To Be Argued By:
MAURICE N. ROSS
Time Requested: 15 Minutes

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

TAXI TOURS INC.,
Plaintiff-Counterclaim Defendant,
—against—
GO NEW YORK TOURS, INC.,
Defendant-Appellant.

CASE NO. 2022-01029

GO NEW YORK TOURS, INC.,
Counterclaim Plaintiff-Appellant,
—against—
BIG BUS TOURS LIMITED, GO CITY LIMITED, GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA, LLC, SIGHTSEEING PASS LLC,
Counterclaim Defendants-Respondents,
—and—
GO CITY NORTH AMERICA, LLC, GO CITY, INC., TAXI TOURS INC., OPEN TOP SIGHTSEEING USA, INC.,
Counterclaim Defendants.

BRIEF FOR DEFENDANT/COUNTERCLAIM PLAINTIFF-APPELLANT

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INTRODUCTION

Counterclaim-plaintiff/appellant Go New York Tours, Inc. ("Go New York") appeals from the Decision and Order of the Hon. Jennifer Schecter dated December 2, 2021 and entered on January 3, 2022 (referred to herein as the "Order"). By the Order, the court (i) granted the motion of counterclaim-defendants/respondents Gray Line New York Tours, Inc. ("Gray Line NY"), Twin America, LLC ("Twin America"), and Sightseeing Pass LLC (referred to herein collectively with Gray Line NY and Twin America as the "Gray Line Defendants") to dismiss, pursuant to CPLR 3211(a)(7), Go New York's First Counterclaim for antitrust violations under the Donnelly Act, Gen. Bus. L. § 340, and Second Counterclaim for tortious interference, for failure to state a cause of action. By the same Order, the court granted the motion of counterclaim-defendants/respondents Big Bus Tours Limited and Go City Limited[1] to dismiss, pursuant to CPLR 3211(a)(8), all of Go New York's counterclaims against them for lack of personal jurisdiction. (All counterclaim defendants/respondents are referred to herein collectively as "Defendants".)

[1] On August 13, 2021, attorneys for the counterclaim-defendants formerly know as The Leisure Pass Group Limited, Leisure Pass North America, LLC, and Leisure Pass Group, Inc., filed a "Notice of Counterclaim Defendants' Name Change" stating that those parties had changed their names to Go City Limited, Go City North America, LLC, and Go City, Inc., respectively. By so-ordered stipulation entered on October 7, 2021 (R. 117-20), the motion court amended the case caption to reflect the name changes. Go New York refers to those parties herein by their current "Go City" names in accordance with the current case caption. In the Record on Appeal, however, those parties are generally referred to by their previous "Leisure Pass" names.

The motion court wrongly dismissed Go New York's Donnelly Act counterclaim by incorrectly employing an overly strict pleading standard and failing to acknowledge the Donnelly Act's broad scope, to hold that Go New York's factual allegations were not sufficient to infer an implicit or express conspiracy among the defendants. While acknowledging that the stricter pleading standard under the federal rules for pleading an antitrust conspiracy articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*[2] is not applicable to a Donnelly Act claim in New York State court, the motion court nevertheless applied effectively the same federal pleading standard to dismiss the counterclaim.

The motion court also misapplied an overly strict standard to wrongly dismiss Big Bus Tours Limited on jurisdictional grounds.[3] Under established New York law, Go New York made a "sufficient start",[4] based on the limited facts available pre-discovery, toward establishing personal jurisdiction over it, warranting either dismissal of the motion or, at the least, a stay pending jurisdictional discovery.

QUESTIONS PRESENTED

1. Did the motion court err by applying a pleading standard equivalent to the federal pleading standard articulated for federal antitrust claims in *Bell Atlantic*

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2 550 U.S. 544 (2007).

3 Go New York does not appeal the dismissal of Go City Limited from this case.

4 *James v. iFinex Inc.*, 185 A.D.3d 22, 30 (1st Dep't 2020).

Corp. v. Twombly to Go New York's Donnelly Act counterclaim in this state court case?

Answer: Yes. While the motion court acknowledged the more liberal notice-pleading standard applicable in New York State courts, the court nevertheless incorrectly applied the *Twombly* pleading standard by examining whether there was a rational non-conspiratorial explanation for the alleged freeze-out of Go New York from trade partnerships with New York city sightseeing attractions ("Attractions"), rather than simply determining whether the facts alleged fit within any cognizable legal theory.

2. Did Go New York plead an anti-competitive conspiracy among Defendants for purpose of the Donnelly Act under the liberal notice-pleading standard applicable in New York State courts pursuant to CPLR § 3013?

Answer: Yes. Go New York alleged the motive for Defendants to conspire to inhibit Go New York's ability to undercut their premium prices for equivalent services in the relevant New York City hop-on, hop-off tour bus market, the refusal of multiple sightseeing attractions ("Attractions") to enter into or to continue trade partnerships with Go New York, and statements by the Attractions that Defendants had pressured or persuaded them not to partner with Go New York, including under threat of losing Defendants' business. Those allegations are

sufficient to allege an anti-competitive conspiracy under the notice-pleading standard of CPLR § 3013.

3. Did Go New York make a "sufficient start" toward demonstrating personal jurisdiction in this case over Big Bus Tours Limited so as to warrant either dismissal of the motion to dismiss or a stay pending jurisdictional discovery?

Answer: Yes. The motion court incorrectly relied on pro forma denials in an affirmation by Big Bus Tours' UK-based Group Chief Financial Officer[5] ("CFO") that Big Bus Tours Limited does not derive substantial income from or control the day-to-day operations of its subsidiaries Taxi Tours, Inc. ("Taxi Tours") and Open Top Sightseeing USA, Inc. ("OTS USA") which operate and/or oversee operation of "Big Bus" tour buses in New York City (Taxi Tours and OTS USA are referred to herein collectively with Big Bus Tours Limited as "Big Bus Tours"),[6] notwithstanding that Big Bus Tours Limited concededly provides management services and operational support and derives income from them. In addition, the motion court wrongly accepted and relied on affidavit testimony from Big Bus Tours' Executive Vice President for North America, which Go New York demonstrated through documentary evidence to be materially false. The totality of

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[5] The affiant, Sean Wilkens, avers that he is an officer of "Big Bus Tours" without explaining that term. (R. 183) "Big Bus Tours" appears to be an informal, generic business name used by companies under the "Big Bus" umbrella in both the UK and the United States, and Go New York uses the term in that sense herein.

[6] *See* note 5, *supra*.

the allegations and evidence demonstrate a non-frivolous basis for alleging personal jurisdiction over Big Bus Tours Limited, which under established New York case law is sufficient to avoid dismissal.

NATURE OF THE CASE

This case arose from anti-competitive conduct in the New York City hop-on, hop-off sightseeing tour bus market (the "NYC Market"), which constitutes a relevant product market for purposes of the Donnelly Act. Hop-on, hop-off sightseeing tour buses follow fixed routes through areas of the City of general interest to tourists, allowing their customers to "hop off" a bus at an Attraction or place of interest to them, and then to "hop on" another bus operated by the same company when they are ready to continue their tour. As alleged, there are three main competitors operating hop-on, hop-off tours buses in New York City, including Go New York which operates its tour buses under its "TopView" brand. The other competitors are Gray Line NY and its parent Twin America (referred to herein collectively as "Gray Line"), which operate tour buses under the "Gray Line" and "Citysightseeing" brands, and Taxi Tours and OTS USA, which operate tour buses under the "Big Bus" brand. (R. 63)

Each of the three branded tour bus operations and their affiliates sell their services in large part via multi-attraction sightseeing passes ("Multi-Attraction Passes") which bundle hop-on, hop-off tour bus services with admissions to various

Attractions and tourist activities for a single, discounted price. Multi-Attraction Passes may be offered directly by the tour bus operator or by an affiliate. Big Bus Tours' affiliates Go City Limited, Go City North America LLC, and Go City, Inc. (the "Go City Defendants") offer Multi-Attraction Passes incorporating Big Bus tour buses, and Sightseeing Pass LLC has offered Multi-Attraction Passes incorporating Gray Line tour buses.

In order to be able to offer a Multi-Attraction Pass, a tour bus operator or its affiliate must generally enter into "trade partner" agreements with Attractions. Trade partners agree to make admission to their attractions available at a discounted "net rate" when bundled into a partner's Multi-Attraction Pass. The trade partner benefits by gaining additional customers, and the tour bus operator benefits by earning commissions and attracting additional customers for its tour bus services. The Multi-Attraction Pass has become a primary and essential facility for the tour bus companies to offer and sell their services and to compete in the relevant market. (R. 65-66)

As alleged, Big Bus Tours, their affiliated Go City Defendants, and Gray Line and their Sightseeing Pass LLC affiliate, conspired to freeze Go New York out of the Multi-Attraction Pass facility, by using their combined market power to pressure, persuade, and intimidate Attractions into refusing to enter into or to continue existing trade partnerships with Go New York. Go New York even learned from some of the

Attractions where it already had relationships that Defendants has conveyed to them that if they participated in Go New York's Multi-Attraction Passes, Defendants would cease to include them in their own Multi-Attraction Passes. (R. 67-71)

The motivation for Defendants' anti-competitive conduct is straightforward. Go New York has been able to offer its tour bus services at significantly lower price points than offered by Defendants for equivalent services. Go New York has thereby disrupted Defendants' premium pricing models and threatened their profits. By interfering with Go New York's trade partnerships with Attractions, Defendants illegally gave themselves an unfair competitive advantage over Go New York – the ability to offer Multi-Attraction Passes incorporating popular Attractions that were no longer available to Go New York – while depriving Go New York of its ability to offer competitively priced Multi-Attraction Passes incorporating the Attractions that tourists want to see and, ultimately, depriving consumers of reasonably-priced alternatives. That is precisely the type of anti-competitive conduct which the Donnelly Act is intended to remedy.

STATEMENT OF FACTS

A. The Parties.

1. Go New York

Go New York was founded in New York City in 2011 by its current principal, Asen Kostadinov, with just four buses, and has since expanded its fleet to more than

40 buses, becoming a significant competitor in the NYC Market. (R. 59-60) Lacking the international organizational advantages and brand name recognition of Big Bus Tours and Gray Line, Go New York has grown its TopView sightseeing tour bus business by finding operating efficiencies which enable it to offer its tour bus services at significantly lower prices than offered by Big Bus Tours or Gray Line. For example, Go New York introduced recorded audio guides via headsets in lieu of live tour guides, and introduced a mobile app with which its customers could track TopView buses in real time so that they can better plan their activities. The prices at which Go New York is able to offer its TopView sightseeing tours to consumers regularly undercut the prices offered by Big Bus Tours and Gray Line for equivalent services by 20 to 40 percent. (R. 64)

Go New York has thus expanded the affordable offerings available to consumers in the NYC Market, who are free to compare the respective offerings of the three major companies and to decide whether they wish to pay less for TopView, or to pay more for the specific offerings of Gray Line or Big Bus Tours. (R. 64) Unsurprisingly, Gray Line and Big Bus Tours did not welcome the disruptive impact on their established higher price structures.

2. <u>The Gray Line Defendants</u>

The Gray Line Defendants are related companies based in New York. (R. 62-63) Gray Line has operated hop-on, hop-off sightseeing tour buses in New York

City under the "Gray Line" and "City sights" brand names,[7] and is a franchisee or licensee of Gray Line Worldwide, which represents itself as the world's largest provider of sightseeing tours. (R. 63) Gray Line's affiliate Sightseeing Pass LLC creates and sells Multi-Attraction Passes. (R. 65)

3. Big Bus Tours and the Go City Defendants

Taxi Tours and OTS USA are wholly owned (directly and/or indirectly) subsidiaries of Big Bus Tours Limited, and all are members of the UK-based "Big Bus Group" of companies which operates hop-on, hop-off sightseeing tour buses in cities around the world, including New York City. (R. 60) Taxi Tours and OTS USA share the same principal office address in New York, New York. (R. 372, 374) The ultimate parent and controlling entity of the Big Bus group is Big Bus Tours Group Holdings Limited, which, like Big Bus Tours Limited, is incorporated in the UK with the same office address in London, England. (R. 453)

Taxi Tours is the Big Bus Tours entity which operates hop-on, hop-off sightseeing buses in New York City under the "Big Bus" brand, and OTS USA appears to have an operational oversight role in the United States. (R. 17, 175) Big Bus Tours Limited owns the "Big Bus" trademark in the United States (R. 380-81), and is the management company for the Group's local operating entities such as Taxi

[7] Gray Line suspended its sightseeing buses during the recent pandemic and has been offering bus tours on Big Bus tour buses in lieu of Gray Line's. *See, e.g.,* https://www.sightseeingpass.com/en/new-york/attractions/city-sightseeing-uptown-tour.

Tours and OTS USA. Big Bus Tours Limited "acts as the global head office and provides resources, advisory and other services to group entities" such as "corporate strategy, accountancy services, information technology, brand marketing, fleet management and online sales platform." (R. 451) Big Bus-branded services and products are offered and sold on the global "Big Bus Tours" web site operated and maintained by Big Bus Tours Limited. (R. 184) Taxi Tours and OTS USA pay management fees to Big Bus Tours Limited, and Big Bus Tours Limited provided interim financial support to both Taxi Tours and OTS USA during the recent pandemic. (R. 184, 185, 415) The same individual, Patrick Waterman, is Executive Chairman of Big Bus Tours Group Holdings Limited, a director of Big Bus Tours Limited, and Chief Executive Officer of both Taxi Tours and OTS USA. (R. 372, 374, 388, 421)

Evidencing Big Bus Tours Limited's direct involvement in Big Bus operations in New York City, in February 2019, Big Bus Tours Limited entered into a heavily negotiated agreement with Go New York and Gray Line establishing conduct guidelines for the New York City double decker tour bus industry (the "Industry Guidelines Agreement") intended to codify the conduct of the companies' street-level and public-facing employees and providing a mandatory alternative disputes resolution mechanism for disputes among the three signatories. (R. 154-59) Julia Conway, an officer and director of both Taxi Tours and OTS USA who

carries the title "Exec. V.P. North America" [8] of Big Bus Tours (R. 174-76), was personally involved in negotiating the Industry Guidelines Agreement with representatives of Go New York and Gray Line over a period of around five months from September 2018 to February 2019, and signed the agreement on behalf of Big Bus Tours Limited. Big Bus Tours was represented in the negotiations by attorneys of the law firm Davidoff Hutcher & Citron LLP (the "Davidoff Firm"). (R. 313, 323-27, 331-71)

In support of Big Bus Tours Limited's motion to dismiss on jurisdictional grounds, Ms. Conway submitted an affidavit denying her involvement in drafting the Industry Guidelines Agreement and implausibly claimed she simply "did not notice" that Big Bus Tours Limited was identified as the contracting party throughout the agreement and above her signature line, and thought she was signing on behalf of Taxi Tours (R. 175-76) – notwithstanding the substantial documentary evidence to the contrary that Ms. Conway was deeply involved in the negotiations over around five months with Big Bus Tours' outside counsel. (R. 331-71) Ms. Conway's affidavit appears to be deliberately intended to mislead the motion court.

[8] *See, e.g.*, Comments Received by the Department of Consumer Affairs on Proposed Rule related to Licensing of Ticket Sellers (Oct. 2, 2017), at 3, available at https://www1.nyc.gov/assets/dca/downloads/pdf/about/PublicComments-LicensingofTicketSellers.pdf; "Women in Buses" Membership Directory, at 15, available at https://www.buses.org/assets/images/uploads/general/Women%20in%20Buses%20Council%20Directory-%202017(7).pdf.

Both Ms. Conway and Big Bus Tours' Group CFO have denied that she was authorized to bind Big Bus Tours Limited to the Industry Guidelines Agreement. (R. 176, 185) Nevertheless, regardless of whether that is true, it is apparent that Ms. Conway, as Big Bus Tours' Executive Vice President for North America, and Big Bus Tours' outside attorneys at the Davidoff Firm, assumed and believed that Big Bus Tours Limited was the correct entity to be responsible for street-level conduct of Big Bus employees in New York City.

The Go City Defendants are members and the main trading companies of the UK-based "Go City Group" of companies. (R. 499, 528) The Go City Defendants "are specialists in inbound tourism, designing and managing sightseeing city passes … [which] allow holders entry to a large number of attractions in the destination [city] through paying one price." (R. 499) The ultimate parent and controlling entity of the Go City Group is Go City Holdings Limited (f/k/a The Leisure Pass Group Holdings Limited), which, like Go City Limited, is incorporated in the UK. The UK companies share the same office address in London, England. (R. 494, 538)

The Big Bus and Go City Groups share common ownership and overlapping management. The ultimate controlling party of the Big Bus Group is an affiliate of the UK private equity firm, Exponent Private Equity LLP ("Exponent"), which acquired the Big Bus Group in March 2015. (R. 415, 467) The ultimate controlling party of the Go City Group is also an affiliate of Exponent. (R. 494, 538) Big Bus

Tours Group Holdings Limited's director and Executive Chairman, Patrick Waterman, is also a director and shareholder of Go City Holdings Limited. (R. 421, 498, 502)

B. The Anticompetitive Conduct

As alleged, multiple Attractions have told Go New York that they cannot or can no longer work with Go New York, even though they continue to work with both Gray Line and Big Bus Tours. In many instances, the attractions have expressly justified their refusals to work with Go New York as being necessary to preserve their relationships with Gray Line, Big Bus Tours, or both of them.

For example, the popular "Top of the Rock" observatory and tourist facility at Rockefeller Center is included in the Multi-Attraction Passes offered by both Gray Line and Big Bus Tours, but has repeatedly rebuffed attempts by Go New York to establish a trade partner relationship so that Go New York can also include it in its own Multi-Attraction Passes. Go New York even proposed that it would not take any commission or fee, passing the entire discounted rate on to Top of the Rock such that it could charge more to Go New York's customers than to Gray Line's and Big Bus Tours'. Top of the Rock expressly told Go New York that it would need Gray Line's approval to trade partner with it. Absent pressure or coercion from Gray Line and Big Bus Tours, there would be no obvious, rational business reason for Top of

the Rock to reject Go New York while continuing to work with Gray Line and Big Bus. (R. 68-69)

Go New York has also been shut out of the Empire State Building observatory and tourist facility (the "ESB Observatory"), which nevertheless participates in the Multi-Attraction Passes of both Gray Line and Big Bus Tours and their respective affiliates, even after Go New York proposed the same no-commission agreement it had offered to Top of the Rock. The ESB Observatory told Go New York that it had an exclusive relationship with Big Bus Tours' Go City Group affiliates, even though it continues as a trade partner with Gray Line as well. (R. 69)

Similarly, Go New York has been shut out of the One World Observatory at the World Trade Center, which told Go New York that it had an exclusive relationship with Gray Line. Nevertheless, the One World Observatory participates in the Multi-Attraction Passes of Big Bus Tours as well as Gray Line and their respective affiliates. (R. 69)

Go New York was able to enter into a trade partner agreement with the Intrepid Sea, Air, and Space Museum (the "Intrepid"), a major tourist attraction docked at the west side piers in midtown Manhattan, after the Intrepid was already participating in the Multi-Attraction Passes of Gray Line, Big Bus Tours, and their respective affiliates. But just as Go New York began sending its own customers to the Intrepid, the Intrepid unilaterally terminated their agreement and refused to honor

passes held by Go New York's customers. The Intrepid told Go New York that it did so in order to avoid upsetting its other trade partners – i.e. Gray Line, Big Bus Tours, and their respective affiliates. (R. 69-70)

Other New York City attractions that have declined to work with Go New York while still working with both Gray Line and Big Bus Tours include the 9/11 Memorial and Museum, the 9/11 Tribute Museum, the Museum of Modern Art, Madame Tussauds wax museum, and Broadway Inbound, and online platform for travel service providers to sell tickets to Broadway shows. Madame Tussauds shares a degree of common ownership with Big Bus Tours, which might suggest a rational business reason for it to deal only with Big Bus Tours and its Go City affiliates. Nevertheless, there is no apparent rational business reason for Madame Tussauds to work with both Big Bus Tours and Gray Line while still excluding Go New York. Go New York's experience with Broadway Inbound was similar to its experience with the Intrepid. After Broadway Inbound was already working with Gray Line and Big Bus Tours, it opened an account for Go New York, but then suddenly closed Go New York's account, stating that it needed time to review the account and that it might reopen it at some undermined time in the future "once we better understand the local market landscape." (R. 70-72) Representatives of a number of attractions have told Go New York that Gray Line and Big Bus Tours have told them that if the attractions enter into trade partner agreements with Go New York and participate in

Go New York's Multi-Attraction Passes, then they will terminate their own trade partner agreements with the attractions. (R. 72)

While an exclusive trade partner agreement between a tourist attraction and a single sightseeing tour bus company might reflect a rational business decision, there is no apparent rational business reason for multiple New York City attractions to work readily with both Gray Line and Big Bus Tours (and their respective affiliates) while virtually boycotting Go New York and foregoing the additional customers and revenues they would receive. The facts as alleged strongly infer that Gray Line and Big Bus Tours, with their respective affiliates, are working in concert to exclude Go New York from trade partner relationships in order to minimize competition in the NYC Market so that they can charge higher prices for their own Multi-Attraction Passes.

C. The Relevant Procedural History

On March 29, 2019, Go New York filed a federal court action in the Southern District of New York against the Gray Line Defendants, Big Bus Tours, the Go City Defendants, and various affiliated companies, asserting claims for antitrust violations under Sections 1 and 2 of the Sherman Act and the Clayton Act, 15 U.S.C. §§ 1, 2, and 15; antitrust violations under New York's Donnelly Act, Gen. Bus. L. § 340; and various common law claims (the "Federal Action"). Less than two months later, on May 21, 2019, Taxi Tours commenced this action against Go New York in

this Court, asserting causes of action for alleged violations of New York's consumer fraud statutes, unfair competition, defamation, and injurious falsehood.

On November 7, 2019, the federal court, by the Hon. Lewis A. Kaplan, granted the defendants' joint motion to dismiss Go New York's First Amended Verified Complaint for failure to plead a valid claim, with leave for Go New York to amend its pleading. *See Go New York Tours, Inc. v. Gray Line New York Tours, Inc., et al.*, 2019 WL 8435369 (S.D.N.Y. Nov. 7, 2019), *aff'd*, 831 F. App'x 584 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2571 (2021). Go New York then filed its Second Amended Complaint, alleging additional facts in support of the alleged antitrust conspiracy under Section 1 of the Sherman Act, and dropping its claim under Section 2 of the Sherman Act. On March 4, 2020, the federal court granted the defendants' joint motion to dismiss the Second Amended Complaint to the extent of dismissing the Sherman Act Section 1 claim with prejudice, and declined to exercise supplemental jurisdiction over the remaining Donnelly Act and common law claims, dismissing those claims without prejudice. The dismissal was affirmed on appeal. *See id.*

On February 6, 2020, Go New York filed its initial answer and counterclaims in this action, asserting counterclaims against Taxi Tours for violations of the Donnelly Act, Gen. Bus. L. § 340; violations of New York's consumer fraud statutes,

Gen. Bus. L. §§ 349 and 350; and common law tortious interference claims. Subsequently, Taxi Tours discontinued its own remaining causes of action.

On May 25, 2021, Go New York filed (with leave of the Court) its Amended Verified Answer and Counterclaims. (R. 54-83) The amended Counterclaims added the Gray Line Defendants and the remaining Big Bus Tours parties (in addition to Taxi Tours) and Go City Defendants as additional defendants in Go New York's First Counterclaim for violations of the Donnelly Act and Second Counterclaim for tortious interference with business relations. The amended Counterclaims also added the remaining Big Bus Tours parties and Go City Defendants as additional defendants in Go New York's Third and Fourth Counterclaims for violations of the consumer fraud statutes.

On July 16, 2021, Taxi Tours and OTS USA filed their joint reply to the Counterclaims. (R 101-16) On the same date, Go City North America LLC and Go City Inc. filed their joint reply to the Counterclaims. (R. 84-100)

On July 16, 2021, the Big Bust Tours Limited and Go City Limited moved under CPLR 3211(a)(8) to dismiss the Counterclaims against them for lack of personal jurisdiction. (R. 128-29) On July 22, 2021, the Gray Line Defendants moved under CPLR 3211(a)(7) to dismiss the Counterclaims against them for failure to state a cause of action. (R. 188-89)

D. The Order Appealed From.

On December 2, 2021, the motion court heard oral argument remotely on both motions, and ruled from the bench as set forth in the hearing transcript. (R. 9-32) While acknowledging the applicability of the liberal notice pleading standard under CPLR § 3013, rather than the stricter federal pleading standard under which the federal court dismissed Go New York's federal antitrust claims, Justice Schecter nevertheless adopted the federal courts reasoning to dismiss Go New York's Donnelly Act and tortious interference counterclaims:

> [F]or much the same reasons as articulated by Judge Kaplan, and in the context of New York's very liberal pleading standard of [CPLR] 3013, I am going to grant dismissal of the counterclaims. I am going to do both of them, the tortious interference of business relations and, in addition, the Donnelly Act claim. Again, that some attractions have relationships with the counterclaim defendant movants but choose not to do business with the plaintiff doesn't suffice for an inference of conspiracy to move forward. And there are no allegations of unlawful concerted actions by any particular counterclaim defendants. They are parroting the words of conspiracy, but there isn't any specified place, how, to who, or who did it. And it's not a function of giving specific detail, but it's really essential to assessing whether there is a cause of action itself. So the failure to identify any specific participants when it comes to allegations that could support a conspiracy, they are just not there. It's just not true that there is no rational basis for third-parties to do business with defendants and not plaintiffs other than a conspiracy. Conspiracy can't be the only reason, and it's just not sufficient to support a Donnelly Act claim
>
> The tortious interference with business relations counterclaim falls as well because there are insufficient allegations of any wrongful means. There being no allegation of

> any statutory violation that survives or allegation of any tort committed by these movants, the counterclaim -- first and second -- have to be dismissed.

(R. 30-31)

The motion court also dismissed Big Bus Tours Limited and Go City Limited from the case for lack of personal jurisdiction, in reliance on the pro forma denials in the affirmations of officers of those two entities and, significantly, the demonstrably untrue affidavit of Julia Conway. Notwithstanding Go New York's showing through documentary evidence that both Ms. Conway and Big Bus Tours' lawyers knowingly designated Big Bus Tours Limited as the contracting entity responsible for the day-to-day, street-level conduct of Taxi Tours' employees and agents in New York City (R. 331-71), Justice Schecter counterfactually concluded that "[e]verybody agrees that Taxi Tours is the party to the" Industry Guidelines Agreement (R. 11), and held that Go New York had not sufficiently alleged a basis for specific jurisdiction:

> I am going to grant dismissal on personal jurisdiction grounds. I do not see any transaction of business or allegations of a tort by these foreign entities that is related to these causes of action. I just don't see any predicates. So if you do find anything in the course of discovery, then I will see this again, but I am going to grant the motion.

(R. 20)

ARGUMENT

POINT I: GO NEW YORK HAS SUFFICIENTLY PLEADED AN ANTITRUST CLAIM UNDER THE DONNELLY ACT.

The motion court prematurely dismissed Go New York's counterclaim under the Donnelly Act, Gen. Bus. L. § 340, concerning Defendants' conspiracy to freeze Go New York out of the trade relationships necessary for it to offer a competitive Multi-Attraction Pass, a primary, essential facility in the relevant NYC Market. The lower court failed to consider that the Donnelly Act is broader in scope and reach than the federal Sherman Act, and incorrectly applied an overly narrow pleading standard equivalent to the federal standard, rather than the notice pleading standard under CPLR § 3013.

As alleged, the New York City hop-on, hop-off tour bus market has three main competitors, including Go New York which has been able to offer equivalent services at lower prices than the other two, thereby undercutting its competitors' established pricing model and giving rise to their motive to cooperate if not expressly conspire to freeze out Go New York. As alleged, numerous New York City sightseeing attractions have reported to Go New York that its two competitors have persuaded and coerced them not to participate in Go New York's Multi-Attraction Passes. Go New York has pled more than just parallel conduct; it has pled an actual arrangement between two competitors in the relevant market to inhibit the third

competitor from offering equivalent products at lower prices. As alleged, their anti-competitive conduct violates the public purposes of the Donnelly Act.

A. Standard of Review.

On an appeal from dismissal of a pleading under CPLR 3211(a)(7) for failure to state a cause of action, the Court's "inquiry is limited to whether the pleadings state any cause of action, and not whether there is any evidentiary support for defendant's counterclaim." *Marine Midland Bank, N.A. v. Charmant Travel Lodge, Inc.*, 111 A.D.2d 908, 909 (2d Dep't 1985). The pleading "should be liberally construed in favor of the plaintiff solely to determine whether the pleading states a cause of action cognizable at law." *E. Consol. Properties, Inc. v. Lucas*, 285 A.D.2d 421, 421–22 (1st Dep't 2001) (internal citations omitted). The "Court must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." *Porco v. Lifetime Ent. Servs., LLC*, 147 A.D.3d 1253 (3d Dep't 2017) (internal citations and quotation marks omitted). "[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). *See Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (same).

B. The Relevant NYC Market.

As a preliminary issue, Go New York has pleaded that the NYC Market is a relevant product market under both federal and state antitrust statutes. "[A] relevant product market must include all products that are reasonably interchangeable and all geographic areas in which such reasonable interchangeability occurs." *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 97 (2d Dep't 2006). As alleged, "[t]he New York City hop-on, hop-off sightseeing tour bus market constitutes a distinct market for services, because the services offered by each of the main operators of hop-on, hop-off sightseeing tour buses are substantially substitutable for each other but collectively are not readily substitutable with any other readily accessible service, and the market by definition is limited geographically to New York City." (R. 78) It bears noting that the United States Department of Justice and New York State Attorney General's Office have identified New York City hop-on, hop-off sightseeing bus tours as a relevant product market under the Donnelly Act and the federal Sherman and Clayton Acts[9] (R. 595), as has the United States Surface Transportation Board. (R. 629-30) *See also Cont. Guest Services Corp. v Intl. Bus Services, Inc.*, 92 A.D.3d 570 (1st Dept 2012) (implicitly accepting plaintiff's definition of relevant product market under

[9] *See United States, et al. v. Twin America, LLC, et al.*, 2012 WL 6127681, Complaint, at ¶ 41, *et seq.* (S.D.N.Y. Dec. 11, 2012).

Donnelly Act as "the market for hop-on, hop-off double-decker sightseeing bus tours in New York City", and dismissing claim on other grounds.)

C. The Donnelly Act Prohibits a Broader Range of Anti-Competitive Conduct than Under the Sherman Act.

To understand the importance of the differing scope of behavior prohibited by the Donnelly and Sherman Acts, it is instructive to consider the history of the two acts. New York passed the Donnelly Act in 1899, in essentially its current form, in part because of a narrow interpretation of the Sherman Act by the United States Supreme Court. *See* 4E N.Y. Prac., Com. Litig. in New York State Courts, "The Donnelly Act—Overview of legislative history", § 124:4 (5th ed.). Specifically, in 1895 the United States Supreme Court had narrowly construed the Sherman Act by determining that it did not reach restraints on manufacturing. *See U.S. v. E. C. Knight Co*., 156 U.S. 1, 12 (1895). The Donnelly Antitrust Act, while modeled on the Federal Sherman Act, was intended to further the protection of the Sherman Act to citizens of New York. *See* 103 N.Y. Jur. 2d Trade Regulation § 15.

The Donnelly Act differs from the Sherman Act in critical ways. In particular, while Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade,"[10] the Donnelly Act proscribes "unlawful 'arrangements' as well as 'contracts', 'conspiracies' and

[10] 15 U.S.C. § 1.

'combinations'"[11] such that "the Donnelly Act is broader than its Federal counterpart…. [and] permit[s] the prosecution of a wider variety of wrongs." *State v Mobil Oil Corp*., 38 N.Y.2d 460, 467-68 (1976) (Gabrielli, J., dissenting). The inclusion of "arrangement" in the statute's text implies that it reaches behavior less formal and more implicit, given that "[t]he word 'arrangement' as used in the statute has a broader meaning than the words 'contract', 'agreement' or 'combination', and it may include each and all of these things and more—that is, all of the various acts, devices and agreements under which the participants are operating for the accomplishment of their purpose." *Eagle Spring Water Co. v Webb & Knapp*, Inc., 236 N.Y.S.2d 266, 275 (Sup. Ct. N.Y. Cty. 1962). Thus, New York jurists have noted that the Donnelly Act "was intended, and in fact has been so interpreted, to be broader in scope and coverage than the Sherman Act." *Mobil Oil Corp*., 38 N.Y.2d at 467-68 (Gabrielli, J., dissenting). *See O'Grady v. Venable*, 2021 WL 6503136, *3 (Sup. Ct. Bronx Cty. July 6, 2021) ("The Donnelly Act, while a counterpart of the Sherman Anti-Trust Act, may be broader in the sense that it adds the term 'arrangement' which connotes a broader sense than the word "contract" found in the Sherman Act"). To assume that "the Legislature did not intend the word 'arrangement' to have substantive effect is to do violence to the canon of construction that each word in a statute must be presumed to have meaning and to

[11] *See* Gen. Bus. L. § 340(1).

have been inserted for a purpose." *Mobil Oil Corp*., 38 N.Y.2d at 467-68 (Gabrielli, J., dissenting).

While the Donnelly Act may generally be construed in light of federal precedent, it should be interpreted differently where "state policy, differences in statutory language, or legislative history justifies such a result." X.*L.O. Concrete Corp. v Rivergate Corp*., 190 A.D.2d 113, 116 (1st Dept 1993), *aff'd*, 83 N.Y.2d 513 (1994). "New York's antitrust law represents a public policy of the first magnitude." *Aimcee Wholesale Corp. v Tomar Products*, *Inc.*, 21 N.Y.2d 621, 625 (1968). As such, "[f]ree competition is the public policy protected by section 340 and wrongful interference with it is prohibited." *Schlottman Agency, Inc. v Aetna Cas. and Sur. Co*., 70 A.D.2d 1041 (4th Dept 1979). *See Columbia Gas of New York, Inc. v New York State Elec. & Gas Corp*., 28 N.Y.2d 117, 127 (1971) ("We have previously declared that section 340 encourages a 'strong public policy in favor of free competition for New York' and represents 'a public policy of the first magnitude.'"). Accordingly, "[a]ll that need be shown is that the tendency of the alleged arrangement or combination will be or has been to lessen competition within the relevant market." *Schlottman Agency*, 70 A.D.2d at 1041.

The Court may note that in 2021, the New York State legislature attempted to pass a bill known as the "Twenty-First Century Anti-Trust Act" (S933A) to expand the reach and scope of the Donnelly Act. Although S933A passed the Senate in 2021

(43-20), it did not pass the Assembly before the legislative session closed. *See* Daniel Vitelli, "UPDATE: New York's Groundbreaking Antitrust Bill Is Reported Out of Committee and Advances to the Senate Floor Calendar", Lexology (Jan. 12, 2022, available at https://www.lexology.com/library/detail.aspx?g=2d0f2a7a-5176-4e6f-a0ee-9a595f0180ff. In January 2022, the New York Senate Consumer Protection Committee voted to send S933A to the full Senate floor calendar, and it is likely that it will pass this year. *See* The New York State Senate, Senate Bill S933A, 2021-2022 Legislative Session, at https://www.nysenate.gov/legislation/bills/2021/s933/amendment/a. The bill's stated purpose is "[t]o specify that any actions or practices which attempt to establish a monopoly or monopsony are illegal and void; to make unlawful that persons in a dominant position in the conduct of any business, trade, or commerce, in any labor market, abuse that dominant position; to establish premerger notification requirements; and allow recoverable damages to be recovered in any action which a court may authorize as a class action." *Id*. Indeed, the bill would transform the Donnelly Act into the strictest and most comprehensive antitrust legislation in the United States. *Id.* In directing the Attorney General to issue guidance on how it will interpret market shares and other relevant market conditions to achieve the purposes of preventing those in a dominant position from abusing that position, the bill instructs the Attorney General to consider "the important role of small and medium-

sized businesses in the state's economy." *See* proposed Gen. Bus. L. § 340 2(c)(iii) (available at *id.*).

D. The Counterclaims Allege a Valid Donnelly Act Conspiracy Under CPLR § 3013's Notice-Pleading Standard.

Under CPLR § 3013, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Thus, notice is the pleading touchstone under the CPLR. This is a more lenient standard than the federal pleading standard articulated in *Twombly*, which requires dismissal of a complaint that contains allegations sufficient to state conceivable claims but that do not "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. In contrast, under CPLR § 3013, even where antitrust averments are "not artfully drawn," a pleading should be "[l]iberally interpreted" and will state a cause of action where, as here, "the [claim] alleges an arrangement or combination between the individual defendants and between them and plaintiff's competitors to interfere with the free exercise by plaintiff of its business and that this interference had the effect of eliminating competition." *Schlottman Agency*, 70 A.D.2d at 1042.

Thus, as this Court has held, a federal court's dismissal with prejudice of federal antitrust claims has no preclusive effect on a claim under the Donnelly Act asserted in state court. *See Williams v Citigroup, Inc*., 104 A.D.3d 521, 522 (1st

Dept 2013) ("The dismissal with prejudice of plaintiff's Sherman Act claim at the pleading stage has no preclusive effect"). *See also* 103 N.Y. Jur. 2d Trade Regulation § 15. "[B]ecause … New York law applies a more lenient standard in motions addressed to the sufficiency of the pleadings[, i]t is therefore necessary to determine the sufficiency of the complaint on a clean slate." *Williams v Citigroup, Inc*., 2012 WL 2377813, *4 (Sup. Ct. N.Y. Cty. June 19, 2012), *aff'd as modified*, 104 A.D.3d 521 (1st Dept 2013). Justice Schecter acknowledged as much, but then proceeded to effectively adopt the federal court's analysis to dismiss the Donnelly Act counterclaim before her, finding that it "suffer[s] from the same infirmities that [federal] Judge Kaplan pointed out, and under *Creative Trading Co.*[12] would be subject to dismissal regardless of whether it's federal or state in terms of the sufficiency of the allegations." (R. 20-21)

The motion court's reliance on *Creative Trading Co.* was misplaced because that case involved an alleged vertical conspiracy by the sponsor of a trade show with exhibitors who were assigned their preferred locations in the trade show floor in exchange for early payment. The Appellate Division's dissenter and the Court of Appeals ultimately rejected the conspiracy allegations because "[a]cceptance of the rationale underlying the repleaded complaint would make anyone in business who ever adhered to the principle of 'first come, first served' a participant in a

12 *Creative Trading Co., Inc. v. Larkin-Pluznick-Larkin, Inc.*, 75 N.Y.2d 830 (1990).

conspiracy." *Creative Trading Co., Inc. v. Larkin-Pluznick-Larkin, Inc.*, 148 A.D.2d 352, 356 (1st Dep't 1989), *rev'd*, 75 N.Y.2d 830 (1990) (Sullivan, J., dissenting). Here, in contrast, Go New York identifies the counterclaim defendants whom it alleges to be parties to a horizontal conspiracy, as well as some of the specific attractions who have trade partner relationships with both Gray Line and Big Bus Tours, but nevertheless have rejected Go New York without any apparent rational business reason. (R. 64-72, at ¶¶ 34-45) The rationale underlying the conspiracy makes sense, as there is no legitimate business reason for Attractions working both Gray Line and Big Bus Tours to exclude Go New York, while there is an obvious anticompetitive motive for Gray Line and Big Bus Tours to work in concert to prevent their lower-priced competitor Go New York from offering Multi-Attraction Passes featuring the most popular tourist attractions.

The motion court denied Go New York "clean slate" to which it was entitled, as is evident from the Court's repeated references to the federal action. The court acknowledged Go New York particularized allegations about a number of specifically identified Attractions and the circumstances of their refusals to enter into trade partnerships or to continue such partnerships with Go New York, but found them insufficient because there might be other rational explanations that the conspiracy alleged by Go New York:

> [M]uch like Judge Kaplan, I don't understand and have gone through – and the focus is Paragraphs 24 through 49 in terms of

> the Donnelly Act allegations, -- all of the different attractions that are listed. For example, for Top of the Rock the allegations are that Top of the Rock consistently rejects Go New York and that there is no rational reason other than the counterclaim defendants required it not to do business with Go New York . What I don't have is the who or the how. What did Go New York do? I mean, there are other rational reasons, much like Judge Kaplan said.

(R. 21)

By focusing on whether an antitrust conspiracy was the *only* or even the *most* rational explanation for the Attractions' refusals to deal with Go New York, the motion court improperly adopted the federal pleading standard articulated in *Twombly*. *See, e.g.*, *Twombly*, 550 U.S. at 545. On a CPLR 3211(a)(7) motion, the only issued to be determined by the court is "whether the facts alleged fit within any cognizable legal theory." *Porco*, 147 A.D.3d at1254.

Here, the Counterclaims identify specific Attractions that have refused to participate in Go New York's Multi-Attraction Passes, and allege that Attractions have told Go New York that Defendants have pressured them not to work with Go New York and have disparaged Go New York to them. (R. 68-72, at ¶¶ 34-47) The Counterclaims also allege the motive for Defendants to conspire to diminish Go New York's ability to compete against them, i.e., that Go New York has been able to offer equivalent services at substantially lower prices, thereby undercutting Defendants' premium pricing structures and affecting their profits. (R. 64-65, at ¶¶ 19-23) It is enough that Go New York has alleged sufficient particular facts to suggest that the

explanation for the Attractions' refusal to work with Go New York is a conspiracy by Defendants to exclude Go New York from the relevant market. *See, e.g.*, *Telerep, LLC v U.S. Intern. Media, LLC*, 2011 WL 11077446, *7 (Sup. Ct. N.Y. Cty. Apr. 11, 2011) ("Based on the liberal pleading standard for a motion to dismiss pursuant to CPLR 3211, USIM only needs to allege enough facts to suggest there was an agreement among the National Reps to satisfy the Donnelly Act requirement of a conspiracy").

The motion court also erred by failing to consider the particular relevant market affected by Defendants' anticompetitive conduct. The fact that the New York City hop-on, hop-off tour bus market has only three significant market players makes the conspiracy and anti-competitive impact all the more substantial — two-thirds of the market is conspiring to shut out the other one-third.

POINT II: GO NEW YORK HAS SUFFICIENTLY PLEADED A CLAIM FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS.

A cause of action for tortious interference with prospective business relations generally requires that the defendant engaged in "wrongful conduct" such as "physical violence, fraud or misrepresentation, civil suits and criminal prosecution, and some degrees of economic pressure." *Carvel Corp. v. Noonan*, 3 N.Y.3d 183, 191 (2004). The motion court dismissed the tortious interference counterclaim upon determining, based on what Go New York submits was an overly restrictive pleading

standard that is not applicable in New York State courts, that Defendants did not commit any statutory violation under the Donnelly Act or any tort. As shown above, Go New York has sufficiently alleged that Defendants employed misrepresentation and economic pressure to destroy its trade partner relationships, and unlawful anticompetitive conduct is sufficient to support a tortious interference claim. *See, e.g.*, *Williams*, 104 A.D.3d at 522 ("Because plaintiff sufficiently alleged her Donnelly Act claim, her claim for interference with prospective business relations should not have been dismissed", citing *Guard–Life Corp. v. Parker Hardware Mfg. Corp.,* 50 N.Y.2d 183, 193–194 (1980)).

POINT III: THE MOTION COURT WRONGLY DISMISSED BIG BUS TOURS LIMITED ON PERSONAL JURISDICTION GROUNDS.

It is well established that on a motion to dismiss on the basis of personal jurisdiction, the party opposing dismissal "need only make a 'sufficient start' in demonstrating, prima facie, the existence of personal jurisdiction, since facts relevant to this determination are frequently in the exclusive control of the opposing party and will only be uncovered during discovery." *James v. iFinex Inc.*, 185 A.D.3d 22, 30 (1st Dep't 2020) (citing *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 466-67 (1974)). The Court of Appeals enunciated this standard in *Peterson* 48 years ago:

> A prima facie showing of jurisdiction … simply is not required and in actual practice, even assuming a workable definition, may

> impose undue obstacles for a plaintiff, particularly one seeking to confer jurisdiction under the 'long arm' statute. (CPLR 302.) In these cases especially, the jurisdictional issue is likely to be complex. Discovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits.

Peterson, 33 N.Y.2d at 467. "Given that jurisdictional issues in long-arm cases are likely to be complex, discovery is 'desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits'". *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 336 n.2 (2016) (Garcia, J. concurring) (quoting same). *See Badger v. Lehigh Valley R. Co.*, 45 A.D.2d 601, 603 (4th Dep't 1974) (even where a party has made a 'sufficient start', "the facts, and particularly statistical data as to interstate commerce, are exclusively in the hands of defendant.") Thus,

> in opposing a motion to dismiss pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth, a sufficient start, and show their position not to be frivolous. The plaintiffs need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant.

Williams v. Beemiller, Inc., 100 A.D.3d 143, 152–53 (4th Dep't 2012), *opinion amended on reargument*, 103 A.D.3d 1191 (4th Dep't 2013) (citing *Peterson*, 33 N.Y.2d at 467, other internal citations, and quotation marks and related punctuation, omitted). *See Archer-Vail v. LHV Precast Inc.*, 168 A.D.3d 1257, 1261 (3d Dep't

2019). "If a party demonstrates that facts may exist in opposition to a motion to dismiss, discovery is sanctioned." *Amigo Foods Corp. v. Marine Midland Bank-New York*, 39 N.Y.2d 391, 395 (1976) (citing *Peterson*, 33 N.Y.2d at 467).

Under New York's long-arm statute, CPLR 302(a)(1), this Court may exercise personal jurisdiction over a non-domiciliary party that, either in person or through an agent, "has purposefully transacted business within the state and there is 'a substantial relationship between the transaction and the claim asserted'". *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 486 (1st Dep't 2017) (quoting *Paterno v. Laser Spine Inst.,* 24 N.Y.3d 370, 376 (2014)). And, under CPLR 302(a)(3), this Court may exercise personal jurisdiction over a non-domiciliary party that commits a tortious act outside of the State that injures a person or property within the State, and the party "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or … expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce[.]" Go New York has made a sufficient start to establishing personal jurisdiction over Big Bus Tours Limited under the long-arm statute.

As discussed above, Big Bus Tours Limited provides management services to its subsidiaries Taxi Tours and OTS USA in New York as well as an internet

platform for ticket sales in New York, and receives management fees from its New York subsidiaries. Big Bus Tours' Executive Vice President for North America, Julia Conway, and Big Bus Tours' outside counsel at the Davidoff Firm negotiated the Industry Guidelines Agreement with Go New York and Gray Line in New York, designating Big Bus Tours Limited as the Big Bus Tours entity responsible for the conduct of street-level employees in New York City. These facts are sufficient to indicate that jurisdictional discovery may uncover evidence that Big Bus Tours Limited was closely involved in the management of Big Bus Tours in New York City and the anti-competitive conduct at issue in the Donnelly Act counterclaim, and that it regularly engages in business in and derives substantial revenue from New York State.[13]

To be sure, Ms. Conway now claims that she had no idea that the agreement which she negotiated over many months actually named Big Bus Tours Limited as the contracting party, and that she always intended to negotiate and execute the agreement on behalf of Taxi Tours. But her sworn statements that she "did not

[13] The statement by Big Bus Tours' Group CFO Sean Wilkins that Big Bus Tours Limited "does not derive substantial revenue from commercial activity outside the United Kingdom" might plausibly be true in the limited sense that the management fees which the companies receive from its subsidiaries around the world are for services performed largely from the company's offices in London. (R. 184) But the company's commercial activities and services are targeted to its subsidiaries around the world, including Taxi Tours and OTS USA in New York, and he makes no attempt to quantify the company's revenues from New York or the extent of its services rendered in New York; nor does he explain what amount or percentage of the company's revenues he might deem to be "substantial".

participate in the drafting of the Stipulation, nor did anyone else at Taxi Tours, Open Top, or Big Bus Tours Limited" are demonstrably false. (R. 176) Ms. Conway was personally involved in the negotiations of the Industry Guidelines Agreement beginning no later than September 2018 through its execution in February 2019, as were Big Bus Tours' outside counsel in New York. (R. 323-27, 331-71) Even assuming that Ms. Conway was not actually an authorized signatory for Big Bus Tours Limited, the fact that she and Big Bus Tours' counsel all deemed Big Bus Tours Limited the party that should be responsible for Taxi Tours' street-level employees in New York City strongly suggests that Big Bus Tours Limited was actively involved in Big Bus operations in New York City. Further, it bears noting that the same individual, Patrick Waterman, was CEO of both Taxi Tours and OTS USA and an officer and/or director of Big Bus Tours Limited and its ultimate parent company.

Go New York has made a "sufficient start" which warrants either denial of the instant motion or a continuance for jurisdictional discovery. *See, e.g.*, *HBK Master Fund L.P. v. Troika Dialog USA, Inc.*, 85 A.D.3d 665, 666 (1st Dep't 2011) ("Plaintiffs made a 'sufficient start' in demonstrating that the Russian defendants were doing business in New York through their direct or indirect subsidiaries to warrant further discovery on the issue of personal jurisdiction, including whether the

parents exercised control over the subsidiaries and are therefore subject to New York's longarm jurisdiction").

CONCLUSION

For the foregoing reasons, defendant/counterclaim plaintiff/appellant Go New York Tours, Inc. respectfully submits that the Court should reverse the motion courts dismissal under CPLR 3211(a)(7) of the First Counterclaim for violation of the Donnelly Act and Second Counterclaim for tortious interference, reverse the motion court's dismissal under CPLR 3211(a)(8) of Big Bust Tours Limited, and grant such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 27, 2022

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

TAXI TOURS INC.,
Plaintiff-Counterclaim Defendant,
—against—
GO NEW YORK TOURS, INC.,
Defendant-Appellant.

GO NEW YORK TOURS, INC.,
Counterclaim Plaintiff-Appellant,
—against—
BIG BUS TOURS LIMITED, GO CITY LIMITED,
GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA, LLC,
SIGHTSEEING PASS LLC,
Counterclaim Defendants-Respondents,
—and—
GO CITY NORTH AMERICA, LLC, GO CITY, INC., TAXI
TOURS INC.,
OPEN TOP SIGHTSEEING USA, INC.,
Counterclaim Defendants.

New York County
Clerk's Index
No. 653012/19

Appellate Division
Case No.
2022-01029

1. The index number of the case is 653012/19.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on May 21, 2019 by service of summons and complaint; Notice of Motion to Dismiss from the Defendant was served on June 21, 2019.

5. The nature and object of the action is commercial civil litigation.

6. This appeal is from a Decision and Order of the Honorable Jennifer Schecter entered in favor of Plaintiff against Defendant/Counterclaim Plaintiff's on December 2, 2021, which granted Plaintiff's motion to dismiss the counterclaims against them by the Defendant/Counterclaim.

7. The appeal is on a full reproduced record.