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

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

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.

REPLY BRIEF FOR DEFENDANT/ COUNTERCLAIM PLAINTIFF-APPELLANT

MAURICE N. ROSS
RANDALL L. RASEY
BARTON LLP
711 Third Avenue, 14th Floor
New York, New York 10017
(212) 687-6262
mross@bartonesq.com
rrasey@bartonesq.com

Attorneys for Defendant/Counterclaim Plaintiff-Appellant Go New York Tours, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Counterclaim plaintiff-appellant Go New York Tours, Inc. ("Go New York") respectfully submits this brief in reply to (*i*) the responding brief of counterclaim defendants-respondents Gray Line New York Tours, Inc., Twin America, LLC, and Sightseeing Pass LCC (referred to herein collectively as "Gray Line", and their responding brief cited herein as "GL Brf.") and (*ii*) the responding brief of counterclaim defendant-respondent Big Bus Tours Limited and counterclaim defendants Taxi Tours, Inc. ("Taxi Tours"), Open Top Sightseeing USA, Inc. ("OTS USA"), Go City North America, LLC, and Go City, Inc. (Big Bus Tours Limited, Taxi Tours, OTS USA, Go City North America, LLC, and Go City, Inc. are referred to herein collectively as "Big Bus" and their responding brief cited herein as "BB Brf.").[1] To the extent any argument raised by Gray Line or Big Bus (referred to herein collectively as "Defendants") in their respective responding briefs may not be addressed fully herein, Go New York relies on its appeal brief.

[1] Go New York and Big Bus have stipulated that the motion court's dismissal of Go New York's First and Second Counterclaims against Gray Line would effectively bar those same counterclaims as asserted against Big Bus, notwithstanding that the motion court did not expressly dismiss those counterclaims as against Big Bus in the Order appealed from, and, therefore, that Big Bus could join Gray Line's response to the portion of the appeal addressing those counterclaims. *See* Supplemental Record on Appeal, at SR-4, *et seq.*

ARGUMENT

POINT I: GO NEW YORK SUFFICIENTLY PLEADS ITS ANTITRUST AND TORTIOUS INTERFERENCE COUNTERCLAIMS

None of Defendants disputes that, as discussed in Go New York's appeal brief, the notice pleading standard applicable in New York courts under CPLR 3013 is more liberal that than the federal pleading standard under which Go New York's antitrust claims were dismissed in the federal district court, or that the scope of New York's Donnelly Act, Gen. Bus. L. § 340, is broader than under the federal Sherman Antitrust Act. And, none of Defendants has refuted that Go New York has sufficiently pleaded its Donnelly Act counterclaim in this action.

A. Go New York alleges an anticompetitive arrangement, if not a conspiracy, under the Donnelly Act.

Gray Line implies that Go New York's use of the term "conspiracy" in its allegations somehow precludes any argument that the broader term "arrangement" might apply here. *See, e.g.*, GL Brf., at 10-11. But on a motion to dismiss, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one". *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Go New York maintains that it has sufficiently pleaded an anticompetitive conspiracy under the notice pleading standard of CPLR 3013. But even if this Court were to find that Go New York's allegations fall short of pleading a conspiracy, the Court may still find that Go New York has pleaded an anticompetitive arrangement.

As discussed in Go New York's appeal brief, "[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). Gray Line insists that the *Eagle Spring Water* Court's broad description of an arrangement under the Donnelly Act "is plainly superseded" by *State v. Mobile Oil Corp.*, 38 N.Y.2d 460 (1976), in which the Court of Appeals stated that the term 'arrangement' should be "interpreted as contemplating a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, 'contract', 'combination' or 'conspiracy'." *Id.*, at 464. *See* GL Brf., at 11-12.

But there is nothing inconsistent in those two interpretations of the term 'arrangement' in the Donnelly Act. They both contemplate an at least tacit understanding between two or more actors that may not be sufficiently expressed so as to constitute a conspiracy or express agreement. *Eagle Spring Water* remains good law in New York. *See, e.g.*, *Rochester Drug Co-op., Inc. v. Biogen Idec U.S.*, 130 F. Supp. 3d 764, 779–80 (W.D.N.Y. 2015) (discussing facts supporting the *Eagle Spring Water* Court's finding of an anticompetitive "arrangement" under the

Donnelly Act, and distinguishing them from the facts before the federal district court).

The Counterclaims allege facts from which one can reasonably infer an anticompetitive arrangement, if not a conspiracy, among Gray Line and Big Bus to exclude Go New York from trade partner relationships with major New York City Attractions. For example, in paragraph 35 of the Counterclaims, Go New York alleges with particularity that "Top of the Rock" at Rockefeller Center, which had consistently rejected Go New York notwithstanding its trade partnerships with both Gray Line and Big Bus, expressly told Go New York it had to talk to Gray Line's president, Mark Marmurstein, if it wanted to be considered for a trade partnership with Top of the Rock. (R. 68-69) In paragraph 37 of the Counterclaims, Go New York alleges that representatives of the One World Observatory at the World Trade Center rejected Go New York on the stated ground that it had an exclusive relationship with Gray Line's president Mr. Marmurstein, but nevertheless also participates in Big Bus's Multi-Attraction Passes. (R. 69) Madame Tussaud's shares a degree of common ownership with Big Bus which might explain an exclusive relationship between them, but Madame Tussaud's also works with Gray Line while still rejecting Go New York. (R. 70-71) Both the Intrepid Sea, Air and Space Museum and Broadway Inbound entered into trade partnerships with Go New York and then suddenly terminated them, while continuing to work with Gray Line

and Big Bus. (R. 70-71) "Conspirators under the antitrust laws include … competitors who agree among themselves to boycott a fellow competitor", and that is what is alleged in the Counterclaims. *Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 148 A.D.2d 352, 356 (1989) (Sullivan, J., dissenting), rev'd, 75 N.Y.2d 830 (1990)).

Gray Line asserts counterfactually that Go New York has not sufficiently identified the alleged co-conspirators (or parties to the anticompetitive arrangement). GL Brf., at 14, 22. To the contrary, Go New York has plainly identified Gray Line and Big Bus as parties to the conspiracy or arrangement. While it is true that each of those shortened names are defined herein to include multiple business entities, each of the Gray Line entities and each of the Big Bus entities share common ownership and control, and are alleged to act in concert to promote their common interests. (R. 60-62, at ¶¶ 6, 10, 11, 15) A parent corporation and its wholly owned subsidiaries, and "sister subsidiaries" sharing common ownership, are considered a single entity for purposes of the Donnelly Act. *N. Atl. Utilities, Inc. v. Keyspan Corp.*, 307 A.D.2d 342, 343 (1st Dep't 2003), *lv. denied*, 1 N.Y.3d 503 (2003). *See Verizon New York, Inc. v. Optical Commc'ns Grp., Inc.*, 91 A.D.3d 176, 183 (1st Dep't 2011) (same, citing *N. N. Atl. Utilities, Inc.*).

The motion court found these and similar allegations insufficient to suggest a conspiracy between Gray Line (or its president) and Big Bus. (R. 28-29) But they

suggest, at the least, an arrangement between Gray Line and Big Bus to exclude Go New York from prominent Attractions, even if the particular elements of an express conspiracy could not yet be alleged.

B. Go New York alleges the relevant market and trade restraint.

Gray Line ignores most of Go New York's allegations explaining why the New York City hop-on, hop-off sightseeing tour bus market (the "NYC Market") constitutes a relevant market for purposes of the Donnelly Act, arguing instead that because Go New York alleges that the tour bus companies' offerings are part of "the multitude of other tourist attractions and activities from which tourists may choose when visiting New York City", they cannot be deemed to constitute a distinct product market. GL Brf., at 24-25 (quoting R. 67, at ¶ 30). Notably, Gray Line cites no case law that would support their argument.

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 are not readily substitutable with any other readily accessible service, and the market by definition is limited geographically to New York City." (R. 78) *See* Go New York's appeal brief, at 23 (quoting same). Those allegations plainly describe a market which includes "all products that are reasonably interchangeable and all geographic areas in which such reasonable

interchangeability occurs", and thus describe a relevant product market. *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 97 (2d Dep't 2006). Defendants do not even try to explain what other tourist activity might possibly be a ready substitute for hop-on, hop-off sightseeing bus tours. The mere fact that a tourist might, for example, decide to forgo a hop-on, hop-off bus tour and choose instead to spend the day at the Museum of Modern Art does not make the museum and the hop-on, hop-off bus tour "functionally interchangeable". *Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc.*, 92 A.D.3d 570, 572 (1st Dep't 2012).

Further, it is astoundingly disingenuous for Gray Line to try to diminish the significance of the antitrust complaint brought against Twin America, LLC ("Twin America"), the parent of the other two Gray Line defendants, by the Department of Justice and New York State Attorney General in 2012, in *United States, et al. v. Twin America, LLC, et al.*, S.D.N.Y 12-cv-8989 (R. 582-605). *See* GL Brf., at 25 n.6. The federal and New York state governments accused Twin America of entering into an illegal joint venture in order to maintain artificially high prices for consumers in the same NYC Market alleged in Go New York's counterclaims:

> Hop-on, hop-off bus tours constitute a relevant product market and line of commerce under Section 7 of the Clayton Act, Section 1 of the Sherman Act, and Section 340 of the Donnelly Act. Although a wide array of tourism offerings are available in New York City, a significant number of visitors specifically demand hop-on, hop-off bus tours and are unlikely to substitute other sightseeing experiences in response to a small but significant and non-transitory price increase. Indeed, Twin America has

> profitably imposed and sustained a price increase of approximately 10 percent for more than three years.

(R. 596, at ¶ 41, emphasis added) As a result of that action, in November 2015 Twin America entered into a consent judgment pursuant to which it was required to disgorge $7.5 million of ill-gotten profits and to undertake remedial measures. (R. 606-18)

Defendants also argue that Go New York has not sufficiently alleged that "the economic impact of" their anticompetitive conduct "is to restrain trade in the market in question". BB Brf., at 21 (quoting *Benjamin of Forest Hills Realty*, 34 A.D.3d at 94). In particular, Gray Line dtries to argue that Go New York's allegations of its growth and success in the NYC Market somehow contradict its allegations that Defendants' anticompetitive conduct has economic impact in restraint of trade. *See* GL Brf., at 26-29. But Go New York has in fact alleged the restraint on trade caused by Defendants in the NYC Market, and nothing in New York case law suggests that an antitrust plaintiff has to wait until is frozen entirely out of the relevant market before it can asset a valid antitrust claim.

Go New York alleges with specificity that the ability to complete effectively in the NYC Market depends substantially on being able to offer popular Attractions in its Multi-Attraction Passes at the best price, and that Gray Line and Big Bus engaged in conduct "intended to diminish the value and competitiveness of Go New York's Multi-Attraction Passes" by precluding Go New York from being able to

include the most popular Attractions in its Multi-Attraction Passes, thereby compelling consumers desiring to visit top New York City Attractions to purchase the higher priced Multi-Attraction Passes offered by the Big Bus Tours/Go City and Gray Line Defendants, rather than the lower-priced Multi-Attraction Passes with which Go New York has been unlawfully prevented from including top Attractions. (R. 67-68, at ¶¶ 30-33) Big Bus and Gray Line collectively control around two thirds of the NYC Market and plainly have the "power within the relevant market to produce a market-wide anticompetitive effect" as alleged in the Counterclaims. *Glob. Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 732 (2012).

C. Go New York has a tortious interference cause of action.

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). Go New York has alleged that Defendants engaged in unlawful anticompetitive conduct, which is sufficient to support a tortious interference claim. *See, e.g.*, *Williams v. Citigroup, Inc.*, 104 A.D.3d 521, 522 (1st Dep't 2013) ("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 II: GO NEW YORK HAS ESTABLISHED A SUFFICIENT BASIS FOR PERSONAL JURISDICTION OVER BIG BUS TOURS LIMITED

As shown in Go New York's appeal brief, it has made "a sufficient start" toward demonstrating the existence of personal jurisdiction over Big Bus Tours Limited under New York's long-arm statute, CPLR 302, so as to warrant denial of Big Bus Tours Limited's motion to dismiss on jurisdiction grounds. *James v. iFinex Inc.*, 185 A.D.3d 22, 30 (1st Dep't 2020). Go New York is not required at the pleading stage to make out a prima facie case for jurisdiction, given the complexity of long-arm jurisdictional issues and that the relevant information lies largely with Defendants. *See Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 336 n.2 (2016) (Garcia, J., concurring); *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 466-67 (1974); *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).

Big Bus's arguments in response largely miss the mark, confusing general with specific jurisdiction by focusing on corporate separation issues more relevant to the existence of general jurisdiction, which Go New York has not argued on this appeal. *See* BB Brf., at 31-33. To make a 'sufficient start' toward demonstrating specific jurisdiction over the UK-based Big Bus Tours Limited under New York's

long-arm statute, Go New York is not required to show that the Big Bus Tours Limited failed to observe corporate formalities with respect to its US subsidiaries or that its "control of the subsidiary is so pervasive that the corporate separation is more formal than real", as Big Bus seems to argue. *See id.* at 32, quoting *Porter v. LSB Indus., Inc.*, 192 A.D.2d 205 (4th Dep't 1993). This is not a veil-piercing case.

Rather, Go New York asserts that Big Bus Tours Limited is sufficiently involved in the day-to-day business and operations of its US subsidiaries Taxi Tours and OTS USA that it would likely be directly involved in and responsible for their decisions and misconduct at issue in the Counterclaims, giving rise to long-arm jurisdiction under CPLR 302(a)(1) and/or CPLR 302(a)(3). Under those provisions, the existence of jurisdiction over a non-domiciliary turns largely on whether and the extent to which it transacts business in or directed to New York and the relationship between those transactions and the claims at issue.

Big Bus concedes that Big Bus Tours Limited provides management services to its US subsidiaries and manages their sales web site, and that the same individual is chief executive officer of both Taxi Tours and OTS USA and a director of Big Bus Tours Limited. *See* BB Brf., at 30-33. Further, it is significant that Big Bus's "Executive Vice President – North America", Julia Conway, as well as other Big Bus executives in New York and Big Bus's lawyers at the New York law firm Davidoff Hutcher & Citron LPP, all of whom were directly involved in negotiating

the Industry Conduct Agreement with Gray Line and Go New York during a five-month period, thought that Big Bus Tours Limited was the appropriate Big Bus entity to execute the Industry Guidelines Agreement governing the day-to-day activities of Big Bus employees and agents in the NYC Market. *See* Appeal Brf., at 10-12. Only after it became an issue in this litigation did Ms. Conway suddenly claim that she simply did not notice who the contracting Big Bus entity was. As demonstrated in Go New York's appeal brief, it has at least made a sufficient start toward showing that Big Bus Tours Limited is subject to jurisdiction in New York in this case, and should be allowed jurisdictional discovery to establish its prima facie case.

CONCLUSION

For the foregoing reasons and the reasons shown in Go New York's appeal brief, Go New York respectfully submits that this Court should reverse the motion court's dismissal of its Donnelly Act and tortious interference counterclaims, reverse the motion court's dismissal of Big Bus Tours Limited on jurisdictional grounds, and grant such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 19, 2022

BARTON LLP

By: _____
Maurice N. Ross
Randall L. Rasey

711 Third Avenue, 14th Floor
New York, NY 10017
(212) 687-6262
mross@bartonesq.com
rrasey@bartonesq.com
Attorneys for Counterclaim Plaintiff-Appellant Go New York Tours, Inc.

PRINTING SPECIFICATION STATEMENT

This computer generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point Size: 14 pt

Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is 2,936.