

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ANTITRUST BUREAU

In the Matter of

Assurance
No. 19-103

**Investigation by LETITIA JAMES,
Attorney General of the State of New York, of**

Hornblower Group, Inc.,

Respondent.

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“OAG”) commenced an investigation pursuant to Section 343 of the New York General Business Law, Section 63(12) of the New York Executive Law, the Donnelly Act, and Section 7 of the Clayton Act concerning the potential harm to competition caused by Hornblower Group, Inc.’s (“Hornblower” or “Respondent”) acquisition of Entertainment Cruises, Inc. (“EC”) (“the Acquisition”). The OAG investigation focused on the potential anticompetitive effects of the Acquisition on consumers in New York State. As part of its investigation, the OAG, among other things, obtained testimony from numerous market participants, gathered and analyzed relevant market data, and reviewed documents and information produced by Hornblower and EC.

This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s investigation and the relief agreed to by the OAG and Hornblower (collectively “Parties”).

OAG’s FINDINGS

1. The relevant product markets are (1) public ticketed dining cruises on the New York Harbor (“Ticketed Dining”) and (2) chartered dining cruises on the New York Harbor (“Charters”) (referred to together as “Dining Cruises”). The relevant geographic market for both

of these products is New York City. Post-Acquisition, Hornblower faces limited competition in both markets, and is particularly dominant in Ticketed Dining.

2. EC was founded in 1978, and, pre-Acquisition, was the largest Dining Cruise company in the United States. It operated approximately 7500 Dining Cruises per year in the United States, and approximately 1500 Dining Cruises per year in New York, serving over 250,000 yearly customers. In New York City, its primary dining vessels included Spirit of New York, Bateaux New York, and Atlantica. Each of these vessels has the capacity to serve hundreds of dining guests. For at least 10 years prior to the Acquisition, the vast majority of EC's revenue in New York City came from Dining Cruises.

3. Hornblower is based in California, and was founded in 1980. At the time of the Acquisition, it was the second largest Dining Cruise company in the United States, in addition to being a leading operator of yacht sightseeing tours and events. It operated over 5000 Dining Cruises per year in the United States, and approximately 1100 Dining Cruises in New York, serving over 125,000 yearly customers. In New York City, its primary dining vessels were the Infinity, Hybrid, and Sensation. Each of these vessels has the capacity to serve hundreds of dining guests.

4. Customers for Dining Cruises are typically New York City tourists or residents.

5. Since Hornblower entered the New York City market in 2012, Hornblower and EC have been close competitors for Dining Cruises.

6. In order to run a successful Dining Cruise business, operators need, among other things, (1) large, modern, and attractive vessels ("Vessels") and (2) overnight dock locations that are near the sightseeing attractions of the New York Harbor, and have access to signage, ticket booths, parking, electricity, sewage, refrigeration, and trash removal ("Dock Space").

7. Building a Vessel takes at least 2 years. However, several companies outside the relevant geographic market already have Vessels, and could potentially enter the market if Dock Space was available.

8. Dock Space is very limited, and a substantial barrier to new entry. Many potential piers do not permit, or are not suitable for, large commercial yachts to dock overnight. Others are not equipped to provide signage and ticket booths, or do not have sufficient electricity or sewage connections to support the preparation, storage, and disposal of food.

9. Pre-Acquisition, both Hornblower and EC had long-term permits for Dock Space in prime Manhattan locations, including Piers 15, 40, and Chelsea Piers.

10. The OAG finds that a potential new Dining Cruise competitor would need to secure sufficient Dock Space to operate multiple Vessels, in order to achieve the scale necessary to replace the competition lost by the Acquisition. The OAG further finds that a potential new competitor could not currently do so.

11. Given the current entry barriers, the OAG finds that the Acquisition is likely to result in increased prices, lower quality, and less innovation for Dining Cruises.

12. The OAG additionally finds that the Acquisition may substantially lessen competition in the Dining Cruise market in violation of the Donnelly Act, Gen. Bus. Law § 340 et. seq., the Clayton Act § 7 (15 U.S.C. § 18), and Executive Law § 63(12).

13. Hornblower neither admits nor denies OAG's Findings 1-12 above.

14. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding for potential violations

of Executive Law § 63(12), the Donnelly Act, Gen. Bus. Law § 340 et. seq., and the Clayton Act § 7 (15 U.S.C. § 18).

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

RELIEF

15. Following the date of this Assurance, Hornblower will comply with the following provisions:

- a. Within 150 days, Hornblower will divest to a buyer approved by the OAG (“Buyer”) a minimum of 600 linear feet of Dock Space and 1000 square feet of interior space at Pier 40 (“the Divested Assets”). In the alternative, within that same time period, Hornblower will divest to a Buyer a minimum of approximately 600 linear feet of Dock Space and 1000 square feet of interior space at Pier 15 or Chelsea Piers (“the Alternate Divested Assets”).¹ Hornblower will divest the Divested Assets or Alternate Divested Assets (together, “Assets”) by sublease, subpermit, or assignment (“Transfer”) of the applicable permit or lease interest (“the Divestiture”). Where applicable, all of the provisions of this AOD that apply to the Divested Assets also apply to the Alternate Divested Assets. Hornblower must grant the Buyer exclusive use of the Assets, and the Buyer must agree to use the Assets to operate Dining Cruises. To the extent there are any limitations on the Buyer’s use of the Assets to operate Dining Cruises, Hornblower must take all reasonable steps to remove

¹ Hornblower has no obligation to divest space at Pier 61 or Pier 78 under this AOD, but may do so in its sole discretion, if approved by the OAG.

those limitations prior to the Divestiture, including, but not limited to, rescinding any exclusivity rights it might have. To the extent there are any pier improvements necessary for the Buyer to use the Assets to operate Dining Cruises (e.g., adding sewage lines), Hornblower must take all reasonable steps to make those improvements prior to the Divestiture. Hornblower may not use any remaining area of the pier for Ticketed Dining. The Divestiture must be consistent with the purpose of creating an independent, viable, and effective competitor in the relevant market, and to remedying the lessening of competition resulting from the merger as alleged in Findings 1-12 above.

- b. No agreement may be finalized between Hornblower and Buyer without the OAG's written approval.
- c. While Hornblower and Buyer work to finalize the Divestiture, Hornblower will immediately permit the Buyer unlimited pick-up and drop-off ("PUDO") access at Pier 40. The only fee that Hornblower may charge for PUDO access is the minimum fee required in its permit agreement for the pier ("PUDO Fee"). Once the Divestiture is completed, Hornblower will credit to the Buyer the portion of the PUDO Fee paid to Hornblower (but not the portion paid to the permitor under the permit between Hornblower and the permitor).
- d. In the event that Hornblower is unable to complete the Divestiture as contemplated in Paragraph 15a, OAG may appoint a divestiture trustee ("Trustee") to do so. The Trustee shall have the right, in its sole

discretion, to select the method for completing the Divestiture; *provided*, *however* that the Trustee must start with the minimum Assets, and consider and pursue in good faith any reasonable request by Hornblower for the pier order for attempting to divest the Assets.

- i. OAG shall select the Trustee, subject to the consent of Hornblower, which shall not be unreasonably withheld. If Hornblower has not opposed, in writing, including the reasons for opposing, the selection of any proposed Trustee within five days after notice by the OAG to Hornblower of the identity of the proposed Trustee, Hornblower shall be deemed to have consented to the selection of the proposed Trustee.
- ii. Within ten days after appointment of the Trustee, Hornblower shall execute a Trust agreement that, subject to the prior approval of the OAG, transfers to the Trustee all rights and powers necessary for the Trustee to complete the Divestiture, including, but not limited to, the right to retain counsel to litigate on behalf of Hornblower.
- iii. The Trustee, and any attorneys or agents retained by the Trustee, shall serve at the reasonable expense of Hornblower and shall have full access to the personnel, books, records, and facilities related to the Divestiture process, or to any other relevant information as the Trustee may request. Respondents shall develop such financial or other information as such Trustee may request and shall fully cooperate with the Trustee. Respondents shall take no action to

interfere with or impede the Trustee's accomplishment of the Divestiture, and shall take all reasonable actions necessary to accomplish the Divestiture.

- iv. The Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available, subject to Hornblower's obligation to divest at no minimum price. If the Trustee receives bona fide offers from more than one Buyer, and if the OAG determines to approve more than one such Buyer, the Trustee shall divest to the Buyer selected by Hornblower from among those approved by the OAG; *provided, however*, that Hornblower shall select such Buyer within five days of receiving notification of the OAG's approval.
- v. The Trustee shall have 180 days from the date of execution of the Trust agreement, unless extended by the OAG, to divest the Assets, which shall be subject to prior approval of the OAG.
- e. After 180 days from the date of execution of this AOD, if Hornblower is unable to complete the Divestiture as contemplated in Paragraph 15a, the Parties agree that it would be difficult to value the damages caused by default in performance, and therefore agree that Respondent shall pay to the State of New York a stipulated penalty of \$400,000, and an additional monthly penalty each month that the default continues ("Monthly Penalty") as follows: (i) \$50,000 per month for months 1 through 24, (ii) \$75,000 per month for months 25 through 36, (iv) \$100,000 per month for

months 37 through 60; such Monthly Penalty to be paid until the earlier of (a) the date the Divestiture is completed or (b) April 2025 (“Penalty”); *provided, however*, that expenses Hornblower pays for the Trustee, and any attorneys or agents retained by the Trustee, will be credited towards the Penalty. If Hornblower demonstrates to the OAG that unanticipated material difficulties have resulted in unavoidable additional delays to the Divestiture, the OAG may, in its sole discretion, agree to forgo some or all of the Penalty.

- f. The OAG will, if applicable, support Hornblower’s efforts to obtain necessary third party consents.

16. Hornblower shall not take any action that will jeopardize, delay, or impede in any way the Divestiture or process for completing the Divestiture.

17. Hornblower may not acquire or partner with the Buyer, or otherwise control any decisions made by the Buyer, without the written consent of the OAG.

18. Hornblower must divest the Assets for the full remainder of the permit or lease term, including any rights to renewal or extension (“the Permit Term”). If Hornblower seeks to reacquire the Assets at the end of the Permit Term, but prior to the end of this AOD, it must notify the OAG and Buyer at least 120 days in advance, and offer the Buyer alternative Assets, and Transfer the alternative Assets to the Buyer within 30 days; *provided, however*, that Hornblower will have no obligation to offer or Transfer Dock Space to the Buyer after the end of this AOD. In the event Hornblower and the Buyer cannot come to an agreement, or Hornblower otherwise cannot Transfer the alternative Assets within 30 days, OAG may, at its discretion, select an alternate Buyer, and Hornblower must offer the alternate Buyer the alternative Assets;

provided, however, that Hornblower will have no obligation to offer or Transfer Dock Space to the alternate Buyer after the end of this AOD. After an additional 30 days, if Hornblower remains unable to Transfer the alternative Assets, OAG may appoint a Trustee as per Paragraph 15d and Hornblower must make the payments required in Paragraph 15e.

19. In the event that Buyer's right to use the Assets for the operation of Dining Cruises is terminated prior to the expiration of the Permit Term, Hornblower must offer the Buyer alternative Assets, and use best efforts to Transfer such alternative Assets to the Buyer as soon as possible, but within 45 days; *provided, however*, that (1) if the Buyer's termination was due to its willful material breach of the subpermit, sublease or assignment, is provided notice, and does not cure within 30 days, Hornblower can satisfy its obligations using best efforts to Transfer the remaining Permit Term to an alternate Buyer as soon as possible, but within 45 days; and (2) Hornblower may restrict the length of the subpermit, sublease, or assignment for the alternative Assets to 5 years. In the event, Hornblower and the Buyer cannot come to an agreement, or Hornblower otherwise cannot Transfer the alternative Assets within 45 days, OAG may, at its discretion, select an alternate Buyer, and Hornblower must offer the alternate Buyer the alternative Assets. After an additional 45 days, if Hornblower remains unable to Transfer the alternative Assets, OAG may appoint a Trustee as per Paragraph 15d and Hornblower must make the payments required in Paragraph 15e.

20. This Assurance will terminate, without any further action by the Parties, 10 years from the last date signed by the Parties, unless terminated earlier by the mutual agreement of the Parties.

21. Hornblower shall provide the OAG with a certification affirming its compliance with the requirements set forth in this Assurance, to be submitted to the OAG by December 31,

2019. This certification shall be in writing and be signed by Hornblower. Thereafter, a certification of compliance shall be submitted to the OAG on an annual basis. In any case where the circumstances warrant, the OAG may require Hornblower to file an interim certification of compliance upon thirty (30) days notice.

MISCELLANEOUS

Subsequent Proceedings:

22. Respondent expressly agrees and acknowledges that the OAG may initiate a subsequent investigation, civil action, or proceeding to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to Paragraph 28, and agrees and acknowledges that in such event:

- a. any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;
- b. the OAG may use statements, documents or other materials produced or provided by the Respondent prior to or after the effective date of this Assurance;
- c. any civil action or proceeding must be adjudicated by the courts of the State of New York, and that Respondent irrevocably and unconditionally waives any objection based upon personal jurisdiction, inconvenient forum, or venue;
- d. evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law pursuant to Executive Law § 63(15).

23. If a court of competent jurisdiction determines that the Respondent has violated the Assurance, the Respondent shall pay to the OAG the reasonable cost, if any, of obtaining

such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

Effects of Assurance:

24. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of the Respondent. Respondent shall include any such successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the OAG.

25. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

26. Any failure by the OAG to insist upon the strict performance by Respondent of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the OAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by the Respondent.

Communications:

27. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 19-103, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows: If to the Respondent, to: Mitchell Randall, or in his/her absence, to the person holding the title of General Counsel. If to the OAG, to the person holding the title of Bureau Chief, Antitrust Bureau.

Representations and Warranties:

28. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by the Respondent and their counsel and the OAG's own factual investigation as set forth in Findings, Paragraphs 1-12 above. The Respondent represents and warrants that neither it nor its counsel has made any material representations to the OAG that are inaccurate or misleading. If any material representations by Respondent or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

29. No representations, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Respondent in agreeing to this Assurance.

30. The Respondent represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved. Respondent further represents and warrants that Hornblower, by Mitchell Randall, as the signatory to this AOD, is a duly authorized officer acting at the direction of the Board of Directors of Hornblower.

General Principles:

31. Unless a term limit for compliance is otherwise specified within this Assurance, the Respondent's obligations under this Assurance are enduring. Nothing in this Agreement shall relieve Respondent of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

32. Respondent shall not in any manner discriminate or retaliate against any of its employees, including but not limited to employees who cooperated or are perceived to have cooperated with the investigation of this matter or any future investigation related to enforcing this agreement.

33. Respondent agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any finding in the Assurance or creating the impression that the Assurance is without legal or factual basis.

34. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that the Respondent violates the Assurance after its effective date.

35. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

36. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

37. Respondent acknowledges that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

38. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

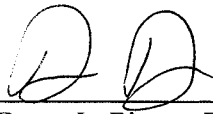
39. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

40. This Assurance may be executed in multiple counterparts by the parties hereto. All counterparts so executed shall constitute one agreement binding upon all parties, notwithstanding that all parties are not signatories to the original or the same counterpart. Each counterpart shall be deemed an original to this Assurance, all of which shall constitute one agreement to be valid as of the effective date of this Assurance. For purposes of this Assurance, copies of signatures shall be treated the same as originals. Documents executed, scanned and

transmitted electronically and electronic signatures shall be deemed original signatures for purposes of this Assurance and all matters related thereto, with such scanned and electronic signatures having the same legal effect as original signatures.

41. The effective date of this Assurance shall be September 30, 2019.

LETITIA JAMES
Attorney General of the State of New York
28 Liberty Street
New York, NY 10005

By: 
Bryan L. Bloom, Esq.
Assistant Attorney General, Antitrust Bureau

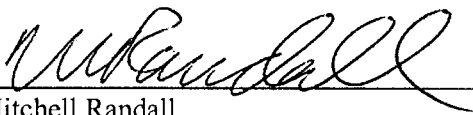
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Chris D'Angelo, Esq.
Executive Deputy Attorney General for Economic
Justice

Hornblower Group, Inc.

By: 
Mitchell Randall
Vice President & General Counsel

STATE OF California)
) ss.:
COUNTY OF San Francisco)

On the 30th day of September in the year 2019 before me personally came Mitchell Randall to me known, who, being by me duly sworn, did depose and say that he resides in Pleasant Hill, CA; that he is the General Counsel of Hornblower Group, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name thereto by like authority.

Sworn to before me this
Thirtieth day of September 2019 _____
NOTARY PUBLIC



