PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTAION BOARD

STB Docket No. MC-F-21035

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

SUR-REPLY OF THE STATE OF NEW YORK TO REPLY OF APPLICANTS TO COMMENTS OF NEW YORK STATE ATTORNEY GENERAL DATED NOVEMBER 17, 2009

The State of New York ("NYSAG") respectfully submits the following Sur-Reply to Reply of Applicants to Comments of New York State Attorney General dated November 17, 2009 ("Reply"), to the Surface Transportation Board ("STB") in connection with the above captioned STB Docket No. MC-F-21035 ("Application") by decision dated January 12, 2010.

The STB by decision dated January 29, 2010 issued a protective order that is prospective only, and disclosures that Applicants have made of commercially sensitive information to NYSAG before the issuance of the protective order lie beyond the scope of the order. Documents or citations used in this Reply are disclosures Applicants made prior to the issuance of the STB's protective order dated January 29, 2010.

EVADING ANTITRUST THROUGH JURISDICTION

The Applicants have placed jurisdiction as a central issue to evade antitrust scrutiny. We see no conflict between the NYSAG and the STB's jurisdiction in this matter. The parties do not dispute the NYSAG's jurisdiction to investigate the events leading to the formation of Twin America, LLC on March 17, 2009. The STB can render its decision now or reserve its decision on the Applicants' August 19, 2009 Application until the NYSAG concludes its investigation, without any jurisdictional issues.

Applicants misstate the NYSAG's position as to jurisdiction by stating that "NYAG's intimation that the Board lacks jurisdiction over the parties to the Transaction is unsupported and incorrect." (Reply at p 3). The issue is not whether the STB lacks jurisdiction under 49 U.S.C. § 14303, as we have never alleged that it lacks jurisdiction. Instead, the Applicants "put the cart before the horse" by legitimizing Twin America in its Application to STB as explained further below.

Applicants state that the "New York Attorney General Has Failed to Show that the STB Lacks Jurisdiction Over the Transaction Under Section 14303." (Reply at p 30). Since we do not argue that the STB lacks jurisdiction over a legitimate § 14303 transaction, we need not make such a showing. Indeed, to the contrary, in our Comment, we stated "the STB should condition the approval of the Application by ordering divestiture of the tour guided sightseeing business by double-decker buses in the 5 boroughs of New York City from the transaction." (NYSAG Comment at p 7).

The Applicants try to muddy the waters by co-mingling two distinct transactions, the March 17, 2009 joint venture agreement ("JV Agreement") and the Application filed with the STB on August 19, 2009, employing a jurisdictional shell game. Applicants conveniently submit to the STB's jurisdiction in order to avoid the NYSAG's investigation by filing their Application with the STB under 49 U.S.C. § 14303 after our subpoenas were issued and yet somehow forgot about the STB when they entered into the March 17, 2009 JV Agreement (Exhibit 1). The Applicants seem to intimate that filing an Application with the STB will now somehow absolve the parties of all prior conduct.

Applicants now disavow their JV Agreement of March 17, 2009 and purport to have "effectively merged their businesses" after our subpoenas. Although Applicants confuse their Application to the STB on August 19, 2009 and their March 17, 2009 joint venture agreement, it is clear that the Applicants try to invoke STB jurisdiction with a flurry of activities after its August 19, 2009 filing as a way to avoid antitrust scrutiny.

Our conclusion that the parties have tried to evade antitrust scrutiny by invoking the STB's jurisdiction is supported by the Applicants' own documents. A document by Coach USA dated July 1, 2008, E-COA00000509 shows the intent of the parties. The slide entitled "[**REDACTED**]" states, "[----------**REDACTED**----------]" (Exhibit 2).

Another slide in the same presentation, entitled "[--------**REDACTED**--------]," states, "[---**REDACTED**---]" (Exhibit 3).

POST JOINT VENTURE FILINGS AND ACTIVITY

Applicants claim Twin America is a fully-integrated joint venture and it is "on all fours" with the joint venture in the Supreme Court's decision in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). (Reply at p. 52). The *Dagher* case may have the same superficial similarities, but closer reading of the Supreme Court decision in *Dagher*, there are very significant differences between that case and Twin America.

In *Dagher*, the Court noted that the two competitors, Texaco and Shell did not compete with each other in the western United States [unlike Gray Line and CitySights], the formation of the joint entity Equilon was conditioned on divestitures and modifications by the Federal Trade Commission as well as State Attorneys General, and most importantly, the Court presumed that Equilon was a lawful joint venture and not a sham. *Id.* at 4-6. As we have stated in our Comment and in this reply, the legitimacy of the formation of the joint venture Twin America on March 17, 2009 is questionable at the very least.

The Applicants have acknowledged our inquiry concerned the formation of the March 17, 2009 JV Agreement (Application at p. 15) although Applicants consistently divert attention to the

August 19, 2009 STB filing as if Twin America's formation was legitimate on March 17, 2009. By their logic, hypothetically, if Ford Motor Company and General Motors fixed prices but decided, after a State Attorney General issued subpoenas, to merge and file with the U.S. Dept. of Justice, then their prior conduct would not matter. Of course that could not be the outcome, but in this case, the Applicants try because they claim that STB jurisdiction will shield them from antitrust scrutiny.

The Applicants have been busy trying to position themselves as well within the STB's jurisdiction. The Twin America of March 17, 2009 and the Twin America post-August 19, 2009 are a very different entity, likely a result of the issuance of our subpoenas on July 31, 2009 and August 3, 2009. For example, some of the changes that took place after NYSAG subpoenas were issued that we are aware of include:

1. On August 10, 2009, Twin America applied to the Federal Motor Carrier Safety Administration ("FMCSA") for appropriate operating authority to become a regulated motor carrier.
2. On August 19, 2009, Applicants filed their Application to the STB.
3. On September 16, 2009, Mr. Zev Marmurstein filed for control of motor passenger carrier, R.W. Express, LLC to the STB, No. MC-F-21036.
4. On November 17, 2009, Twin America was issued its operating certificate
5. In Applicants Reply on November 17, 2009, Applicants claim they a testing a "new product" called "FreeStyle New York on Gray Line-branded buses." (Marmurstein V.S. at ¶16).
6. In Applicants Reply on November 17, 2009, Applicants claim Twin America will begin cross-ticketing arrangements between Gray Line and CitySights bus and vice-versa. (Marmustein V.S. at ¶17).

7. In Applicants Reply on November 17, 2009, Applicants state, "Twin America intends to conduct interstate and local New York area charter and special operations..." (Kinnear V.S. at ¶14).

Applicants make up "new products" post the March 17, 2009 JV Agreement to be able to escape a *per se* condemnation of their JV Agreement. Applicants conveniently list various ticketing arrangements with Applicants' own or affiliated entities for Twin America to constitute interstate transportation. Twin America has an arrangement with Peter Pan Bus Lines which is owned by Coach USA. (Reply at p. 26). Twin America has an arrangement with Show Bus Tours, a Peter Pan Bus Lines partner. (*Id.*). Twin America has an arrangement with Butler Motor Transit, a Coach USA controlled carrier. (*Id.* at p. 27) Twin America has an arrangement with Lenzer Coach Lines, a member of Coach USA. (*Id.*) Twin America has arrangements with R.W. Express, Inc., the company as to which Mr. Marmurstein recently filed for control. (*Id.* at p 28).

But all of these arrangements are founded on the presumption by the Applicants that Twin America's formation on March 17, 2009 was legitimate. Applicants are aware our inquiry concerns the formation of Twin America on March 17, 2009 but the Applicants keep diverting attention to the August 19, 2009 Application and the STB's jurisdiction over a merger (which again, we have not challenged).

MARCH 17, 2009 JOINT VENTURE AGREEMENT

a. March 17, 2009 Joint Venture Agreement

Twin America LLC was formed on March 17, 2009 by the two largest operators of double-decker sightseeing buses in New York City, Gray Line and CitySights. The JV Agreement executed by International Bus Services ("IBS")/Gray Line of New York and City Sights Twin, LLC/CitySights created the largest operator of double-decker sightseeing buses in New York City. Despite the Applicants' position that the new and improved Twin America is an

interstate carrier and that the market is broader than the sight-seeing "hop-on/hop-off double decker buses" in New York City, their own words and documents contradict those assertions.

The JV Agreement shows the transaction to be confined to New York City for conducting a sightseeing hop-on/hop-off tour, primarily by double-decker buses.

The "business and purposes" of Twin America, LLC, as stated in the JV Agreement, "[----------**REDACTED**----------]" (Exhibit 1, JV Agreement p 8). "[----------**REDACTED**----------]. (Exhibit 1, JV Agreement p 7). "[----------**REDACTED**----------] " (Exhibit 1, JV Agreement p 7).

A [**REDACTED**] clause in the JV Agreement again explicitly reiterates that Coach USA, IBS, and City Sights Twin [----------**REDACTED**----------], they [----------**REDACTED**----------" [five boroughs of New York City]. (Exhibit 1, JV Agreement pgs. 28-29). The JV Agreement further states, Coach USA, IBS, and City Sights Twin "[----------**REDACTED**----------]" (Exhibit 1, JV Agreement p 31, ¶(c)). Clearly, Applicants differentiate transportation business from Sightseeing Business.

Contrary to the Applicants' assertions in their Application and Reply, the Applicants contemplated a transaction for the sightseeing business primarily by double-decker buses within the five boroughs of New York City.

The joint venture does not meet Dr. Willig's "single firm" analysis. (Reply at p. 52-53). The joint venture collaboration did not involve an efficiency-enhancing integration of economic activity in the relevant market. Consolidating "backroom" operations (*e.g.* administrative and managerial tasks) and procurement functions such as the purchase of fuel are not the type of efficiency-enhancing integration that justifies the elimination of competition. The terms of the JV

Agreement also clearly contemplate the dissolution of the joint venture by its own specific and express terms. The JV Agreement has a [----------**REDACTED**----------] section in which the [----------**REDACTED**----------]. (Exhibit 1, JV Agreement p. 26, Section VII). The JV Agreement establishes a [----------**REDACTED**----------] (Exhibit 1, JV Agreement p. 11, ¶3.6) and [----------**REDACTED**----------] (Exhibit 1, JV Agreement p. 13, ¶¶ 4.1 and 4.2). These and other indicia of a joint venture does not meet Dr. Willig's "single firm" analysis.

"The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding *per se* condemnation." 2000 Dep't of Justice and Federal Trade Comm'n Antitrust Guidelines for Collaborations Among Competiors, at § 3.2.

b. Intent of the parties

The Applicants gloss over their March 17, 2009 joint venture agreement and now focus on the August 19, 2009 filing for control of Twin America, LLC under 49 U.S.C. § 14303 ("Application") as a way to avoid antitrust scrutiny.

Applicants rely on *Colorado Mountain Express, Inc., and Airport Shuttle Colorado, Inc., d/b/a Aspen Limousine Service, Inc.—Consolidation and Merger—Colorado Mountain Express*, No. MC-F-20902, 1997 WL 82536 (STB served Feb. 28, 1997) as "strikingly similar" to the present proceeding. They are wrong. In that proceeding, Colorado Mountain Express, Inc. and Airport Shuttle Colorado, Inc., both had interstate operating authority. Unlike the present situation, CitySights LLC and City Sights Twin LLC never had interstate operating authority and Twin America, LLC has very recently applied for one. More importantly, *Colorado Mountain* did not involve the two largest competitors forming a joint venture.

Applicants cite to numerous cases inapplicable in this context for the same proposition, i.e., that there are low entry barriers in the bus industry and pervasive intermodal competition, and claim the relevant market is broader than the product segment "hop-on/hop-off double-decker

tour bus business" in New York City. (Reply at p 44). Applicants' Application under § 14303 is predicated on the legitimacy of the March 17, 2009 formation of Twin America. The Applicants jump ahead one step--the NYSAG is investigating the legitimacy of that joint venture.

As noted above, Applicants' own documents contradict their claims of a market broader than the "hop-on/hop-off double-decker tour bus business" in the five boroughs of New York City. The JV Agreement includes a [----------**REDACTED**----------]. The Applicants agreed [----------**REDACTED**----------] (Exhibit 1, JV Agreement Exhibit F). New York Ducks and Shortline Charters are all owned by Coach USA. Although the Applicants purport to have "effectively merged their businesses," they agreed not to compete with each other for certain lines of business but agreed to coordinate on the sightseeing hop-on/hop-off double-decker tour bus line of business in New York City.

Applicants state that "the management personnel involved in the Transaction were not immediately aware that STB jurisdiction would attach to their creation of the new joint venture..." (Reply at 12). Mr. Ross Kinnear, Vice President, Chief Financial Officer and Treasurer of Coach USA, Inc. and a member of the Board of Twin America, LLC, states in his Verified Statement ("Kinnear V.S.") that, "at the time of the Agreement and for a period of weeks thereafter, neither I nor my colleagues involved in the transaction were aware that the transaction was subject to Surface Transportation Board ("STB") approval by virtue of the interstate nature of the transaction forming the new Twin America LLC entity..." Kinnear V.S. at ¶ 2. Mr. Kinnear seems to say that neither he nor his colleagues who are in the transportation business were aware that the Transaction was subject to STB jurisdiction.

Although Mr. Kinnear and Mr. Moser claim to be unaware that the joint venture transaction was subject to STB approval, in 2008 alone, Stagecoach and Coach USA filed three bus acquisition applications with the STB with verifications signed by Mr. Moser (10/7/08

Docket # MCF_21030_0, 8/19/08 Docket # MCF_21029_0, and 3/13/08 Docket # MCF_21027_0).

As Applicants note, "CitySights was able to enter the transportation business in 2005 with eight buses and grow its operations to a 70-bus fleet over four years..." It is exactly this competitive threat to Coach USA's double decker tour bus business by a rapidly growing start-up company that led to the horizontal joint venture agreement of March 17, 2009.

THE TRANSACTION IS NOT IN THE PUBLIC INTEREST

The STB should not approve the Application because it is not in the public interest. The transaction fails to encourage fair competition and negatively impacts the interests of the carrier employees.

a. The Transaction Lessens Competition

Dr. Willig's conclusions regarding the effects of the joint venture are in general flawed and biased as explained more fully by Dr. Kitty Kay Chan in her Reply to Verified Statement of Professor Robert D. Willig ("Chan Reply"). The evidence plainly contradicts his conclusion that the joint venture does not increase market power or increase the likelihood of anticompetitive effects. For example, one of Gray Line's internal documents, which Dr. Willig himself introduced when he used part of the information from this document to conclude an estimated cost savings of $7 to $11 million from the joint venture, states that one of the benefits from the joint venture will be "[e]asier decision making as sole player in 'double deck' market." Dr. Willig also concluded that the joint venture promotes public interest because it results in efficiencies and synergies. However, the efficiencies and synergies which Dr. Willig proposed are in general speculative and have not been verified. Furthermore, as stated in the 1997 Horizontal Merger Guidelines: "In the Agency's experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly." Even if there are any

efficiencies and synergies generated from the joint venture, they still do not justify the creation of a monopolist in the double-decker bus tour market through the joint venture.

Dr. Willig's claims that the NYSAG's assessment of efficiencies and synergies is inconsistent with economic logic. For example, Dr. Willig attacks the NYSAG's concerns and economic arguments that the merged company would achieve some of it cost savings by using its greater purchasing power to obtain volume discounts and that these discounts would increase the barriers to entry in the double-decker tour business. Specifically, Dr. Willig states that "Twin America's fuel, spare parts, and insurance cost savings are not generated from new volume discounts but rather by applying the parties' experience in efficiently operating and maintaining buses to the contributed bus assets." His claim contradicts the evidence which he himself presents. The one-page document that Dr. Willig submitted as evidence to support his estimate of $7 to $11 million cost savings from the joint venture explicitly lists "[i]ncreased purchasing power on fuel and attraction costs" as one of the sources of the estimated savings. Contrary to Dr. Willig's claims, the parties' own assessment of their purchasing power clearly validates NYSAG's concerns.

Dr. Chan's report expands on the summary above, and provides a more detailed discussion with additional economic evidence showing that Dr. Willig's opinions are in general flawed. As set forth in the NYSAG's filing, the joint venture risks harming the public interest by strengthening market power and the likelihood of anticompetitive actions..

b. Interests of Carrier Employees Negatively Impacted

The STB is obligated to consider the impact of carrier employees in determining whether the transaction is in the public interest. As explained below, the approval of the transaction will negatively impact the carrier employees. Applicants state in their Application that the "impact of the Transaction to date has been marginal to date and limited to administrative "back office" personnel. (Application at p 11). However, Applicants own documents better explain the impact of the merger on their employees.

The Applicants' documents show that the cost savings and efficiencies to be achieved come from reducing labor and raising fares on the double-decker tours. On January 5, 2009, two months before the JV Agreement was signed, CitySights sent Coach USA a memo that states:

"1. [----------**REDACTED**----------].

2. [----------**REDACTED**----------].

3. [----------**REDACTED**----------].

4. [----------**REDACTED**----------]

[----------**REDACTED**----------].

(Exhibit 4, E-COA00000200)

The Applicants wanted to "[----------**REDACTED**---------]" thereby achieving savings in months and not years at the expense of its workers. As we stated in our Comment to the STB on November 2, 2009, the approval of the Application is not in the public interest and labor is and will be detrimentally affected once the Application is approved.

Our point is further emphasized by the Comment of the Transport Workers Union 225, served on the NYSAG today, February 1, 2009. The NYSAG's belief that the Applicants' joint venture will lessen competition and result in reduced service to consumers and negatively impact carrier employees is supported by the submission of the Transportation Workers Union ("TWU") to the STB.

We note that the NYSAG served subpoenas on the Applicants and they have challenged our jurisdiction and have voluntarily produced documents at the Applicants' leisure and discretion.

The STB should reject the August 19, 2009 Application because it is not in the public interest or in the alternative, reserve its decision until the NYSAG can conclude its investigation

DATED: February 1, 2010

Respectfully submitted,

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PUBLIC VERSION

EXHIBIT 1

STB Docket No. MC-F-21035

EXHIBIT 1 is REDACTED in its Entirety

PUBLIC VERSION

EXHIBIT 2

STB Docket No. MC-F-21035

EXHIBIT 2 is REDACTED in its Entirety

PUBLIC VERSION

EXHIBIT 3

STB Docket No. MC-F-21035

EXHIBIT 3 is REDACTED in its Entirety

PUBLIC VERSION

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

REPLY TO VERIFIED STATEMENT OF PROFESSOR ROBERT D. WILLIG

Dr. Kitty Kay Chan

I. Qualification and Assignment

1. I am the Director of Economics in the office of Andrew M. Cuomo, Attorney General of the State of New York (NYSAG). Prior to joining the NYSAG, I was a Research Fellow at the New York University Law School and an Adjunct Assistant Professor at the New York University Wagner School of Public Administration and Policy. I have also worked as an Economist for the U.S. Department of Agriculture and for the Federal Communications Commission. I have published academic articles on issues related to regulation, trade, foreign direct investment, consumer products, and public policy reform. I received my B.S. in Business and M.A. and Ph.D. in Economics from the University of Southern California. I also earned a Doctoral Graduate Certificate in Environmental Sciences, Policy, and Engineering from the University of Southern California.
2. A "joint venture" agreement was entered into by Coach USA {"Coach")/International Bus Services, Inc. ("IBS") and City Sights in March, 2009 for the formation of Twin America, LLC. IBS operated under the trade name Gray Line New York ("Gray Line") before entering into the agreement. I have been requested to evaluate the verified statement of Dr. Robert D. Willig, dated November 17th, 2009, including his conclusions on the public interest and competitive implications of the joint venture and his opinions on the comments made by the NYSAG dated November 2, 2009. Dr. Willig concluded that (i) the joint venture promotes the public Interest through efficiencies and synergies; (ii) the joint venture does not increase market power or increase the likelihood of anticompetitive effects; and (iii) NYSAG's assessment of the scope for efficiencies and synergies is inconsistent with the economic evidence.

II. Summary of Conclusion

3. Dr. Willig's conclusions regarding the effects of the joint venture are in general flawed and biased. The evidence plainly contradicts his conclusion that the joint venture does not increase market power or increase the likelihood of anticompetitive effects. For example, one of Gray Line's internal documents, which Dr. Willig himself introduced when he used part of the information from this document to conclude an estimated cost savings of $7 to $11 million from the joint venture, states that one of the benefits from the joint venture will be "[e]asier decision making as sole player in 'double deck' market." Dr. Willig also concluded that the joint venture promotes public interest because it results in efficiencies and synergies. However, the efficiencies and synergies which Dr. Willig proposed are in general speculative and have not been verified. Furthermore, as stated in the 1997 Horizontal Merger Guidelines: "In the Agency's experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly." Even if there are any efficiencies and synergies generated from the joint venture, they still do not justify the creation of a monopolist in the double-decker bus tour market through the joint venture.
4. Dr. Willig's claims that the NYSAG's assessment of efficiencies and synergies is inconsistent with economic logic. For example, Dr. Willig attacks the NYSAG's concerns and economic arguments that the merged company would achieve some of it cost savings by using its greater purchasing power to obtain volume discounts and that these discounts would increase the barriers to entry in the double-decker tour business. Specifically, Dr. Willig states that "Twin America's fuel, spare parts, and insurance cost savings are not generated from new volume discounts but rather by applying the parties' experience in efficiently operating and maintaining buses to the contributed bus assets." His claim contradicts the evidence which he himself presents. The one-page document that Dr. Willig submitted as evidence to support his estimate of $7 to $11 million cost savings from the joint venture explicitly lists "[i]ncreased purchasing power on fuel and attraction costs" as one of the sources of the estimated savings. Contrary to Dr. Willig's claims, the parties' own assessment of their purchasing power clearly validates NYSAG's concerns.
5. The remainder of this report expands on the summary above, and provides a more detailed discussion with additional economic evidence showing that Dr. Willig's opinions are in general flawed. As set forth in the NYSAG's filing, the joint venture risks harming

the public interest by strengthening market power and the likelihood of anticompetitive actions.

III. Dr. Willig's Conclusion that the Joint Venture Promotes Public Interest is Flawed and Biased

6. Dr. Willig's partial analysis leads to the biased and false conclusion that the joint venture promotes public interest by producing efficiencies and synergies. His claims of efficiencies and synergies are generally speculative, without means of verification, and contradict economic logic and evidence.

7. Dr. Willig concluded that "the joint venture is expected to result in an estimated cost savings of $7 to $11 million." The only quantitative evidence which Dr. Willig submitted to support this claim is a one page document (see Gray Line/City Sights Partnership, COA 000243, annexed hereto as Exhibit 1) that states in conclusory fashion that the consolidation has an estimated "synergy savings" of $7 to $11 million.[1] Dr. Willig has not disclosed that these "synergy savings" were designed to be implemented together with a [**REDACTED**] in fares, which was estimated to cost consumers approximately [----------**REDACTED**----------], annexed hereto as Exhibit 2). If the joint venture intended to benefit consumers by passing on its cost savings to consumers in the form of lower prices, Exhibit 1 should indicate a fare decrease instead of the increase that is actually shown in the profit margin estimates for the pre and post consolidation scenarios. That is, the joint venture not only does not anticipate passing on any of the estimated "synergy savings" in the form of lower prices to consumers but instead intends to [---**REDACTED**---]. Furthermore, Dr. Willig does not provide any evidence to confirm the sources of the estimated $7 to $11 millions synergies savings. As stated in the Horizontal Merger Guidelines, "efficiency claims will not be considered if they are vague or speculative or otherwise cannot be verified by reasonable means (see United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1997), annexed hereto as Exhibit 3)." In particular, the Guideline places the burden upon the parties to provide antitrust investigators with evidence that allows investigator to verify by reasonable means the

[1] The synergy savings in Exhibit 1 are generated from 6 items. They are (i) reduction in street sellers; (ii) renegotiated 3rd party commissions (particularly hotel concierge group); (iii) combined approached to advertising – reducing overall marketing and advertising spending; (iv) reduce administration/overhead costs; (v) possible fleet reduction; (vi) increased purchasing power on fuel and attraction costs; That is, Exhibit 1 counts concierge saving as part of the synergy savings.

veracity of the claims. Dr. Willig has not provided any convincing evidence to allow verification of any of his efficiency claims.

8. Dr. Willig suggests that cross-ticketing between the Gray Line and City Sights will enhance consumer benefits by reducing waiting time, and increasing the occupancy per bus. His claim is speculative because it contradicts economic logic. The consolidated entity has already decreased the number of double-decker buses in service in New York by 20 since the time the two parties entered into the agreement (see Verified Statement of Professor Robert D. Willig, annexed hereto as Exhibit 4). Cross-ticketing could only decrease waiting time if there is enough free space on the vehicles to accommodate the same number of passengers. According to Dr. Willig, the joint venture brings together 59 double-decker buses, 12 motor coaches, and 16 miscellaneous support vehicles from Gray Line as well as 62 double-decker buses and 8 additional such vehicles to be built from City Sights (see Exhibit 4). Based on the above information, the joint entity has already removed 9% of the capacity of double-decker buses in the New York market. Although the scheduled time could be shortened by the flexibility to ride on buses from both of the previously independent companies, if the buses are more often full due to the reduction in total seating capacity, passengers will have to spend more time waiting until the next bus with free space arrives. Thus the mere fact that the waiting time between bus arrivals would decrease does not necessarily indicate that passengers overall will have a shorter waiting time, as this depends on the availability of space. With the 9% decrease in bus capacity already in place, Dr. Willig's claim that the merger will result in a decrease in waiting time and an increase in occupancy per bus is speculative. Furthermore, any potential economic efficiency benefits to customers from decreases in waiting time would be eroded if a complete implementation of cross-ticketing leads to the elimination of routes or the number of stops, or decreases stopping times at each route.

9. Dr. Willig suggests that the joint venture will increase efficiency because the best administrative, management, and operational practices of each partner will reduce expenses. However, Dr. Willig fails to point out that some of these best operational practices have combined to intensify the competitive power of the joint venture and increase the barriers to entry. As stated in an email exchange between Gray Line and City Sights, "[----------**REDACTED**----------]." (see [--------**REDACTED**---------], annexed hereto as Exhibit 5). The [----------] demonstrates that

Gray Line's ownership by a major organization in the transportation industry could intensify the market power of the consolidated entity and increase the barriers to entry. What Dr. Willig claims as an efficiency gain actually puts potential entrants in competition with an incumbent which possesses the ability to benefit from volume discounts from service providers that further enhance its competitive position.

10. Dr. Willig also suggests that firing a carrier's current employees is welfare enhancing because these workers are being released to the market to be deployed for more productive uses in the economy. Dr. Willig does not provide any evidence that individuals who have been fired by the joint venture have been able to secure alternative jobs, not to mention work placement for more productive activities compared to their prior employment. On the contrary, Dr. Willig fails to incorporate the current high employment rate in the economy into his analysis. The potential unemployment paid to the workers who were fired by the joint venture and the loss in productivity because these displaced workers are spending time searching for jobs instead of producing services are additional costs that would reduce any efficiency gains from labor force reallocation.

IV. Dr. Willig's Conclusion that the Joint Venture Does not Increase Market Power or Increase the Likelihood of Anticompetitive Effects is Flawed and Biased

11. Dr. Willig concluded that the joint venture does not increase market power or increase the likelihood of anticompetitive effects. Dr. Willig reaches this conclusion based on his assessments that (i) Twin America competes with various transportation tour companies; and (ii) it is easy to enter into the market. These conclusions are inaccurate and not supported by a more complete analysis.

<u>The Joint Venture Increases Market Power and Allows Twin America to Become "the Sole Player in the Double-Decker Market"</u>

12. Dr. Willig argues that the joint venture should be analyzed as if it were a merger. However, he does not follow the standard economic practice for justifying his conclusion that Twin America competes with other transportation tour companies. He merely describes the various modes of transportation tourism but provides none of the economic evidence and logical arguments that are required under the Horizontal Merger Guidelines to show who are the relevant competitors in the relevant market.
13. As described by Dr. Willig, All Loops account for 64%, Downtown Loops accounts for 16.7%, Essential New York accounts for 16.6% and Uptown loop account for 2.8% of all

riders for Gray Line (see Exhibit 4). The following Tables show that in February 2009, around the time when the joint venture agreement was being finalized, prices for these tours were [----------REDACTED----------].

Table 1a: Summary of [------REDACTED------] (in U.S. Dollars)

----------REDACTED----------

source: [----------REDACTED----------]
[----------REDACTED----------]
Note: [----------REDACTED----------].

Table 1b: Summary of [——-REDACTED-----] (in Percentage terms)

----------REDACTED----------

source: [----------REDACTED----------]
[----------REDACTED----------]
Note: [----------

----------REDACTED----------

----------].

14. When comparing these [----------REDACTED----------
----------], Gray Line had [----------
----------REDACTED----------
----------] after the joint venture was finalized). For City Sights, as described by Dr. Willig, its Downtown tour, Uptown tour, Brooklyn tour and Night tour accounts for 65%, 20%, 5% and 10% of total riders (Exhibit 4). The following table shows that the prices for these tours have been [----------
----------REDACTED----------
----------].

Table 2: Summary of [------REDACTED------] (in U.S. Dollars)

----------REDACTED----------

source: [----------REDACTED----------]

15. These [----------REDACTED----------] allowed the newly formed entity to exercise market power, beyond the extent to which it

could be achieved before the consolidation. This is not surprising since as stated in one of Gray Line's internal documents, introduced by Dr. Willig, stated that one of the benefits from the joint venture is "[E]asier decision making as sole player in 'double deck' market." This evidence directly contradicts Dr. Willig's conclusion that the joint venture does not increase market power or increase the likelihood of anticompetitive effects.

16. The double-decker bus tour products do not compete directly with non double-decker tour products. This is clearly evident in the fact that Gray Line has not increased prices of tours not on double-decker buses. Prices on these tours dropped between 3% to 31% in January of 2010 (see Table 1). The fact that the consolidated entity chose to increase prices on double-decker tours but not on non double-decker tours suggests that the double-decker tours form their own product segment market. That is, tours by non double-decker bus tours do not compete directly with tour by double-decker bus tours.
17. Dr. Willig pointed out that the joint venture brings together 59 double-decker buses, 12 motor coaches, and 16 miscellaneous support vehicles from Gray Line and 62 double-decker buses and 8 additional such vehicles to be built from City Sights (see Exhibit 4). That is, besides the support vehicles, the joint company has a total of 141 vehicles. Assuming each vehicle generates similar revenues, this indicates that over 90% of the consolidated company's revenue is related to the double-decker product segment market. This suggests that one of the major economic impacts of the joint venture is the creation of a monopolist in the double-decker bus tour product segment.

Dr. Willig's Conclusion of Ease of Entry Relies on Imbalanced Comparisons

18. Dr. Willig has concluded that there are no barriers to entry. He claims that anyone can easily obtain regulatory approval from the New York City Department of Transportation for bus stops where double-decker passengers could be picked up and dropped off. He based his claim on the experience of City Sights which had no difficulty in obtaining approval from the Department for more than 50 well-situated bus stops throughout New York City since its inception in 2005. Dr. Willig did not consider that the New York City Department of Transportation's decisions regarding the approval of additional bus stops in connection with new applications will likely include the evaluation of elements such as the number of double-decker bus-stop already in the city and how frequently these bus stops are in use. The number of double-decker bus stops and double-decker buses in New York City has greatly increased since City Sights's inception. City Sights owned

approximately half of the total number of double-decker buses in New York City by 2009. Dr. Willig has thus not made a valid comparison when evaluating the probability that a new entrant could gain approval for additional bus stops.

19. It is also an invalid comparison when Dr. Willig argues that potential entrants' success in entering other geographic markets suggests that entry could easily occur in New York City's more mature market. Dr. Willig disregards unique characteristics of each geographic market such as different degrees of market concentration indicated, for example, by different numbers of existing bus stops per square mile.

V. Dr. Willig's Response to NYSAG's Comments

Dr. Willig Claims that the Relevant Market and the Market Share Estimate Proposed by the NYSAG Lacks Economic Support

20. Dr. Willig argues that the relevant markets proposed by the NYSAG lack economic support. Dr. Willig challenges the NYSAG's estimated change in market concentration in the double-decker bus tour product market segment due to the joint venture (approximately 90%) is "grossly misleading." Surprisingly, Dr. Willig's claim contradicts the statements in one of the very documents which he introduced as part in his analysis. The document stated that the cost savings from the joint venture will in part be derived from "Easier decision making as sole player in 'double deck' market" (see Exhibit 1). This confirms that the joint venture creates a monopolist in the double-decker tour bus product market segment.

21. Dr. Willig further contends that the NYSAG's analysis is misleading because it uses the number of routes in its estimate and ignores the actual sales. The NYSAG did not have access to the sales figures or the number of buses employed from all competitors in the market at the time of the estimation. With the limited information available to the NYSAG, the NYSAG used an alternative method to summarize and describe the impact of the joint venture on market concentration. In particular, NYSAG used the number of routes as a proxy for the sales by the various competitors in the market. It is not uncommon to use such proxies in an economic analysis when data are limited. Moreover, the evidence suggests that Dr. Willig's critiques are unfounded and that the NYSAG's approximation correctly reflects the parties' dominant market share. The parties' own statements that the joint venture will create "a sole player in the 'double-

deck' market" confirm the NYSAG's market definition and assessment of market domination.

Dr. Willig Claims that NYSAG's Assessment of Efficiencies and Synergies is Inconsistent with the Economic Evidence

- ***The Efficiencies and Synergies Created by the Joint Venture Could Increase Barriers to Entry***

22. Dr. Willig dismisses NYSAG's concern and economic reasoning that the merged company is likely to achieve some of its cost savings by using its purchasing power to obtain volume discounts and that these discounts would increase barriers to entry in the double-decker tour market. Specifically, Dr. Willig states that "Twin America's fuel, spare parts, and insurance cost savings are not generated from new volume discount but rather by applying the parties' experience in efficiently operating and maintaining buses to the contributed bus assets" (see Exhibit 4). Dr. Willig's claim once again contradicts the factual evidence on which he relied. The one page document which Dr. Wiling submitted as evidence to support his estimate of $7 to $11 million in cost savings from the joint venture includes "increased purchasing power on fuel and attraction costs" as one of the items that generated the $7 to $11 million estimate (see Exhibit 1). In addition, as stated in an email exchange between Gray Line and City Sights "[----------**REDACTED**----------.]" (see Exhibit 5). The [----------REDACTED----------] demonstrates that Gray Line's ownership by a major organization in the transportation industry could intensify the market power of the consolidated entity and increase the barriers to entry. What Dr. Willig claims as an efficiency gain actually puts potential entrants in competition with an incumbent that has the ability to benefit from volume discounts from service providers that further enhance its competitive position.

- ***Cost Savings Do not Always Increase Total Welfare***

23. Dr. Willig argues that NYSAG fails to recognize that the public interest is served by the efficient allocation of labor and physical assets. Dr. Willig first argues that NYSAG does not recognize that the joint venture has proposed more frequent access to buses on the same routes as a source of efficiency generated under the joint venture. Dr. Willig's

critique is unfounded since the parties have not stated in the original application that it will increase more frequent access to buses along the same routes. For example, the joint venture never mentioned the implementation of cross-ticketing. Thus, NYSAG had no basis for discussing this issue in its comments on the application. As stated in the previous section, cross-ticketing between the Gray Line and City Sights could theoretically, under particular conditions, enhance consumer benefits by reducing waiting time, and increasing the occupancy per bus. However, Dr. Willig's claim that this is likely to occur in this specific case is speculative and contradicts economic logic. The consolidated entity has already decreased the number of double-decker buses by 20 in service in New York since the time the two parties entered into the agreement (see Verified Statement of Professor Robert D. Willig, annexed hereto as Exhibit 4). Cross-ticketing could only work to decrease waiting time if there is enough free space on the vehicles to accommodate the same number of passengers. According to Dr. Willig, the joint venture brings together 59 double-decker buses, 12 motor coaches, and 16 miscellaneous support vehicles from Gray Line as well as 62 double-decker buses and 8 additional such vehicles to be built from City Sights (see Exhibit 4). Based on this information, the joint entity has already removed 9% of the capacity of double-decker buses in the New York market. Although the scheduled time could be shortened by the flexibility to ride on buses from both of the previously independent companies, if the buses are more often full due to the lower overall seating capacity, passengers will have to spend more time waiting for the next bus with free space. Thus the mere fact that the waiting time between bus arrivals would decrease does not necessarily indicate that passengers overall will have a shorter waiting time, as this depends on the availability of space. With the 9% decrease in bus capacity already in place, Dr. Willig's efficiency claim regarding the merger decreasing waiting time and increasing the occupancy per bus is speculative. Furthermore, any potential economic efficiency benefits to customers from decreases in waiting time would be eroded if a complete implementation of cross-ticketing leads to the elimination of routes or the number of stops, or decreases stopping times at each route.

24. Dr. Willig then argues against the NYSAG's concern that the joint venture could harm the public interest through the firing current's carrier employees. Dr. Willig suggests that firing a carrier's current employees is welfare enhancing because these workers are being released to the market to be deployed for more productive uses in the economy. Dr. Willig does not provide any evidence that individuals who have been fired by the joint

venture have been able to secure alternative jobs, not to mention work placement for more productive activities compared to their prior employment. On the contrary, Dr. Willig fails to incorporate the current high employment rate in the economy into his analysis. The potential unemployment benefits paid to the workers who were fired by the joint venture and the lost in productivity because these displaced workers are spending time searching for jobs instead of producing services are additional costs that would reduce any efficiency gains from labor force reallocation.

- ***Dr. Willig Criticizes the NYSAG Asserted that Consumers Only Benefit from a Merger when Cost Savings from the Merger are Passed Along in the From of Lower Prices***

25. Dr. Willig criticizes the NYSAG asserted that "consumers only benefit from a merger when cost savings from the merger are passed along in the form of lower price." (see Exhibit 4). Dr. Willig is correct that consumers could technically still benefit from a merger if prices for the original product do not fall, or even increase, in the case that the quality of the product being provided is increasing at the same time. However, even in this case, the benefits to consumer are still based on the reduction in prices for the product after adjusting for quality. The NYSAG's response to the application was focused on changes in tour prices without discussion of potential changes in the quality of the service. This is because the original application did not propose such improvements, such as Dr. Willig's claims of waiting time reductions due to cross-ticketing. Dr. Willig further discounts the NYSAG concern that the joint venture could lead to higher prices by stating that "There is no economic evidence that the Twin America joint venture is able to exercise market power to raise price ..." (see Exhibit 4). As pointed out in the previous section, price increases are not only anticipated by the parties but already have been realized. The joint venture anticipated a [**REDACTED**], which was estimated to cost consumers approximately[**REDACTED**](see Exhibit 2). In addition, around the time when the joint venture agreement was being finalized, prices for [----------

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----------**REDACTED**----------

----------**REDACTED**----------] since the two companies consolidated during the first quarter of 2009.

The Joint Venture's Impact on Ticket Agents Raises Anticompetitive Concerns

26. Dr. Willig questions NYSAG's concerns that the joint venture could harm competition in the provision of tour marketing services by ticket agents, and could foreclose entrants to the marketing business from gaining access to ticket sources. Dr. Willig's argument is that competition will not be reduced because Twin America must continue to pay ticket agents enough commissions to induce them to sell Twin America's products rather than selling competing products. However, as pointed out in the previous section, Dr. Willig is aware that the joint entity is a monopolist in the double-decker bus tour product market segment. If agents want to sell double-decker bus related products, the only provider is Twin America. Tours by non double-decker buses do not compete directly with tours by double-decker buses. Thus, the joint venture has the potential to exercise its market power and raises competition concerns in the business of marketing double-decker bus tours.

Kitty K. Chan

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February 1, 2010

PUBLIC VERSION

EXHIBIT 1

STB Docket No. MC-F-21035

GRAY LINE / CITY SIGHTS PARTNERSHIP

Combine both businesses going forward operating as one in New York market.

Benefits of Combined Business

- **Synergies,** savings on our respective cost bases of between 10% - 15%, estimated at between $7m - $11m on the combined business
  - Reduction in street sellers
  - Renegotiated 3rd party commissions (particularly hotel concierge group)
  - Combined approached to advertising – reducing our overall marketing & advertising spend
  - Reduced administration / overhead costs
  - Fleet reduction (?)
  - Increased purchasing power on fuel and attraction costs

- **Reduced Risk of Regulation,** the threat of regulation by the City would decrease
  - Reduced number of street sellers
  - Much reduced conflict between street sellers
  - One point of contact for administration matters

- **Management**
  - Best of both worlds, combining / stream lining respective management teams
  - Easier decision making as sole player in "double deck" market

- **Competition**
  - A combined entity will be better positioned to deal with a new market entrant
  - Flexibility regarding pricing

PUBLIC VERSION

EXHIBIT 2

STB Docket No. MC-F-21035

EXHIBIT 2 is REDACTED in its Entirety

PUBLIC VERSION

EXHIBIT 5

STB Docket No. MC-F-21035

EXHIBIT 5 is REDACTED in its Entirety

CERTIFICATE OF SERVICE

I certify that I have on this 1st day of February, 2010 served a copy of the foregoing Sur-Reply of the State of New York to Reply of Applicants to Comments of New York State Attorney General Dated November 17, 2009 by overnight courier to:

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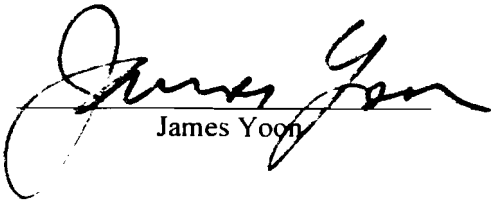

James Yoon