York City also increased by 20 percent in November 2009. Although a few tours did not raise price, these isolated cases do not negate the overwhelming evidence that prices in this industry were increasing.⁴ The STB made no attempt to disentangle Twin America's price increase from general price increases occurring throughout the transportation tour sector, and instead, attributes the price increase to an exercise of unrestrained market power.
10. Twin America's sustained price increase is not evidence of unrestrained market power. Taken to its extreme, this logic would imply that any post-merger price increase reflects an exercise of market power. Market power is the ability profitably to maintain prices above competitive levels for a significant period of time. The STB has performed no analysis to eliminate the highly plausible explanation that Twin America's price increase was due to upward pressure on prices caused by higher operating costs, including fuel prices, over an extended period of time and by general market conditions experienced by other firms operating in the transportation-based tour industry. The evidence indicates that Twin America's price increase was coincident with, and not caused by, the joint venture.

³ The STB mischaracterizes my analysis of the events leading to the 2009 price increases.

⁴ I obtained information on 28 transportation-based tours operating in NC. Of those, only five decreased prices during this period (three were dinner cruises offered by the same company). One helicopter tour's price remained constant. Price increases on 18 of the tours ranged from 3.7 to 36 percent. To say the data are mixed is technically accurate, but misleading.

IV. The STB Misapplied the Hypothetical Monopolist Test in Reaching its Decision

11. The STB's alleged application of the Horizontal Merger Guidelines "small but significant non-transitory increase in price" test reflects a fundamental misunderstanding of the hypothetical monopolist test. To be clear, the hypothetical monopolist test attempts to delineate the relevant market by examining whether a hypothetical profit-maximizing monopoly seller of a candidate group of products could profitably impose a small, but significant, non-transitory increase in price. If the hypothetical monopolist would find the price increase not profitable, the candidate group of products is expanded to include other products consumers would consider as alternatives. The test is repeated with additional alternatives until the hypothetical monopolist finds it profitable to increase prices over that last candidate group of products, thus delineating this final group of products as a relevant antitrust market.
12. This is not the exercise performed by the STB, nor would the analysis performed by the STB be a proxy for the hypothetical monopolist test.⁵ There is no attempt to define an appropriate candidate group of products for applying the hypothetical monopolist test, nor is there an attempt to examine whether a price increase by a hypothetical monopolist over a candidate group of products would be profitable holding constant other salient conditions, such as costs, the overall level of demand, and prices charged for substitute services. Profitability does not enter into the STB's purported application of the hypothetical monopolist test and no attempt is undertaken to assess the price increase in light of unchanged market conditions.
13. The STB asserts the price increase by Twin America is an example of a significant, non-transitory price increase. Its basis for this assertion is the "default 5% increase DOJ/FTC presume to be problematic."⁶ According to the STB, because Twin America has been able to sustain this price increase, this "demonstrates that it [Twin America] does not face sufficient competition in its relevant market to keep prices at a competitive level."⁷ This is further evidence of the STB's fundamental misunderstanding of the hypothetical monopolist test and relevant antitrust market definition.

⁵ The STB appears to adopt the erroneous and misleading analysis submitted by Dr. Chan.

⁶ STB Decision at 12.

⁷ STB Decision at 12.

14. The STB misinterprets the hypothetical monopolist test's five percent price increase as an indication of a problematic price increase resulting from a merger. This is simply wrong. Five percent is not a default increase for purposes of presuming an acceptable or non-acceptable price increase. For some candidate markets, such as those with significant market rigidities, five percent may not be sufficient to ensure that customers will switch to other products in the candidate market in response to the price increase. For other candidate product markets, five percent may be too large of a price increase in applying the hypothetical monopolist test. The price increase, whatever level is found to be appropriate, is nothing more than a tool for performing the iterative analysis. The five percent test is not a metric for evaluating the competitive effects of a post-merger price increase.
15. The STB's review of competitive alternatives also is flawed. I agree that substitution cannot be determined only by identifying different types of products purchased by consumers for a broadly defined purpose. Substitution requires examining alternatives considered in response to changes in price, which is the critical role of the hypothetical monopolist test correctly applied. The STB failed to perform this analysis.

V. The STB's Analysis of Entry Barriers is Inconsistent with Application of the Horizontal Merger Guidelines

16. The STB bases its finding of high entry barriers on two factors: (1) no new entry has occurred despite a sustained price increase and (2) a natural limit exists on the number of bus stops near popular NYC attractions. The STB finds the lack of entry following the joint venture to be probative evidence of high entry barriers. To the contrary, a lack of entry may be evidence of a competitively functioning market.
17. The Merger Guidelines consider entry into a relevant market "if such entry will deter or counteract any competitive effects of concern so that the merger will not substantially harm customers."⁸ Recent examples of entry are the best guide for identifying the likelihood, sufficiency, and timeliness of practical entry efforts. The STB acknowledges CitySight's ease of entry into double-decker tours, but dismisses that successful entry by

⁸ Merger Guidelines at § 9.

asserting the market is now “mature,” a condition of competition which, according to the STB, now creates impenetrable entry barriers.

18. The STB fails to acknowledge the more plausible explanation that the lack of entry reflects a market characterized by high quality product offerings at competitive prices. Lack of entry alone is not probative of high barriers to entry or unrestrained market power. CitySights’s entry is the best evidence of the ease of entry and should not be arbitrarily dismissed.
19. The STB cites other factors as evidence of high entry barriers. These include (1) the “uniqueness” of double-decker, hop-on, hop-off services and vehicle design components and (2) a natural limit on the number of bus stops near popular NYC attractions. The first factor should carry little weight since this “barrier” was applicable when CitySights successfully entered this business. With respect to the second “barrier” to entry, the STB fails to acknowledge that the NYC Department of Consumer Affairs controls the assignment of bus stops and has the ability to re-assign bus stops to encourage competition.

VI. Dissolution of the Joint Venture Would Likely Have Significant Anticompetitive Effects and Adversely Affect Consumer Welfare

20. The STB decided that the joint venture is not in the public interest and must be dissolved. As I understand the term, dissolution means that the joint venture must cease to exist and the parties restored to their pre-joint venture status. This is distinguishable from a divestiture which requires that the joint venture spin-off or sell assets to create or enlarge a separate entity. In merger analysis, a divestiture typically requires that the assets divested be sufficient to create a viable competitor capable of restoring any loss of competition in the relevant market.
21. The stated business rationale for the Twin America joint venture was to combine operations to generate cost savings that would enable the joint venture to compete more effectively. Both Gray Line and CitySights were experiencing upward pressure on price due to the economic downturn and the increasing costs of providing transportation tour services. The joint venture has been in operation since March 31, 2009. During this

- period, Twin America undertook efforts to achieve the cost savings identified as part of the rationale for the transaction.
22. I understand that Twin America has fully integrated the parties' call centers, charter business, organized group sales, training, IT operations, marketing and advertisement departments, contracting, and central dispatching, and nearly all of the accounting systems. There are no separate operations to dissolve. Moreover, Gray Line's pre-merger management team is no longer involved with Twin America's operations.
 23. Twin America also envisioned that the joint venture would enable it to expand the quality and array of services in ways that the parties could not do independently. Twin America has undertaken efforts to reinvigorate the internationally-known Gray Line brand.⁹ Twin America has given the Gray Line brand exclusive use of newly-developed tours as part of its efforts to invigorate the brand. The joint venture has also expanded its operations to include City Experts (a concierge service) and has committed to new ventures for tourist attraction developments in New York City. It also has committed to new bus ventures in other cities in the United States and Europe. These new operations are not associated with either Gray Line or CitySights and therefore, cannot be "dissolved" into the original two companies.
 24. The size and make-up of the fleet operating under the Gray Line and CitySights brands have changed. Gray Line provided 59 double-decker buses in April 2009; it now has 77 buses. CitySights contributed 70 double-decker buses; it now has 63 buses.
 25. Intellectual property and trade secrets are now commonly known by Gray Line and CitySights. Dissolution of the joint venture, assuming it is even possible, would fundamentally alter the ability of the parties to independently compete.
 26. Importantly, Twin America competes in a highly seasonal tourism business. It makes the majority of its profits in the April through October period. Dissolution of the joint venture during this period would severely impair competition and the quality of services offered to consumers..
 27. The joint venture's integration of back-office and operational support systems and development of new tours, and expansion of the business to include complementary services has generated significant benefits for consumers in the form of higher quality

⁹ Twin America has rights to the Gray Line brand only in NYC.

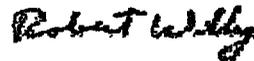
and more expansive set of offerings. Consumers also may benefit from cost savings which prevent a firm from increasing prices. The STB appears not to have considered any of the quality improvements or offsetting cost savings in its evaluation of the procompetitive, consumer welfare enhancing benefits of the joint venture.

VII. Conclusions

28. I urge the STB to reconsider its decision to dissolve the Twin America joint venture. At a minimum, the STB should reconsider its decision to force the dissolution of the joint venture and consider other remedies which would minimize the adverse effect on competition and consumers.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on February 18, 2011



Robert D. Willig

Exhibit A

<u>Company</u>	Adult			
	2008	2009	2010	2011
Twin America	100.0	110.0	110.0	110.0
<i>Circle Line (Average)</i>	100.0	112.2	116.3	117.3
Circle Line Sightseeing (3-hr cruise)	100.0	109.7	112.9	116.1
(2-hour cruise)	100.0	111.1	114.8	114.8
(The Beast)	100.0	115.8	121.1	121.1
(75-min. cruise)	100.0	114.3	119.0	119.0
(75-min. cruise Special incl in AAT tour)				
<i>NY Waterway (Average)</i>	100.0	104.6	105.0	113.2
NY Waterway 90-min	100.0	100.0	100.0	96.2
NY Water Taxi (Harbor Pass)	100.0	125.0	125.0	NA
(Statue of Liberty Cruise Special)	100.0	60.0	60.0	100.0
SOL Ferry	100.0	100.0	100.0	125.0
Manhattan By Sail				
ESB	100.0	100.0	100.0	105.0
Skyride	100.0	122.0	122.0	122.0
Top of the Rock	100.0	100.0	105.0	110.0
Harlem Gospel (TG1)	100.0	110.0	110.0	110.0
(TG2)	100.0	110.0	110.0	110.0
<i>Liberty Helicopter (Average)</i>	100.0	106.8	106.8	120.6
Liberty Helicopter (Lady Liberty)	100.0	109.1	109.1	NA
(Big Apple)	100.0	107.1	107.1	107.1
(New York, NY)	100.0	105.4	105.4	105.4
<i>Manhattan Helicopters (Average)</i>	100.0	100.0	97.1	97.1
Manhattan Helicopters (Express Saver)				
(Express)	100.0	100.0	97.1	97.1
(Deluxe)				
<i>Dinner Cruises (Average)</i>	100.0	89.9	91.0	94.4
Dinner Cruises				
Spirit Cruises: Sun-Thur	100.0	93.7	94.9	98.2
Fri	100.0	87.2	88.3	92.1
Sat	100.0	89.4	90.4	93.7
<i>Bateaux (Average)</i>	100.0	103.6	104.5	107.1
Bateaux Sun-Thur	100.0	105.5	106.4	108.4
Fri	100.0	100.8	101.6	104.4
Sat	100.0	104.8	105.6	108.6
<i>World Yacht (Average)</i>	100.0	106.6	104.2	150.1
World Yacht: Sun-Thur	100.0	105.3	103.0	123.0
Fri + Sat	100.0	107.8	105.5	136.0
Sunday Brunch (May-Oct)	100.0	106.7	103.7	NA

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2011, a true and accurate copy of the foregoing Petition for a Stay Pending Petition for Reconsideration and for Stay Pending Judicial Review was served via overnight delivery upon counsel for the following parties:

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