To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

CASE NO. 2022-01029

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.

BRIEF FOR COUNTERCLAIM DEFENDANTS-RESPONDENTS GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA, LLC, AND SIGHTSEEING PASS LLC

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Introduction

The Motion Court correctly applied settled New York law to dismiss Go New York's antitrust and tortious interference counterclaims. Its decision should be affirmed.

Go New York pled conclusory and contradictory allegations claiming that Counterclaim Defendants-Appellees acted in concert with each other and tourist attractions to harm Go New York and competition in an alleged antitrust market for "hop-on, hop-off" tour buses in New York. The Motion Court dismissed Go New York's claims under CPLR 3013, ruling that (1) Go New York's proposed inferences of conspiracy based on the facts pled were unsound, and (2) that its remaining allegations lacked sufficient factual material to provide a description of an antitrust conspiracy – a requirement to state a Donnelly Act claim under New York law.

This appeal is the fifth time a court has evaluated the sufficiency of the antitrust claims Go New York has repeatedly asserted since 2019. The four previous federal and state decisions have all identified the same problem: Go New York's pleadings contain no facts supporting an antitrust violation. The Motion Court's dismissal should be affirmed.

Concise Statement of Questions Involved

Question: Whether the Motion Court correctly held that Go New York's Amended Counterclaims failed to allege facts that tend to establish an anticompetitive conspiracy or reciprocal relationship in violation of the Donnelly Act under the New York pleading standard.

Answer: The Motion Court correctly concluded that Go New York failed to state a Donnelly Act claim in the context of CPLR 3013 because its pleadings did not contain facts that tend to establish a conspiracy or reciprocal relationship, where (1) its inferential allegations of conspiracy were based on faulty reasoning and (2) its pleadings lacked key facts required by New York cases to substantiate its conspiracy allegations.

Question: Whether the Motion Court correctly held that Go New York's Amended Counterclaims failed to allege any restraint of trade or wrongful means sufficient to sustain a claim for tortious interference with prospective business relations.

Answer: The Motion Court correctly held that, without a Donnelly Act violation as an anchor for a claim of tortious interference with prospective business relations, Go New York had pled no wrongful means sufficient to state a claim under New York law.

Nature of the Case & Facts

Go New York, Big Bus, and Gray line each offer "hop-on, hop-off" bus tours in New York City. R. 59-60, ¶¶ 2, 6. Counterclaim Plaintiff Go New York "has enjoyed significant growth" since it was founded in 2012 and alleges that it is "comparable in terms of size and revenues" to its main competitors. R. 63-65, ¶¶ 18, 20, 22. Its own pleadings reflect that Go New York has "disrupted the business models" of the Counterclaim Defendants, regularly undercuts them by "20 to 40 percent or more" on ticket prices, has enjoyed "year-to-year growth in both ridership and revenues," and gained market share over time, including at the expense of Counterclaim Defendant Taxi Tours. R. 64-65, ¶¶ 20, 22. Go New York has grown by "finding operating efficiencies and offering less expensive sightseeing alternatives to tourists." R. 64, ¶ 19. Consumers "are free to examine and compare" Go New York's and the Counterclaim Defendants' product offerings, and "decide whether they wish to pay less for TopView, or to pay more for the specific offerings of Big Bus or Gray Line." *Id.*, ¶ 21.

Go New York, Leisure Pass (which shares ownership with Big Bus) and Sightseeing Pass (which shares ownership with Gray Line) each offer some variation of a "Multi-Attraction Pass[.]" R. 65, ¶ 24. These passes offer access to multiple tourist attractions with a single ticket, at a lower price than paying individually for each attraction. *Id.* Go New York and the Counterclaim

Defendants compete with each other for partnerships with tourist attractions to include in their Multi-Attraction Passes. R. 66-67, ¶¶ 27-29. Go New York refers to Multi-Attraction Passes, which are offered by each party to this litigation, as an "essential facility[.]" Br. at 6, 21. Go New York alleges that it competes with the Counterclaim Defendants, and with "the multitude of other tourist attractions and activities from which tourists may choose when visiting New York City[.]" R. 67, ¶ 30. It also alleges that the "hop-on, hop-off sightseeing tour bus market," in New York City is a relevant market for antitrust purposes. R. 78, ¶ 64.

Since 2019, Go New York has unsuccessfully pursued the same basic antitrust theory against Counterclaim Defendants, first in federal court, and now in state court: that Counterclaim Defendants have conspired with each other and with tourist attractions to persuade or pressure attractions not to partner with Go New York for inclusion in its Multi-Attraction Passes. Go New York alleges that Counterclaim Defendants "intended to diminish the value and competitiveness" of its Multi-Attraction Passes, and to cause Go New York "to lose market share, customers, and revenues." R. 67, 79, ¶¶ 31, 70. It also alleges that its competitive advantage has been diminished, including because of lost customers and reputational damage, and reduced growth and revenues. R. 68, 73, 79, ¶¶ 33, 49, 69.

Judge Lewis Kaplan of the Southern District of New York dismissed Go New York's claims twice. R. 302-03, 699-703. With regard to Go New York's allegations of horizontal conspiracy (*i.e.*, a conspiracy among competitors, here the Counterclaim Defendants), Judge Kaplan noted that Go New York "must make more than inferential allegations that the success of defendants' businesses relative to plaintiff's implies the existence of an unlawful conspiracy." R. 701. Judge Kaplan also rejected the allegations of "vertical conspiracies" (conspiracy with a given tourist attraction), declining to follow Go New York's "faulty inference" of antitrust conspiracy from the fact that tourist attractions had declined to partner with it, because "there are many logical and permissible business reasons that the third parties might have chosen not to do business with plaintiff." *Id*. The district court dismissed Go New York's complaint with leave to replead, but dismissed its amended complaint with prejudice, finding that its conspiracy allegations were "virtually identical" and that it had failed to remedy any of its initial complaint's defects. R. 302-03, 703.

The Second Circuit affirmed Judge Kaplan's dismissal, noting that "Defendants' allegedly anticompetitive acts would have been objectively rational even if done independently of one another, and [that Go New York] pleads no facts suggesting that they in reality "stem[med] from … an agreement." *Go N.Y. Tours, Inc. v. Gray Line N.Y. Tours, Inc.*, 831 F. App'x 584, 586-87 (2d Cir. 2020)

(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007)), *cert. denied*, 141 S. Ct. 2571 (2021). The Supreme Court denied certiorari. 141 S. Ct. 2571 (2021).

After the Second Circuit's ruling, Go New York added counterclaims alleging the same theory under New York's Donnelly Act in an unrelated state court action brought by the Big Bus Counterclaim Defendants against Go New York based on fake online reviews. R. 59. While that case was pending, Go New York added the Gray Line Defendants to its counterclaims.

The counterclaims recycled Go New York's failed antitrust claims from federal court - key sections of the counterclaims' allegations are identical to those dismissed in the federal action. R. 201-03. As before, Go New York alleges that the Counterclaim Defendants conspired with each other and with a handful of tourist attractions to pressure and / or persuade them not to partner with Go New York for inclusion in its Multi-Attraction Passes. R. 65-73, ¶¶ 24-49. As in the federal complaints, Go New York repeatedly asserts that there must be an antitrust conspiracy because third-party tourist attractions have "no rational business reason" or "no apparent rational business reason" to turn down partnerships with Go New York. R. 68-69, 70-71, ¶¶ 35-36, 41, 43.

At the Motion Court, Judge Schecter, like Judge Kaplan and the Second Circuit before her, rejected this inference of conspiracy from the facts as pleaded,

explaining that "[i]t'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." R. 31. Go New York's counterclaims present multiple reasons why tourist attractions might prefer to partner with Counterclaim Defendants and not Go New York: it has a large number of negative reviews on the internet, and tourist attractions believe they are risking their reputations by working with it. R. 72, 74-75, 80-81, ¶¶ 46, 52-53, 57, 79, 84.

Judge Schecter found that the closest Go New York came to alleging a conspiracy was paragraph 47 of its counterclaims, which alleges that:

> Go New York has been informed consistently and repeatedly by many Attractions that executives of Counterclaim Defendants have told them that if they allow Go New York to include their attractions in Go New York' Multi-Attraction Passes, they will terminate their contractual relationships with such attractions and refuse to include them in their own respective Multi-Attraction Passes.

R. 72, ¶ 47. However, Judge Schecter ruled, these allegations were "just simply too conclusory and bereft of any factual foundation" to support a Donnelly Act claim, as they included no factual information about which tourist attractions, which executives, or even which of the nine entities comprising the Counterclaim Defendants the paragraph refers to. R. 26. Judge Schecter dismissed Go New York's Donnelly Act claim and its derivative tortious interference with prospective business relations claim, finding both insufficient "in the context of New York's very liberal pleading standard of [CPLR] 3013[.]" R. 30.

Go New York appeals from Judge Schecter's order dismissing its antitrust and tortious interference claims and argues that the pleading standard applied to its claims was too demanding. In particular, Go New York argues that Judge Schecter implicitly and impermissibly applied the more demanding federal pleading standard in dismissing its Donnelly Act claim. Br. at 2-3. Go New York also argues that Judge Schecter erred in dismissing its claims because the Donnelly Act proscribes anti-competitive "arrangements" in addition to contracts and conspiracies, and that it has properly alleged an "arrangement" under the Donnelly Act. Br. at 21, 24-26. Go New York's counterclaims make no reference to "arrangements," but explicitly allege conspiracy 12 times, and allege that Counterclaim Defendants have entered contracts with tourist attractions to exclude Go New York. R. 67, 69-73, 78, ¶¶ 31, 36-37, 39, 40-41, 43, 45, 48, 66. The decision below should be affirmed.

Standard of Review

On a "motion to dismiss for failure to state a cause of action," this Court is "required to accept as true the facts in the complaint and consider whether plaintiff can succeed upon any reasonable view of the facts stated[.]" *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 81 (1st Dep't 2022). "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting

of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss[.]" *Barnes v. Hodge*, 118 A.D.3d 633, 633 (1st Dep't 2014) (quoting *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009)). "While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support[.]" *Elsky v. KM Ins. Brokers*, 139 A.D.2d 691, 691 (2d Dep't 1988).

Argument

I. The Motion Court correctly applied New York law in dismissing Go New York's Donnelly Act claim under CPLR 3013.

The Motion Court correctly ruled under New York law that Go New York's fact-free allegations of conspiracy were unsound and that its complaint was too conclusory and lacking in sufficient factual material to state a Donnelly Act claim. Go New York's attempts to argue for a looser pleading standard that would allow its claims to survive should be rejected in light of the fact that Judge Schecter expressly recognized the differences between state and federal pleading standards, and appropriately applied the New York standard, not the federal standard, in finding that Go New York's claims were entirely unsupported.

A. Go New York pleads no facts that tend to establish an "arrangement," a term that the Court of Appeals has clearly defined.

Go New York relies heavily on the presence of the term "arrangement" in the text of the Donnelly Act to argue that its antitrust claims should survive,

because the inclusion of this additional term in the Donnelly Act makes it broader than the Sherman Act. That the Donnelly Act is broader than the Sherman Act is uncontroversial. *State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 464 (1976)("[U]undoubtedly the sweep of Donnelly may be broader than that of Sherman[.]"). Even so, the inclusion of the term "arrangement" in the text of the Donnelly Act makes no difference here, because Go New York has pled no facts that tend to establish an "arrangement" – a term the Court of Appeals has clearly defined, and a definition Go New York conveniently omits from its brief.

Go New York repeatedly cites Justice Gabrielli's dissent in *State v. Mobil Oil* to support its claims about the breadth of the Donnelly Act in comparison to the Sherman Act. Br. at 24-25. But it ignores the majority's opinion in the same case, which defines "arrangement" as a "reciprocal relationship of commitment between two or more legal or economic entities[.]" *Mobil Oil*, 38 N.Y.2d at 464. This omission gives an incomplete picture of the controlling law. The relevant passage from Court of Appeals' decision bears quoting in full:

> Although undoubtedly the sweep of Donnelly may be broader than that of Sherman, we conclude that under the familiar canon of statutory construction, *noscitur a sociis*, the term, "arrangement", takes on a connotation similar to that of the other terms with which it is found in company, and thus must 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. Go New York's brief does not even attempt to explain how it has pled facts tending to establish an "arrangement" or "reciprocal relationship of commitment"[1] between any of the Counterclaim Defendants or between any Counterclaim Defendant and any tourist attraction. Moreover, review of Go New York's pleadings makes clear that it intended to plead Donnelly Act violations based on *conspiracy* and *contracts* – its counterclaims never use the word "arrangement," but explicitly allege conspiracy 12 times, and also allege that defendants have entered contracts with tourist attractions to exclude Go New York. R. 67, 69-73, 78, ¶¶ 31, 36-37, 39, 40-41, 43, 45, 48, 66.

Go New York also cites no case law supporting the position that the facts pled amount to an "arrangement." The cases it does cite amount to a few scattered quotes emphasizing the breadth of the term "arrangement," while its brief never addresses the Court of Appeals' definition of the term. Br. at 25. The broad definition of "arrangement" Go New York cites from *Eagle Spring Water Co.*, a

[1] "Reciprocal relationship," the key phrase in the Court of Appeals' definition of the term "arrangement," has been integrated into the standards New York courts have used for Donnelly Act claims for over 30 years (including in the First Department). The statutory term "arrangement" is thus fully accounted for in the settled New York case law, and any argument that the Motion Court misunderstood breadth of the Donnelly Act and construed it too narrowly by failing to account for the term "arrangement" should be rejected. *See Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 136 A.D.2d 461, 462 (1st Dep't 1988) ("[T]he Donnelly Act mandates that there be a conspiracy or reciprocal relationship between two or more entities before liability can be found[.]"); *see also Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 94 (2d Dep't 2006) ("To state a claim under the Donnelly Act, a party must . . . show a conspiracy or reciprocal relationship between two or more entities[.]") (citations omitted).

1962 trial court decision, is plainly superseded by the Court of Appeals' 1976 definition of the term "arrangement" in *State v. Mobil Oil Corp.* *O'Grady v. Venable* is also inapposite. Go New York cites dicta from *O'Grady*, which offers the commonsense observation that the word "arrangement" is different in meaning than the word "contract." Br. at 25. But *O'Grady* does not help Appellants, because it deals with a bid rigging offense, and its holding is completely unrelated to any interpretation of the word "arrangement." *O'Grady v. Venable*, No. 29507/2020E, 2021 WL 6503136, at *3 (N.Y. Sup. Ct., Bronx Cnty. July 6, 2021).

Nor does Go New York's discussion of the Twenty-First Century Anti-Trust Act – a proposed New York law that has not been enacted[2] – help its case in any way. The proposed law is irrelevant to the issue in this appeal – what is required to state a conspiracy claim under the Donnelly Act – because it deals only with monopolization and monopsonization, abuse of dominance by a single firm, pre-merger notification requirements, and damages in class actions.[3] Go New York ostensibly cites material about this proposed legislation to indicate the seriousness

[2] NY State Senate Bill S933A, "Twenty-First Century Anti-Trust Act," *available at* https://www.nysenate.gov/legislation/bills/2021/s933/amendment/a (describing the status of the proposed legislation and indicating that it has not passed in the New York State assembly or been signed into law).

[3] *Id.* (Describing the purpose of the "Twenty-First Century Anti-Trust Act" as "[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.").

of New York State's antitrust policy, which would, in Go New York's view, warrant an interpretation of the Donnelly Act that allows its claims to survive after repeated dismissals in federal and state court. But Go New York does not – and cannot – present any argument that this proposed, unpassed legislation, which covers legal issues entirely unrelated to those before this court, supports reversing the Motion Court's dismissal of its antitrust claims.

B. Judge Schecter did not apply federal law, implicitly or otherwise, in dismissing Go New York's counterclaims.

Judge Schecter explicitly applied New York law in dismissing Go New York's counterclaims. She (1) held that res judicata *did not* apply to bar Go New York's state law claims, (2) distinguished New York's "more generous liberal pleading standard" from the federal pleading standard, and (3) applied a standard set by the New York Court of Appeals in *Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.* to dismiss Go New York's counterclaims:

– " . . . I am convinced that res judicata does not apply . . ." R. 20.

– "[E]ven under New York['s] more generous liberal pleading standard, it won't survive either." R. 26.

– "[I]n the context of New York's very liberal pleading standard of 3013, I am going to grant dismissal of the counterclaims." R. 30.

– " . . . [U]nder *Creative Trading Co.* [the claims] would be subject to dismissal regardless of whether it's federal or state in terms of the sufficiency of the allegations . . ."[4] R. 21.

Judge Schecter's paragraph-by-paragraph analysis of Go New York's factual allegations or references to Judge Kaplan's dismissals of Go New York's virtually identical pleadings in federal court in no way indicate that she implicitly applied federal pleading standards or the equivalent in dismissing Go New York's Donnelly Act claim. To the contrary, Judge Schecter analyzed Appellants' allegations in detail, and identified as a basis for dismissal "Plaintiffs[']fail[ure] to identify any alleged co[-]conspirator(s)" – a factor frequently cited in dismissals of Donnelly Act claims under New York law. *Creative Trading*, 136 A.D.2d at 462; R. 21-22, 25-26; *Abax Servs. Corp. v. Loc. 78 Asbestos, Lead & Hazardous Waste Laborers, AFL-CIO*, 286 A.D.2d 308, 309 (2d Dep't 2001) (reversing motion court and dismissing Donnelly Act claims where complaint "failed to identify any of the alleged co-conspirators"); *Lopresti v. Mass. Mut. Life Ins. Co.*, No. 12719/04, 2004 WL 2364916, at *2 (N.Y. Sup. Ct., Kings Cnty. Oct. 19, 2004) ("Plaintiff does not

[4] Go New York's argument that the Motion Court erred in relying on *Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 75 N.Y.2d 830 (1990) should be rejected. Appellants' characterization of the basis for Judge Sullivan's dissent is incorrect. Judge Sullivan's dissent, affirmed by the Court of Appeals, plainly states that it would have dismissed the case because its allegations were too conclusory to state a Donnelly Act claim. *Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 148 A.D.2d 352, 355 (1st Dep't 1989) (Sullivan and Carro, JJ., dissenting).

specify which defendants entered into any agreements, when such agreements were made, or the nature and scope of any agreement[.]"), *aff'd*, 30 A.D.3d 474 (2d Dep't 2006); *Isaac v. Med. Liab. Mut. Ins. Co.*, No. 2013-883, 2014 N.Y. Misc. LEXIS 2843, at *13 (N.Y. Sup. Ct., Erie Cnty. Apr. 23, 2014) ("Plaintiffs also fail to describe . . . who from Defendants participated in or furthered the conspiracy or how they did so[.]"), *aff'd*, 132 A.D.3d 1249 (4th Dep't 2015). Judge Schecter's analysis and ruling was completely consistent in approach and substance with reported cases dismissing Donnelly Act complaints for failure to state a claim under New York law.

Nor did Judge Schecter's references to Judge Kaplan's rationale for dismissing Appellant's complaint in the federal action deny Go New York a "clean slate." Br. at 30. Judge Schecter's decision was not based on an evaluation of "whether an antitrust conspiracy was the only or even the most rational explanation for the Attractions' refusals to deal with Go New York[.]" Br. at 31. Rather, it was based on a recognition that there is no logical or rational reason at all to infer conspiracy from the facts Go New York has pled, something Judge Kaplan also recognized. Go New York's inferential allegations of conspiracy depend on accepting the premise that tourist attractions have no rational basis to turn down a partnership with Go New York. Go New York asks the Court to accept the truth of this allegation, and on that basis, infer an antitrust conspiracy. But as Judge

Schecter explained, this logic simply does not work: "[i]t'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." R. 31. Without this step in the reasoning, Go New York's inferential allegation of conspiracy falls apart. This insight has nothing to do with the applicable pleading standard. There is no logical reason to infer wrongdoing from the allegation that third-party tourist attractions declined to do business with Go New York, given that its own counterclaims include multiple reasons attractions might not want to partner with it: it has a large number of negative reviews on the internet, and tourist attractions believe they are risking their reputations by working with it. R. 72, 74-75, 80-81, ¶¶ 46, 52-53, 57, 79, 84. And of course, tourist attractions may simply prefer the economics of working with one or both of the Counterclaim Defendants, and not with Go New York.

This approach is entirely consistent with New York case law on the standards for pleading Donnelly Act claims, which requires that "[t]he complaint must allege facts to support the existence of a conspiracy[.]" *Lopresti*, 2004 WL 2364916, at *2 (dismissing Donnelly Act Claim); *Creative Trading*, 148 A.D.2d at 355 (Sullivan and Carro, JJ., dissenting) (dismissing Donnelly Act claim where plaintiffs failed to allege facts that "tend to establish an unlawful conspiracy"), *rev'd*, 75 N.Y.2d 830 (1990).

Schlottman Agency Inc. v. Aetna Cas. & Sur. Co., on which Go New York relies heavily, also supports Judge Schecter's analysis of whether Go New York's inference of conspiracy on the facts alleged was reasonable: "[u]pon a motion to dismiss, a complaint is deemed to allege whatever can reasonably be implied from its statements – and not whether the allegations can be established – considering the complaint as a whole[.]" 70 A.D.2d 1041, 1041 (4th Dep't 1979). The plain logical corollary to this statement is that a complaint will not be deemed to allege things that cannot be reasonably implied from its statements. That is exactly what Judge Schecter found in declining to follow Go New York's proposed inference of conspiracy: conspiracy could not be reasonably implied from the statements in Go New York's counterclaims. That is not applying the equivalent of the federal pleading standard for antitrust cases, as Go New York argues – it is looking at the allegations with plain common sense and logical reasoning and evaluating the pleadings under the governing New York standards. Finding that the facts alleged did not support the existence of a conspiracy, and that the inferences Go New York was asking the court to draw from those facts were unreasonable, Judge Schecter correctly dismissed Go New York's Donnelly Act claim.

Accepting Go New York's argument as a rule would lead to irrational outcomes as a matter of policy. Go New York's proposed ruling would mean that New York judges would be barred from evaluating the rationality and validity of

parties' arguments about what their pleadings imply. Judges would be prevented from evaluating whether pleadings are conclusory and adequately supported by facts, and whether the proposed inferences from the alleged facts are warranted. This is obviously the wrong outcome, as it would undesirably bind judges to litigants' interpretations of their own pleadings. This analytical task – parsing parties' allegations to determine if they state a claim – is central to a judge's evaluation of the adequacy of a complaint on a motion to dismiss under New York law.

C. Go New York pleads no facts that tend to establish a horizontal or vertical conspiracy or arrangement under the Donnelly Act.

1. Horizontal Conspiracy Allegations: Go New York pleads no facts that tend to establish a conspiracy or arrangement between any of the Counterclaim Defendants.

"An antitrust claim under the Donnelly Act . . . must allege . . . concerted action by two or more entities[.]" *Glob. Reinsurance Corp. v. Equitas Ltd.*, 18 N.Y.3d 722, 731 (2012). Go New York's counterclaims contain zero facts that tend to establish or describe any conspiracy, concerted action, or reciprocal relationship between any of the Counterclaim Defendants. The closest Go New York comes to alleging any conspiracy between the Counterclaim Defendants is its repeated claim "on information and belief" that Counterclaim Defendants have conspired with one another. R. 67, 69-72, ¶¶ 31, 37, 39, 40, 43, 45. But, as the Court of Appeals has affirmed, conclusory allegations of conspiracy "on

information and belief" are insufficient to state a Donnelly Act Claim. *Creative Trading*, 148 A.D.2d at 355 (Sullivan and Carro, JJ., dissenting) ("Instead of identifying specific participants in an unlawful conspiracy, as directed, they . . . assert conclusorily, 'on information and belief', that these businesses 'entered into a reciprocal relationship with defendants.'"), *rev'd*, 75 N.Y.2d 830 (1990). The Motion Court correctly dismissed Go New York's counterclaims, because conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act. *Sands v. Ticketmaster-N.Y., Inc.*, 207 A.D.2d 687, 688 (1st Dep't 1994).

New York courts also routinely dismiss Donnelly Act claims for failure to provide basic details concerning the identities of co-conspirators, and the time, place, and functioning of the conspiracy – all facts that Go New York has failed to plead here. These requirements make sense because they help courts to determine if concerted action has been alleged. Which employees from any of the nine entities that comprise the Counterclaim Defendants were involved in the conspiracy? Which of the nine entities making up the Counterclaim Defendants were involved? What was the "reciprocal relationship of commitment" between the entities? How did the conspiracy work? When was it formed? Where was it formed and where did it operate? Go New York's counterclaims contain no facts that speak to – let alone answer – any of these questions, and thus provide no

indication at all of "concerted action by two or more entities[.]" *Glob. Reinsurance*, 18 N.Y.3d at 731. *See Creative Trading*, 148 A.D.2d at 355-56 (Sullivan and Carro, JJ., dissenting) ("Instead of alleging facts that would tend to establish an unlawful conspiracy, [plaintiffs] repeatedly parrot the words 'conspiracy and reciprocal relationship', without specifying the dates or places relevant to the alleged conspiracy."), *rev'd*, 75 N.Y.2d 830 (1990); *see also Victoria T. Enters., Inc. v. Charmer Indus., Inc.*, 63 A.D.3d 1698, 1698 (4th Dep't 2009) (affirming dismissal of a Donnelly Act claim where the "majority of the allegations in the amended complaint contain no more than a vague and conclusory repetition of the statutory language without reference to date, time or place"); *see also supra* at 14-15 (collecting cases dismissing Donnelly Act claims where plaintiffs failed to identify co-conspirators).

A plaintiff may not fail to plead "facts that would tend to establish an unlawful conspiracy" and just "repeatedly parrot" the term conspiracy. *Creative Trading*, 148 A.D.2d at 355-56 (Sullivan and Carro, JJ., dissenting), *rev'd*, 75 N.Y.2d 830 (1990). As Judge Schecter ruled, applying the First Department's standard, "there has to be a description of the nature of the conspiracy," and it's "not there." R. 21, 31; *see Creative Trading*, 136 A.D.2d at 462. Judge Schecter's dismissal makes sense, as she rejected Go New York's inferential allegations of conspiracy as unsound, and also concluded that the counterclaims lacked key

details required by the case law for a viable Donnelly Act claim. No facts Go New York pled tend to establish an unlawful conspiracy as required under New York law, and the Motion Court's dismissal should be affirmed.

2. Vertical Conspiracy Allegations: Go New York pleads no facts that tend to establish a conspiracy or arrangement between any Counterclaim Defendant and any tourist attraction.

Alleged vertical restraints, which involve entities at different levels of the distribution chain (like the Counterclaim Defendants and the third-party tourist attractions here) are evaluated under the "rule of reason." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). At the pleading stage, this means that a plaintiff must plead a relevant market, market power, and anticompetitive effects. *See id.*; *Glob. Reinsurance*, 18 N.Y.3d at 732 ("Ordinarily, a Donnelly . . . Act plaintiff, to survive a motion to dismiss in a rule of reason case . . . must minimally allege that conspirators possessed power within the relevant market to produce a market-wide anticompetitive effect[.]"). As argued below in section I.C.2.a., Go New York has failed to plead any of these elements.

But even if Go New York had alleged the basic required elements of a rule of reason claim, its allegations of conspiracy between Counterclaim Defendants and tourist attractions were also properly dismissed as failing to state a claim under the Donnelly Act because they lack essential details about the alleged conduct. R. 21-22, 25-26. The details of Go New York's alleged vertical conspiracies are less

than vague. Its allegations amount to this: out of all the tourist attractions in New York City, Go New York was unable to secure partnerships with a handful of them, and two tourist attractions discontinued their relationships with Go New York. R. 68-72, ¶¶ 33-47. Certain unnamed tourist attractions have informed Go New York that Counterclaim Defendants have indicated that they would not continue to partner with the attractions if they partner with Go New York, but as Judge Schecter noted, Go New York's counterclaims do not specify which attractions, executives, or even which Counterclaim Defendants this allegation applies to. R. 72, ¶ 47.[5] Go New York makes two brief, conclusory mentions of contracts between the Counterclaim Defendants and third parties aimed at excluding Go New York from relationships with tourist attractions. R. 67, 78, ¶¶ 31, 66. On the most generous reading of its counterclaims, Go New York has alleged that exclusive agreements exist between an individual Counterclaim Defendant and a handful of tourist attractions, and that some attractions

[5] Go New York's appeal brief appears to allege, for the first time, that the two entities from the Counterclaim Defendants referred to in paragraph 47 of its counterclaims are Big Bus Tours and Gray Line, but these allegations are not present in its pleadings (the Counterclaim Defendants are made up of nine different entities). Br. at 15. *See* R. 72, ¶ 47 (referring to "Counterclaim Defendants" and not Big Bus Tours or Gray Line). As is evident from the record of the motion to dismiss hearing, Judge Schecter's view was that paragraph 47 was the closest Go New York came to alleging conspiracy. R. 25. Go New York cannot now nudge its claims over the line by raising new facts to add detail to its allegations in paragraph 47 on appeal, because "[i]t is axiomatic that, on a motion brought pursuant to CPLR 3211, [the court's] analysis of a plaintiff's claims is limited to the four corners of the pleading." *Premium Millwork, Inc. v. Great Am. Ins. Co.*, No. 154106/2018, 2018 NY Slip Op 31516(U), ¶ 2 (N.Y. Sup. Ct., N.Y. Cnty. July 9, 2018) (quoting *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96, 105 (1st Dep't 2015)).

unilaterally decided not to work with Go New York and prioritize their relationships with Counterclaim Defendants.

It is entirely appropriate and legally permissible for certain tourist attractions to make the decision not to partner with Go New York. "Courts have recognized the right of a company to select a person with whom it does business and to refuse to deal or continue to deal with anyone for reasons sufficient to itself[.]" *Lopresti*, 2004 WL 2364916, at *3 (dismissing Donnelly Act Claim) (citation omitted). The Supreme Court's antitrust case law has also long recognized that the kinds of agreements Go New York alleges have legitimate business rationales and are pro-competitive. *See, e.g.*, *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977) ("Vertical restrictions promote interbrand competition[.]"). Nor does the fact that multiple tourist attractions that work with Counterclaim Defendants declined to partner with Go New York support its case, as Supreme Court precedent makes clear that parallel conduct does not equate with antitrust conspiracy. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). That is because it is logical, and not conspiratorial, for similarly situated companies to respond in a similar manner to similar circumstances. *See* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962). Claiming that the alleged facts amount to an antitrust conspiracy is plainly insufficient under New

York law, as a plaintiff may not "assert[], in conclusory fashion, the existence of a generalized conspiracy arising out of defendants' various contracts and arrangements or by referring to unilateral business actions taken by them[.]" *Creative Trading*, 136 A.D.2d at 462.

a) The Motion Court had multiple alternative bases to dismiss Go New York's vertical conspiracy claims.

The Motion Court also had multiple alternative bases to dismiss Go New York's vertical conspiracy claims. Judge Schecter could have dismissed Go New York's vertical conspiracy claims because of deficiencies in its allegations regarding the relevant market, market power, or harm to competition, all of which are required to plead a vertical conspiracy claim under the rule of reason. *Glob. Reinsurance*, 18 N.Y.3d at 732.

(1) Relevant Market.

Failure to allege a relevant product market in a rule of reason case alleging vertical conspiracy is fatal to a Donnelly Act claim. *Lopresti*, 2004 WL 2364916, at *2-3; *Glob. Reinsurance*, 18 N.Y.3d at 732. Go New York's market definition is plainly underinclusive and warrants dismissal. *Id.* Its pleadings show why. Go New York alleges a market for "hop-on, hop-off" bus tours, but then goes on to allege that hop-on, hop-off bus companies (it, Gray Line, and Taxi Tours) compete with "the multitude of other tourist attractions and activities from which tourists may choose when visiting New York City." R 67, ¶ 30. Go New York's proposed

market definition is incomplete because "[i]f there are other products available to consumers that are similar in character or use to the products in question, then the products are said to be functionally interchangeable and form the outer boundaries of a relevant product market for antitrust purposes." *Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc.*, 92 A.D.3d 570, 572 (1st Dep't 2012) (affirming dismissal). Go New York does not explain why the two Counterclaim Defendants in this case are the only other participants in its alleged relevant market, when it alleges that they all compete with all of the other tourist attractions and activities for tourists in New York. R. 67, ¶ 30. It thus fails to meet its burden on a motion to dismiss, and the Motion Court could have also dismissed its vertical conspiracy claims on this basis: "[t]he plaintiff must explain why the market it alleges is in fact the relevant, economically significant product market." *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 95 (2d Dep't 2006).[6]

[6] Go New York's argument that the First Department "implicitly accepted" its market definition in *Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc.* overstates the content of that decision: all the court did there was report in its opinion that the plaintiff's complaint "define[d]" a "market for hop-on, hop-off double-decker sightseeing bus tours in New York City[.]" Br. 23-24; *Cont'l Guest Servs.*, 92 A.D.3d at 571. Go New York also cites a 2012 complaint filed by the Department of Justice and the New York State Attorney General's Office that *alleges* a market for hop-on, hop-off bus tours, but as argued above, Go New York fails to meet the basic standards under New York law for properly alleging a relevant market, and its own factual allegations undermine its alleged market definition. The fact that other plaintiffs made similar allegations in federal court ten years ago does nothing to remedy the deficiencies in its pleadings when evaluated under New York law.

(2) Economic Impact in Restraint of Trade: Market Power & Harm to Competition.

Nor has Go New York alleged any economic impact in restraint of trade, as required to state a claim under the Donnelly Act. "To state a claim under the Donnelly Act, a party must . . . allege how the economic impact of that conspiracy is to restrain trade in the market in question[.]" *Benjamin of Forest Hills Realty*, 34 A.D.3d at 94. Go New York has alleged neither that the Counterclaim Defendants have the ability to impact competition in any relevant market (market power), or that competition in any relevant market has actually been harmed (as opposed to harm to a single competitor).[7]

A plaintiff must plead market power in order to sustain a claim for restraint of trade in a rule of reason case. *Glob. Reinsurance*, 18 N.Y.3d at 732. Dismissal

[7] Go New York suggests in its brief that Multi-Attraction Passes are an "essential facility," in an attempt to suggest that Counterclaim Defendants control some key resource it needs to do business, thereby harming competition. Br. at 6, 21. This allegation makes no sense, as the essential facilities doctrine describes a type of monopolization claim. Here there is no monopolist, as each of the parties has equal market share, and because the Multi-Attraction Pass is not (and cannot be) a resource controlled by one monopolist – each party to this litigation provides its own version of the Multi-Attraction Pass. R. 63, 65, ¶¶ 18, 24. *See, e.g.*, *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995) (dismissing Donnelly and Sherman Act essential facilities claims and holding that "[t]he 'essential facilities' doctrine is not an independent cause of action, but rather a type of monopolization claim . . . [plaintiffs] must meet two prerequisites before the essential facilities doctrine comes into play. First, the defendant's facility must be 'essential,' or one for which there is no feasible alternative. Second, the plaintiff must be a competitor of the defendant monopolist whose facility it seeks to employ.") (citation omitted).

is appropriate "where the complaint simply does not allege" market power over the asserted relevant antitrust product. *Id.* at 733.

Go New York's market power allegations are deficient because (1) its counterclaims paint a picture of robust competition in which Go New York undercuts its competitors and has rapidly gained market share, and (2) because its counterclaims only allege conduct and competitive harm related to Multi-Attraction Passes but say nothing about any impact on the alleged market for hop-on, hop-off bus tours – the market it has defined.

"Defined in the context of sales, market power is the ability to raise prices significantly without losing business, but more generally may be understood as the capacity to impose onerous economic terms without suffering competitive detriment." *Glob. Reinsurance*, 18 N.Y.3d at 732 (citation omitted). Market power must be alleged in the relevant market a plaintiff is proposing. *Id.* at 730 ("[A]n assertion of market power adequate to sustain a claim for restraint of trade may only be demonstrated within the context of an identified relevant market or submarket[.]"). Go New York fails this requirement, as it makes no allegation of market power in the hop-on, hop-off tour bus market. Its only (entirely conclusory) allegation of market power relates to contracting with tourist attractions, with no explanation of how this relates to bus tours: Counterclaim

Defendants have "leveraged [their] respective and combined market power to persuade Attractions to exclude Go New York." R 67, ¶ 32.

And Go New York has not explained at all how Counterclaim Defendants have the "ability to raise prices significantly without losing business" or "impose onerous economic terms without suffering competitive detriment." *Glob. Reinsurance*, 18 N.Y.3d at 732. The facts pled in its counterclaims indicate that the opposite is true: Go New York has been able to expand rapidly, gaining share and undercutting its competitors by finding operating efficiencies and expanding the array of options available to consumers, at lower prices than Counterclaim Defendants offer. R. 64-65, ¶¶ 19-22. Go New York makes the point clearly itself. Customers are "free to examine and 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 Big Bus or Gray Line." R. 64, ¶ 21. Evidently, Counterclaim Defendants are losing business because of the success of Go New York's lower priced option, and consumers have free choice of differently priced options with different features. Go New York's complaint does not plead market power, and its vertical conspiracy claims could have also been dismissed on this basis. *Glob. Reinsurance*, 18 N.Y.3d at 733.

A claimant must also plead harm to competition in the entire market to state a Donnelly Act claim in a rule of reason case based on allegations of vertical

conspiracy. Go New York fails this requirement because it has pled only harm to itself. "[T]he antitrust laws were enacted to protect competition, not competitors[.]" *Cont'l Guest Servs.*, 92 A.D.3d at 573. "It is market-wide effect that is crucial to an antitrust claim under the Sherman Act or Donnelly Act[.]" *Glob. Reinsurance*, 18 N.Y.3d at 733. Go New York's counterclaims do not allege any facts that explain or substantiate its allegations of minimized competition and inflated prices in the New York City hop-on, hop-off sightseeing tour bus market, and these allegations are directly contradicted by their narrative of Go New York as rapidly gaining market share by expanding the range of less expensive options for consumers. R. 64-65, 73, ¶¶ 20-22, 49.

Go New York makes numerous other claims of harm, but all describe harm to Go New York – not harm to competition in the relevant market. *See* R. 73, ¶ 49 (diminished competitive advantage, lost customers and sales, and reputational damage); R. 79, ¶ 69 (reduced growth and revenue). The Motion Court could have also dismissed Go New York's claims entirely on this basis. *See Glob. Reinsurance*, 18 N.Y.3d at 733 ("The question here is whether plaintiff may, premised on such allegations of localized individual harm, seek an award of treble damages for an antitrust violation. Inasmuch as it is the market-wide nature of the harm that would justify any such award, the answer, we believe, must be no."); *Benjamin of Forest Hills Realty*, 34 A.D.3d at 97 ("While the plaintiff may have

been deprived of certain brokerage commissions as a result of the [defendant's] practice, these losses are clearly not tantamount to injury to competition in the market as a whole and thus do not constitute a cognizable claim under the Donnelly Act[.]").

II. Go New York's tortious interference claim must fail because it pleads no wrongful means.

The Motion Court correctly dismissed Go New York's claim for tortious interference with prospective business relations because Go New York pled no antitrust violation or other wrongful means that could be a basis for the claim. A claim for tortious interference with prospective business relations will fail if the plaintiff shows no unlawful restraint of trade or other wrongful means. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980). As explained above, Go New York has, for multiple reasons, failed to allege a Donnelly Act violation (*i.e.*, an unlawful restraint of trade) that could be the anchor for a tortious interference claim. Nor has Go New York pled any other wrongful means that satisfies the pleading requirements under New York law. The Court of Appeals has defined "[w]rongful means" as "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure[.]" *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 191 (2004) (citation omitted). Only "extreme and unfair" economic pressure is "wrongful" and sufficient to support a tortious interference claim. *Id.* at 192.

None of Go New York's other allegations come close to alleging wrongful means required to sustain a claim for tortious interference with prospective business relations. To begin with, a defendant's "status as a competitor" largely "excuse[s] him from the consequences of interference with prospective contractual relationships[.]" *Guard-Life*, 50 N.Y.2d at 190-91. Counterclaim Defendants' alleged statements to tourist attractions attempting to persuade them not to partner with Go New York, or expressing preference for an exclusive arrangement, cannot amount to wrongful means under New York law. Go New York alleges that Counterclaim Defendants "require[d] and/or … persuade[d] Attractions to refuse to enter into trade partner agreements with Go New York," but "persuasion alone," even if "knowingly directed at interference with the contract," is insufficient to survive a motion to dismiss. R. 67, ¶ 31; *NBT Bancorp v. Fleet/Norstar Fin. Grp.*, 87 N.Y.2d 614, 624 (1996). Counterclaim Defendants' alleged preferences for exclusive relationships with a handful of tourist attractions cannot support a tortious interference claim, as "[mere] hard bargaining positions, if lawful . . . will not be deemed duress" sufficient to constitute wrongful means. *Advanced Glob. Tech. LLC v. Sirius Satellite Radio*, No. 603680/06, 2008 NYLJ LEXIS 1949, at *14 (N.Y. Sup. Ct., N.Y. Cnty. Aug. 20, 2008). Finally, Go New York has alleged no misrepresentation or fraud that could support a tortious interference claim. Go New York's counterclaims offer no explanation at all of what conduct was

fraudulent or why, or why any alleged statement was a misrepresentation. These cursory allegations cannot serve as the basis for a tortious interference with prospective business relations claim.

Conclusion

For the foregoing reasons, the Motion Court's dismissal of Go New York's Donnelly Act and tortious interference with prospective business relations claims should be affirmed.

Dated: August 10, 2022

Respectfully submitted,

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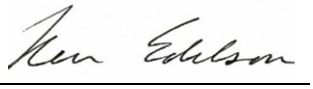

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I hereby certify pursuant to 22 NYCRR § 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word in Times New Roman 14-point font. The brief is double-spaced, except for block quotations and footnotes, which are single-spaced. 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, and this Statement is 7,940.

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