Court of Appeals No. APL 2023-00025

To be Argued by:
MAURICE ROSS
(Time Requested: 30 Minutes)

Court of Appeals
of the
State of New York

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,
Counterclaim Defendants,
GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA, LLC,
SIGHTSEEING PASS LLC,
Counterclaim Defendants-Respondents,
GO CITY NORTH AMERICA, LLC, GO CITY, INC., TAXI TOURS INC.
and OPEN TOP SIGHTSEEING USA, INC.,
Counterclaim Defendants.

BRIEF FOR DEFENDANT/COUNTERCLAIM PLAINTIFF-APPELLANT

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APPELLATE INNOVATIONS
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, Appellant Go New York Tours Inc, states that it has no parents or subsidiaries, but does have the following affiliates:

Topview London LTD.
52 Grosvenor Gardens
London, England SW1W;

A S K Standard Transit Corp.
2 E. 42nd Street,
New York, NY, 10017;

DK Transit Services, Inc.
11 E. 44th St., 6th Floor
New York, NY, 10017.

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Appellant Go New York Tours Inc. states that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

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PRELIMINARY STATEMENT

This case involves substantial questions as to the scope of New York's antitrust protections under the Donnelly Act. Appellant Go New York Tours, Inc., ("Appellant" or "Go New York") will demonstrate that both the motion court and the First Department of the Appellate Division of the New York State Supreme Court treated the Donnelly Act and the Sherman Act as essentially mirror images of each other, despite the plain language of the Donnelly Act clearly covering a greater range of anticompetitive *relationships* as well as anticompetitive *action.* By requiring that Appellant demonstrate a plausible *conspiracy* (not merely an arrangement) resulting in a restraint on trade, the lower courts not only applied the Sherman Act standard to the Donnelly Act, but also erroneously applied the Federal "plausibility" pleading standard adopted in *Bell Atlantic Corp. v. Twombly* 550 U.S. 544 (2007), when they should have applied New York's lower "notice pleading" standard.

JURISDICTIONAL STATEMENT

This action originated in the New York State Supreme Court, New York County. The First Department's Decision and Order is a final determination that completely disposes of Go New York's Donnelly Act and tortious interference

Counterclaims. (R. 744-745) Accordingly, this Court has jurisdiction over Go New York's appeal. *See* CPLR § 5602(a)(1)(i).

QUESTIONS PRESENTED FOR APPELLATE REVIEW

1. Did the First Department err by failing to hold that the Donnelly Act prohibits a greater range of anti-competitive conduct than that prohibited by the Sherman Act, including anti-competitive arrangements as well as restraints on the free exercise of business, trade, or commerce in New York?

Answer: Yes. Under the plain language of the Donnelly Act, it prohibits a broader range of anticompetitive conduct than the Sherman Act.

2. Did the First Department and the motion court err by failing to apply New York's "notice pleading" standard at the pleading stage to evaluate whether the pleadings adequately state and provide notice of claims under the Donnelly Act?

Answer: Yes. The lower courts erroneously required more particularized factual allegations than required at the pleading stage, when they should have assessed whether Appellant's claims fit into any cognizable legal theory.

The questions raised here were preserved below. Go New York specifically argued that the Donnelly Act implicated a broad amount of anticompetitive conduct and that New York courts should not apply the heightened federal

pleading standards in evaluating whether pleadings have sufficiently alleged Donnelly Act antitrust claims. (R. 566-557, 571-573)

NATURE OF THE CASE

I. The Parties and Underlying Conduct

This case pertains to anti-competitive conduct within the New York City hop-on, hop-off sightseeing tour bus market (the "New York City Hop-on, Hop-off Market"). (R. 63-65) New York City Hop-on, Hop-off Market buses transport tourists along fixed routes stopping at New York City's top tourist attractions ("New York City Key Attraction(s)") to allow customers to "hop off" to visit New York City Key Attractions and then "hop on" a different bus of the same company to visit the next New York City Key Attraction. *Id.*

A. Appellant Go New York

Appellant Go New York Tours, Inc. ("Go New York" or "Appellant") is a New York corporation founded in 2011 with its main offices in New York City. (R. 59) Go New York operates double decker tour buses under the brand name "TopView." *Id.* With only four buses when it started in 2011, Go New York has amassed a fleet of more than 40 buses and is now one of three main competitors in the New York City Hop-on, Hop-off Market. Go New York is the largest local competitor in the New York City Hop-on, Hop-off Market. (R. 59-60)

Without the global organizational advantages and marketing power of the other two main competitors in the New York City Hop-on, Hop-off Market, Go New York has grown its operations by developing operating efficiencies in order to offer significantly lower prices than its competitors by 20 to 40 percent. (R. 64) These efficiencies include replacing live tour guides with recorded audio guides and a mobile app that allows customers to track its buses and schedule attraction visits. (R. 64)

B. Respondents Gray Line New York Tours, Inc.; Twin America, LLC; and Sightseeing Pass, LLC

Respondent Gray Line New York Tours, Inc. ("Gray Line") is the local branch of Gray Line Worldwide, which represents itself to be largest provider of sightseeing tours in the world. (R. 62-63) Specifically, Gray Line is a franchisee or licensee of Gray Line Worldwide (R. 63) that operates tour buses under the brand names "Gray Line" and "Citysights" and represents, along with Go New York, one of the top three competitors in the New York City Hop-on, Hop-off Market. Respondents Twin America, LLC, and Sightseeing Pass, LLC (collectively with Gray Line, "Respondents" or the "Gray Line Parties") are affiliates of Gray Line which enter into trade partner agreements and offer "multi-attraction passes" (discussed *infra*) on behalf of Gray Line. (R. 63, 65)

C. Severed Parties Go City Inc.; Go City North America, LLC; Open Top Sightseeing USA; and Taxi Tours, Inc.

Taxi Tours, Inc. ("Taxi Tours") and Open Top Sightseeing, USA, ("OTSUSA") are subsidiaries of the United Kingdom based Big Bus group, and operates "Big Bus" branded busses on behalf of Big Bus Group. (R. 60) Taxi Tours and OTUSA share the same principal office address in New York City as Taxi Tours and appears to have an operational oversight role over Taxi Tours in the United States (R. 372, 374) As alleged by Go New York, their corporate parent corporation in the UK, Big Bis Tours Ltd., acts in concert through common management with Taxi Tours and OTSUSA to wield their considerable market share to great effect. (R. 60)

Go City, Inc., and Go City North America, LLC (collectively with Taxi Tours and OTUSA, the "Big Bus Parties") are United States based "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) They too are subsidiaries of a corporation incorporated in the United Kingdom, Go City Holdings, Ltd. (R. 494, 538) All three of these companies are affiliated of Big Bus group and share common ownership and overlapping management. (R. 415, 467, 494, 538)

D. The Anti-Competitive Conduct

The three main competitors operating in the New York City Hop-on, Hop-off Market during the relevant time period are Appellant Go New York, Gray Line, and Big Bus. (R. 63) Respondents and the Big Bus Parties have affiliated companies that negotiate and enter "trade partner" agreements with New York City Key Attractions in order to create bundled packages that include admission to certain New York City Key Attractions in combination with tickets for hop-on, hop-off tour bus services ("Multi-Attraction Passes"). (R. 65) Multi-Attraction Passes have become a primary and essential means for tour buses to compete in the New York City Hop-on, Hop-off Market. (R. 65-66) Multi-Attraction Passes are mutually beneficial for Hop-on, Hop-off tour busses and New York City Key Attractions in that bundling allows the buses and New York City Key Attractions to increase the numbers and quality of customers. The hop-on, hop-off tours operators benefit additionally by earning commissions from Multi-Attraction Passes. Most importantly, Multi-Attraction Passes provide substantial benefits to consumers, who have access to a wider variety of attractions at a lower cost than they would pay without the bundling together of attractions and tour bus services.

Visitors to New York City, however, have not been able to fully reap the benefits of the Multi-Attraction Pass model, because as alleged in Go New York's Counterclaims, the Gray Line Parties and the Big Bus Parties have entered into

exclusive Trade Partner Agreements with many major New York City Key Attractions, and disparaged Go New York in the marketplace, even threatening to refuse to do business with many New York City Key Attractions if they also contract with Go New York. (R. 67, 72) Respondents and the Big Bus Parties have each entered into "exclusive" Trade Partner Agreements with various New York City Key Attractions (identified specifically by Go New York in its pleadings) which specifically require such New York City Key Attractions to agree that they will not do business with Go New York or allow Go New York to include such attractions in its bundled attraction passes. (R. 67-72) As alleged by Go New York in its pleadings, notwithstanding their respective rights of exclusivity with respect to certain of New York City Key Attractions, both the Gray Line Parties and the Big Bus Parties have waived their exclusive rights so as to share access to certain of New York City Key Attractions, while agreeing with each other and such attractions to forbid Go New York from access to such attractions. *Id.*

For example, the Big Bus Parties have exclusive rights for access to Madame Tussauds Wax Museum, which is owned by a corporate affiliate of Big Bus. (R. 71) Yet, the Big Bus Parties have waived their exclusivity so as to allow the Gray Line Parties to include Madame Tussauds Museum in Gray Line's Multi-Attraction Pass. Therefore, Big Bus, Madame Tussauds Museum and Gray Line have arranged to shut out Go New York from access to Madam Tussauds'

Museum. (R. 70-71) Likewise, the Gray Line Parties have exclusive rights to access to One World Observatory at the World Trade Center for their Multi-Attraction Pass, but have waived exclusivity to allow the Big Bus Parties access to One World Observatory in their Multi-Attraction Pass, but not Go New York. (R. 69) As alleged by Go New York, Gray Line, One World Trade Center and Big Bus have at least arranged to exclude Go New York from access to One World Observatory. *Id.*

By working together and with various New York City Key Attractions to deny Go New York access to them for Go New York's Multi-Attraction Pass, Respondents, the Big Bus Parties, and the attractions entered into agreements and arrangements to shut out Go New York from access to the attractions, and in so doing, give themselves unfair competitive advantages in the New York City Hop-on, Hop-off Market. (R. 65-70) This causes substantial harm to consumers, who are denied lower cost Multi-Attraction Passes which would otherwise have been provided to consumers by Go New York. *Id.* As explained in Go New York's pleadings, Go New York could have offered consumers lower cost Multi-Attraction Passes because Go New York's efficient and high technology tour bus operations allow it to reduce prices to consumers while providing service of comparable quality to its competitors. (R. 64)

II. Relevant Procedural History

A. Appellant's Federal Sherman Act Claims

On March 29, 2019, Go New York filed a federal court action in the Southern District of New York against the Gray Line Parties and the Big Bus Parties 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").

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 under §§ 1 and 2 of the Sherman Act and the Clayton Act without prejudice, and granted leave for Go New York to amend its pleading. Judge Kaplan based dismissal of Go New York's Sherman Act §1 claims on Go New York's inability to plead facts demonstrating respondents Gray Line and Big Bus formed an express agreement to conspire with one another to exclude Go New York from participating in Multi-Attraction Pass Trade Partnership Agreements or circumstantial evidence and "plus factors" under *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.* (709 F.3d 129, 136 (2d Cir. 2013)) and *Twombly v. Bell Atl. Corp*. (425 F. 3d 99, 114 (2d Cir. 2005)):

> Absent direct evidence of a horizontal agreement, which is lacking here, a court may infer a conspiracy based on "conscious parallelism, when . . . interdependent conduct is accompanied by

> circumstantial evidence and plus factors." "Plus factors" can include a "common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." On a generous reading of the FAC, the existence of any plus factors or similar indicia of a conspiracy is implausible.

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 filed a Second Amended Complaint, alleging additional facts in support of violation of Section 1 of the Sherman Act and dropping its claim under Section 2 of the Sherman Act. As is clear from Go New York's Second Amended Complaint, Go New York could have alleged that certain New York City Key Attractions were co-conspirators but it elected not to do so. 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 §1 claim with prejudice. *See* Compendium. Declining to exercise supplemental jurisdiction over the remaining Donnelly Act and common law claims, Judge Kaplan dismissed those claims without prejudice. *Id.* The dismissal was affirmed on appeal.

B. Appellant's New York State Donnelly Act Claim

Two months after Go New York filed the above federal action, on May 21, 2019, Taxi Tours commenced an action in the Supreme Court of the State of New York, County of New York against Go New York (the "State Action"), asserting

causes of action for alleged violations of New York's consumer fraud statutes, unfair competition, defamation, and injurious falsehood. On February 6, 2020, Go New York filed its initial answer and counterclaims in the State 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 voluntarily dismissed all of its causes of action without prejudice.

On May 25, 2021, Go New York filed (with leave of the motion court) an Amended Verified Answer and Counterclaims (the "Counterclaims"). (R. 54-83) The Counterclaims added the remaining Big Bus Parties, their parent companies based in the United Kingdom, and Gray Line 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. *Id.* The Counterclaims also added the remaining Big Bus Parties as additional defendants in Go New York's Third and Fourth Counterclaims for violations of the consumer fraud statutes. *Id.* Once again, Go New York elected that it would not name various New York City Key Attractions as parties and co-conspirators, although it could have reasonably done so. On July 16, 2021, Taxi Tours and Open Top Sightseeing USA filed their joint reply to the Counterclaims. (R 101-116) On the same date,

Go City North America LLC and Go City Inc. filed their joint reply to the Counterclaims. (R. 84-100)

C. Respondent's Motions to Dismiss

On July 22, 2021, Respondents moved to dismiss the Counterclaims under CPLR § 3211(a)(7) for failure to state a cause of action. (R. 188-89).

D. The Motion Court's Final Order Dismissing Appellant's Claims

On December 2, 2021, the motion court heard oral argument remotely on both motions to dismiss and ruled from the bench as set forth in the hearing transcript. (R. 9-32)

Although Judge Schechter paid lip service to New York's notice pleading standard, in dismissing Plaintiff's counterclaim under the Donnelly Act,[1] the record reflects that she relied on the federal "notice pleading standard" and the federal court's Sherman Act analysis, even explicitly referencing the Sherman Act's language of "conspiracy:"

> [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.

[1] The Supreme Court also dismissed Go New York's claim for tortious interference because it was predicated on Go New York's Donnelly Act claims, so "There being no allegation of any statutory violation that survives or allegation of any tort committed by these movants, the [tortious interference] counterclaims …have to be dismissed." (R. 30-31).

> . . 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… (R. 30-31 (emphasis added))

E. Supreme Court Appellate Division, First Department's Affirmation of Dismissal

On June 28, 2022, Go New York appealed to the Appellate Division of the Supreme Court, First Judicial Department, seeking reversal of the motion court's dismissal of the antitrust and tortious interference counterclaims for failure to state a cause of action, as well as reversal of the motion court's dismissal of the counterclaims against Big Bus Tours, Ltd. and Go City Ltd. for lack of personal jurisdiction.

On November 3, 2022, the Appellate Division of the Supreme Court, First Department, affirmed the motion court's dismissal of Appellant's Donnelly Act and tortious interference claims for many of the same reasons that the lower court dismissed those claims. (R. 745) Specifically, the First Department stated that "The antitrust counterclaim under the Donnelly Act failed to state a cause of action, as it did not contain facts sufficient to support the allegations that Gray Line *conspired* with defendant Taxi Tours…Given the lack of any allegations concerning specific conspiratorial acts or discussions by the alleged coconspirators, the court properly declined to infer the existence of a conspiracy or an unlawful anticompetitive

arrangement among Gray Line, Taxi Tours, and the attractions…" (R. 744 (emphasis added)) applying the same incorrect standard the motion court did. Furthermore, the First Department specifically denied Go New York's assertion regarding the heightened pleading standard, stating: "Nor does the record support Go New York's contention that Supreme Court applied the more restrictive federal pleading standard to the Donnelly Act claim." *Id.*

ARGUMENT

As demonstrated, *infra*, the motion court, affirmed by the First Department, wrongly limited the reach of the Donnelly Act by mistakenly relying on Federal statutory and common law. When they dismissed Go New York's antitrust claims, the lower courts both (1) incorrectly evaluated Go New York's antitrust claims using the federal Sherman Act standards, and (2) wrongly applied the heightened federal pleading standard elucidated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), when they should have used the Donnelly Act's broader antitrust prohibitions, as well as New York's long established more liberal pleading standard for claims, which focus on whether the pleadings provide fair notice of the claims. CPLR § 3013. This consistent misapplication of the law, if allowed to withstand scrutiny by this Court, has

unreasonably and substantially diluted the protections provided by New York's antitrust rights for maintaining free and competitive markets.

I. Go New York Properly Alleged Valid Counterclaims Under New York's "Notice Pleading" Standard

New York is a "notice pleading" state; that is "Statements 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." CPLR § 3013. Essentially, to properly state a claim in New York, a party need only put their opponent on notice of the claims that could be asserted against them. *Id.* The "notice pleading" standard is a far more liberal standard than the "plausibility standard" for pleadings adopted by the U.S. Supreme Court, requiring "enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *Bell Atlantic Corp v. Twombly,* 550 U.S. at 545.

Therefore, under New York's "notice pleading" standard, "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction *(see,* CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit *within any cognizable legal theory*…" *Leon v. Martinez,* 84 N.Y.2d 83, 87–88 (1994) (emphasis added). Expanding on the last point, this Court has stated that "[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) (emphasis added).

The motion court acknowledged that Go New York's Donnelly Act claim specifically identified New York Key Attractions who reported Respondents as the reasons behind their refusals to enter into or continue Multi-Attraction Pass Trade Partnership Agreements with Go New York. (R. 25, 31) However, rather than apply the proper standard, the motion court improperly required Appellant to plead facts sufficient to preclude "other rational reasons": "I mean, there are other rational reasons, much like Judge Kaplan said. It doesn't follow that just because Top of the Rock rejects, even if would be a profitable contract for it that doesn't mean that there is a conspiracy… I don't know again that the necessary conclusion is that there must be a conspiracy." (R.21) *See also* (R. 27 ("If I had more facts, perhaps that would be true…")); (R. 31 ("…but there isn't any specified place, how, to who, or who did it…")) The First Department, in affirming the motion court's holding, required an equally improper factual determination: "The antitrust counterclaim under the Donnelly Act failed to state a cause of action, as it did not contain facts sufficient to support the allegations…" (R. 744) However, on a motion to dismiss, the court's "inquiry is limited to whether the pleadings state any cause of action, and not whether there is any evidentiary support for the

counterclaims." *Marine Midland Bank, N.A. v. Charmant Travel Lodge, Inc.*, 111 A.D.2d 908, 909 (2d Dep't 1985).

II. The Donnelly Act is Broader than the Sherman Act

While it is true that "An antitrust claim under the Donnelly Act, or under its essentially similar federal progenitor, section 1 of the Sherman Act must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market," (*Glob. Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 731 (2012) (internal citations omitted)), it is equally well-settled New York law that "the sweep of the Donnelly Act is broader than the Sherman Act. *People v. Schwartz*, No. 1557/86, 1986 WL 55321, at *2 (Sup. Ct. Queens County Oct. 17, 1986) (*citing State v. Mobil Oil Corp*. 38 NY2D 460, 464 (1976)). The legislative history of the Donnelly Act is instructive as to the difference between it and the Sherman Act, and it is humbly submitted that clarification is needed by this Court to make clear that under the Donnelly Act, a party need only allege an *attempted* restraint on trade *or* the "free exercise" or business, trade, or commerce.

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 § 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.

It was the New York State's Legislature's decision to include more language prohibiting agreements as well as action that give the Donnelly Act its broader heft. *See Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988) ("the Donnelly Act — often called a "Little Sherman Act" — should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result."). This was an important, deliberate policy decision in light of the Supreme Court's decision that the Sherman Act did not reach restraints on manufacturing, and so, New York needed broader antitrust laws. *See Aimcee Wholesale Corp. v Tomar Products, Inc.*, 21 N.Y.2d 621, 625 (1968) ("New York's antitrust law represents a public policy of the first magnitude."). 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, 1041 (4th Dept 1979). *See also 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.'").

Because of these key differences between the language of the Donnelly Act and the Sherman Act, the critical inquiry under the Donnelly Act is not merely applying the same standards of "concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market…" (*Glob. Reinsurance Corp. U.S. Branch*, 18 N.Y.3d at 731) as would be applied under the Sherman Act. Rather, it must be recognized that the Donnelly Act prohibits both a significantly broader range of anticompetitive *relationships* ("concerted action") **and** anticompetitive *actions* ("restraints on trade") than the Sherman Act. Unfortunately, however in regard to concerted action resulting in restraints on trade under the Donnelly Act, "There is little guidance in the state court precedents." 4E N.Y.Prac., Com. Litig. in New York State Courts § 124:15 (5th ed.). Thus, it is incumbent upon this Court to give meaning to the words of the Donnelly Act, as comparing the entirety of the two statutes makes plain why the Donnelly Act has a broader scope for both anticompetitive relationships *and* anticompetitive action. The Sherman Act, as written, addresses parties taking concerted action to restrain "trade or commerce" or effectuate a monopoly exclusively through contract, combination, or conspiracy:

> Every *contract, combinatio*n in the form of trust or otherwise, or *conspiracy*, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal… Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C §§ 1, 2. (emphasis added). It does not address other anti-competitive conduct. In contrast, the language of the Donnelly Act is broader in scope, prescribing more methods of acting to restrain trade than those brought by conspiratorial agreement between parties for the purpose of restraining trade or attempting to effectuating a monopoly. *See, e.g. State v. Horsemen's Benev. & Protective Ass'n (New York Div.),* 55 A.D.2d 251, 253 (1st Dep't 1976) ("The Donnelly Act is not restricted to monopolistic activities."). Rather, the Donnelly Act condemns any "arrangement" or "combination" resulting in a monopoly or restraint on free trade or commerce, as well as "arrangements" that do or **may** restrain "competition or the free exercise of any activity in the conduct of any **business,** trade, or commerce":

> Every contract, agreement, *arrangement* or combination whereby a monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, *or whereby competition or the free exercise of any activity in the conduct of any business, trade or commerce* or in the furnishing of any service in this state is or *may* be restrained or whereby for the purpose of establishing or maintaining any such monopoly or *unlawfully interfering* with the *free exercise* of *any activity* in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce

> or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

Gen. Bus. L. § 340(1) (emphasis added). Thus, it is apparent on the face of the statute that the Donnelly Act prohibits both a greater range of "concerted efforts" to restrain trade as well as a greater range of anticompetitive behavior itself. In drafting the Donnelly Act, the New York State legislature would not have added the additional language of "**arrangements**… whereby competition or the **free exercise** of any activity in the conduct of any **business**, trade or commerce or in the furnishing of any service in this state is or may be restrained…" (*Id.*) had they not intended to give meaning to those extra words.[2] *See, e.g. Kimmel v. State*, 29 N.Y.3d 386, 393 (2017) ("we are guided by the principle that a statute should be construed to avoid rendering any of its provisions superfluous"); *Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 7 (2019) ("It is also our well-established rule that "'statutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous.'") (*quoting Lemma v. Nassau Cnty. Police Officer Indemnification Bd.*, 31 N.Y.3d 523, 528 (2018)). Accordingly, "[a]ll that

[2]It is well settled that the Sherman Act and Donnelly Act are both subject to a reasonableness requirement or a "rule of reason." *See e.g., Atkin v. Union Processing Corp.*, 90 A.D.2d 332, 336, 457 N.Y.S.2d 152, 156 (4th Dep't 1982) ("New York's 'rule of reason' and the federal standard of "reasonableness" are similar standards which look to the same factors in deciding whether a restraint is unreasonable.") Appellant does not urge this court to prohibit every attempt to interfere with the free activity of business trade, or commerce in New York, but submits that it must be clarified that "restraint on trade" under the Donnelly Act includes unreasonably interfering in the free exercise of trade, commerce, or business.

need be shown [to state a claim under the Donnelly Act] 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.

Even federal courts recognize that the Donnelly Act may impose liability where federal law does not, such as when the S.D.N.Y dismissed a Sherman Act claim with prejudice, but refused to dismiss a Donnelly Act claim on the grounds that:

> It is not clear that the heightened standard for demonstrating an antitrust conspiracy that governs claims under § 1 of the Sherman Act also applies to the Donnelly Act. The parties have not identified a case from the New York state courts that establishes such a principle, and I have found none. It is therefore prudent to dismiss the Donnelly claims without prejudice.

U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers Local Union No. 3, AFL-CIO, No. 00-civ-4763, 2007 WL 2219513, 15 (S.D.N.Y. Aug. 3, 2007). Indeed, Judge Kaplan, in the Federal Action, recognized the broader scope of Donnelly Act claims, when he dismissed Go New York's Donnelly Act claims without prejudice, allowing Go New York to bring Donnelly Act claims in New York state court based on the allegations that were contained in Go New York's federal pleadings. *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). Appellant will now address the key differences between the two in greater detail.

A. The Donnelly Act Extends to Anti-Competitive "Arrangements"

Of critical importance here, the lower courts failed to recognize that the Donnelly Act extends to "arrangements," a broader category of concerted actions which do not require the existence of smoking gun conspiracies or formal contracts. Gen. Bus. L. § 340(1). The early caselaw surrounding the interpretation of the phrase "arrangement" illuminates the diversions between the Donnelly Act and the Sherman Act. Specifically, with regard to the former, implicit agreements that restrict the free exercise of trade, such as those alleged in the pleadings in this case, are sufficient. In *People v. American Ice Co*, 29 120 N.Y.S. 443, 449 (N.Y. County 1909), decided shortly after the Donnelly Act's enactment in 1899, the defendant was criminally charged with attempting to monopolize the ice industry by acquiring ice producers and distributors and obtaining non-compete agreements from them. Explaining the term "arrangement" in a jury charge, the trial court wrote:

> In our judgment it has a broader meaning than either the word "contract," "agreement," or "combination." It may include each and all of these things, and more. . . . It is []defined as: "The disposition of measures for the accomplishment of a purpose; preparation for successful performance." [or] "A structure or combination of things in a particular way for any purpose."
>
> It is the theory of the people in this case (and the indictment is drawn accordingly) that all the various contracts, agreements, acquisition of property and rights, by purchase or merger of other corporations, and the various acts set forth in the indictment and proven on this trial, constituted an "arrangement" within the meaning of the statute

> whereby a monopoly was created, or attempted, and competition restrained or attempted to be restrained.

People v. American Ice Co. 29 120 N.Y.S. at 449. Similarly, in *Eagle Spring Water Co. v. Webb & Knapp, Inc*., 236 N.Y.S.2d 266, 275 (N.Y. County 1962), the trial court granted an injunction against the defendant landlord, who sought to exclude the plaintiff's water delivery and installation personnel from entering its buildings because the landlord had an exclusive agreement with a rival water provider. The court stated that "The 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.* 236 N.Y.S.2d at 275. *See also H.L. Hayden Co. of NY, Inc. v. Siemens Medical Sys. Inc.*, 672 F. Supp. 724, 745 n.28 (S.D.N.Y. 1987), aff'd, 879 F.2d 1005 (2d Cir. 1989) ("the word "arrangement" in section 340 may include relationships beyond the 'contract[s], combination[s], or conspirac[ies]' proscribed by section 1 of the Sherman Act, and, to that extent, the Donnelly Act may be slightly broader in scope."); *Harlem River Consumers Co-op., Inc. v. Associated Grocers of Harlem, Inc*., 408 F. Supp. 1251, 1283 (S.D.N.Y. 1976) ("The term 'arrangement' has been interpreted in a way which gives the Donnelly Act a scope somewhat broader than that of Section 1 of the Sherman Act.") (*citing American Ice*, 120 N.Y.S. 443). *See also State v. Mobil*

Oil Corp., 38 N.Y.2d 460, 467-468 (1976) (Gabrielli, J., dissenting) (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 have been inserted for a purpose.").

Notably, in both *American Ice* and *Eagle Spring Water*, the defendant seemingly had actually made one or more agreements with co-conspirators, which likely could have satisfied the Sherman Act's "concert of action" element. Nevertheless, each court explicitly affirmed that the term "arrangement" covered conduct beyond "agreements." *See People v. American Ice Co*., 120 N.Y.S. at 449. *See also Eagle Spring Water Co.* 236 N.Y.S.2d at 275. In another early case, the New York State Supreme Court similarly concluded that "[a]n arrangement condemned by these statutes is unlawful even if it does not rise to the dignity of a contractual obligation." *Alexander's Department Stores v. Ohrbachs, Inc*., 180 Misc. 18, 26 (N.Y. County 1943), rev'd on other grounds, 266 A.D. 535 (1st Dep't 1943), appeal dismissed, 291 N.Y. 707 (1943).

As alleged by Appellant, communications between Go New York executives and New York City Key Attractions revealed that the Gray Line Defendants as well as the Big Bus Parties worked together at least implicitly to exclude Go New York from offering Multi-Attraction Passes by using their combined market power to pressure, persuade, dissuade, and even so far as to intimidate New York City

Key Attractions from entering Trade Partnership Agreements with Go New York. Multiple New York City Key Attractions, such as Top of the Rock, the Empire State Building Observatory, the Intrepid Museum, and various others, 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. (R. 65-72) 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. *Id.* Some New York City Key Attractions with existing relationships with Go New York report that the Gray Line Defendants and/or the Big Bus Parties conveyed to them that if they participated in Go New York's Multi-Attraction Passes, the Gray Line Defendants and/or the Big Bus Parties would cease to include them in their own Multi-Attraction Passes. *Id.*

It is all the more troubling that the lower courts found that Go New York had not adequately pled an "arrangement" for the purposes of the Donnelly Act, as Go New York alleged *actual agreements* between certain New York City Key Attractions and the Gray Line Defendants and Big Bus Parties. For instance, Madame Tussauds, *which shares common ownership* with the Big Bus Parties, severed ties with Go New York owing to an allegedly "exclusive" relationship with Big Bus. (R. 70-71) However, despite its allegedly exclusive relationship with Big Bus, Madame Tussauds continues to partner with Gray Line with knowledge

and at least implicit consent of Big Bus, which waived exclusivity to allow Gray Line to have access to Madam Tussauds. *Id.* ***The Lower Courts inexplicably and erroneous failed to recognize that this constituted allegations of an implicit agreement among Gray Line, Big Bus and Madame Tussauds to exclude Go New York***. At the very least, this should have been construed as an anticompetitive "arrangement". *See State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 464 (1976) ("the term 'arrangement'… 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'").

The same is true of One World Observatory at the World Trade Center, except in reverse. Indeed, representatives of One World Observatory even cited its exclusive relationship with Gray Line when refusing to do business with Go New York. (R. 69) However, One World Observatory continues to do business with Big Bus, with at least implicit consent of Gray Line, which waived its exclusive rights to allow Big Bus to have access, while Gray Line, Big Bus and One World Observatory have at least implicitly agreed among themselves to exclude Go New York from access to this attraction. *Id.* These waivers of exclusivity by Big Bus and Gray Line in connection with agreements with certain attractions to forbid Go New York from having access for purpose of Go New York's Multi-Attraction

Pass are anticompetitive arrangements that fall squarely within the scope of the Donnelly Act, and the lower courts committed clear error by deciding otherwise.

B. The Donnelly Act Also Restricts *Attempted* Restraint On the "Competition or Free Exercise of any Business, Trade, or Commerce…" in New York

The Donnelly Act condemns far more practices than the Sherman Act. Whereas the Sherman Act only restricts "restraint of trade or commerce among the several States or with foreign nations…," (15 U.S.C. §1), to sustain an action under the Donnelly Act, a plaintiff merely must allege facts demonstrating respondents had a:

> "contract, agreement, arrangement, or combination whereby… Competition or the **free exercise of any activity** in the conduct of any **business**, trade or commerce or in the furnishing of **any service** in this state **is or may be** restrained or whereby for the purpose of … unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce

Gen. Bus. L. § 340(1) (emphasis added). On the other hand, the Sherman Act *only* condemns attempts to monopolize, *not* merely attempts to restrain trade. *Compare* 15 U.S.C. § 1 *with* 15 U.S.C. § 2. One of the critical differences between the two statutes is that the New York State Legislature did not only prohibit a wider range of conduct under the Donnelly Act, it also made a deliberate choice to prohibit *attempts* on restraining trade or interfering with the free exercise of business, trade or commerce, not merely actual restraints on trade. 4E N.Y.Prac., Com. Litig. in New York State Courts, § 124:4 (5th ed.) Therefore, to require a claimant to show

a "consequent restraint of trade within an identified relevant product market…" (*Glob. Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 731 (2012) rather than merely an *attempt* to restrain trade within a relevant product market is to disregard deliberate choices of the New York State Legislature in enacting the Donnelly Act. The same is true of the tendencies of courts to treat "restraints on trade" under the Donnelly Act as analogous to those under the Sherman Act. *See, e.g. Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 94 (2nd Dep't 2006)("The Sherman Act (15 USC § 1) and the Donnelly Act require identical basic elements of proof for claims of monopolization or attempt to monopolize."); *George Miller Brick Co. v. Stark Ceramics, Inc.* 801 N.Y.S.2d 120, 126 (Monroe County 2005). Without further clarification from this Court, the citizens of New York are powerless to arrest "**arrangements**… whereby competition or the **free exercise** of any activity in the conduct of any **business**, trade or commerce or in the furnishing of any service in this state is or may be restrained…" (Gen. Bus. L. § 340(1)(emphasis added)) a right given to them by the New York State Legislature in the Donnelly Act.

Appellant submits that under current precedent, it adequately pleaded an arrangement among competitors to unreasonably restrain trade within a discrete product market. However, if this Court deems that not to be the case, at the very least it must find that Go New York alleged unreasonable *attempts* to restrain the

"*free exercise* of any activity in the conduct of any business, trade or commerce." Gen. Bus. L. § 340(1). Given the unrelenting pattern in which attractions excluded Go New York but continued to work with its two competitors, the lower courts should have found that was entirely possible, if not probable, that, as alleged by Go New York, there had to be some sort of arrangement among the Gray Line Parties, the Big Bus Parties, and New York Key Attractions to unreasonably restrain Appellant from freely participating in the New York Hop-on, Hop-off Market by offering competitive Multi-Attraction Passes. Indeed, Go New York specifically alleged that the "Representatives of One World Observatory have told Go New York that it has an exclusive relationship with Mark Marmurstein, the president of Gray Line NY, and, indeed, Gray Line advertises the One World Observatory as one of several attractions offered "exclusively" with Gray Line's Multi-Attraction Passes." (R. 69) Nevertheless, the Big Bus Parties also offer One World Observatory as part of their Multi Attraction Pass. *Id.* Similarly, other New York Key Attractions, such as the Empire State Building Observatory (R. 69) and Top of the Rock (R. 68) are "trade partners," with Respondents as well as the Big Bus Parties, but have refused to work with Go New York. Top of the Rock even told a representative of Appellant to talk to Respondents' president in order to gain approval for being a trade partner and consequently having the ability to offer Top of the Rock as part of Go New York's Multi Attraction Pass. (R. 69)

As alleged by Go New York, however, Respondents' interference with the free exercise of Go New York's business did not cease at merely conspiring to ensure that Go New York did not enter into new trade partner agreements, but rather, Respondents and the Big Bus Parties arranged to have Go New York's existing trade partner agreements *terminated*, not once or twice, but *three times*. Go New York had trade partner agreements with the Intrepid Sea, Air and Space Museum, Broadway Inbound, and Madame Tussauds Wax Museum terminated, each one citing its relationship with both the Gray Line Parties and the Big Bus Parties as a reason. (R. 69-71) In fact, Madame Tussauds *shares common ownership* with the Big Bus Parties, so it would stand to reason they would have an exclusive relationship with them – nevertheless, Madame Tussauds maintained a trade partner agreement with Respondents, but not Go New York. (R. 71). It was clear error for the lower courts to speculate concerning other possible explanations for this behavior or to demand detailed citation to evidence of phone calls, dates and meetings wherein the alleged arrangements conspiracies occurred. Go New York should not have been required to prove its case at the pleading stage, without the benefit of discovery. Under the proper New York notice pleading standard, Go New York adequately alleged both attempted *and* successful limitations on the free exercise of its participation in the New York Hop-on, Hop Off Market.

When both the plain meaning of the text, "competition or the free exercise of… any business trade or commerce… is or may be restrained" **and** the legislative history support a broader interpretation than that of the Sherman Act, to find otherwise would be to ignore the clear dictate that "In statutory interpretation cases, the Court's primary consideration is to ascertain and give effect to the intention of the [l]egislature. The statutory text is the clearest indication of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." *People v. Badji*, 36 N.Y.3d 393, 398 (2021) (*quoting Mestecky v. City of New York,* 30 N.Y.3d 239, 243 (2017). Indeed, there could scarcely be a greater attack on the free market than supposed competitors arranging to completely shut their major third competitor out.

III. The Lower Courts Made Explicit References to the Incorrect Federal Pleading Standards and Sherman Act Claims When Evaluating Go New York's Motion to Dismiss

Rather than applying New York's lower pleading standard and more expansive view of antitrust prohibitions, the lower courts made explicit reference to the Sherman Act condition precedent for a "conspiracy" as well as the "plausibility" standard adopted by the Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544*:*

> If I had more facts, perhaps that would be true; but, for example, you know, that one paragraph that maybe would have been compelling if it

> had more to it, I have no idea which executives of the counterclaim defendants told which attractions that if they allow Go New York to include their attractions they are going to terminate their relationship. It's important for me to know that because I don't know who the counterclaim defendants involved in the **conspiracy** are. Is there substance to this? I have no idea. Is it all of the executives? I mean, again, I want to know who because I want to know who should be in, who should be out. Is there really a **conspiracy**? I don't know.

(R. 27-28) It was not proper for the motion court to demand that Go New York establish a conspiracy, rather than merely an arrangement, moreover, it was also improper for the court to inquire whether there was "substance" behind Go New York's allegations. The motion court concluded:

> So, yes, for much the same reasons as articulated by Judge Kaplan, and in the context of New York's very liberal pleading standard of 3013, I am going to grant dismissal of the counterclaims… 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… 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.

(R. 30-31) In dwelling on whether an antitrust conspiracy was the *only* or even the *most* rational explanation for the Attractions' refusals to deal with Go New York as well making "conspiracy" a requirement, the motion court improperly adopted the federal pleading standard articulated in *Twombly* as well as the narrowed language of the Sherman Act. *See, e.g.*, *Twombly*, 550 U.S. at 545.

This was a clear error of law. *Williams v. Citigroup, Inc.*, 104 A.D.3d 521, 522 (1st Dep't 2013), the seminal First Department case on the issue, is particularly instructive here.

In an analogous situation, the United States District Court for the Southern District of New York dismissed Federal antitrust claims as well as New York antitrust claims with prejudice "on the same deficiencies it detected in the federal claims", (*Williams v. Citigroup Inc.*, 659 F.3d 208, 211 (2d Cir. 2011)) and denied a postjudgment motion for reargument and reconsideration to obtain leave to amend the complaint to cure the pleading deficiencies. *Id.* The Second Circuit affirmed the lower court's dismissal of the Sherman Act claims with prejudice, but reversed its dismissal of the Donnelly Act claims with prejudice,[3] on the theory that "It appears to us that [New York's pleading] standard is more lenient than the "plausibility" standard applicable in federal courts, and at the very least that New York's state courts have not yet adopted the *Iqbal/Twombly* pleading standard with respect to claims under the Donnelly Act…" *Id.*, at 215, n.4 (internal citations omitted).

[3] The Second Circuit also reversed the lower court's denial of the motion for reconsideration to amend the complaint in order to fix its deficiencies, on the grounds that the lower court abused its discretion in light of Federal precedent freely granting leave to amend. *See Williams*, 659 F.3d at 214.

The *Williams* plaintiff refiled her Donnelly Act claims in New York State Supreme Court, which were then dismissed by the motion court. *Williams*, 104 A.D.3d at 521.The First Department reversed, stating:

> Contrary to defendants' assertion, the Donnelly Act claim was neither dismissed with prejudice nor barred by the prior federal action The dismissal with prejudice of plaintiff's Sherman Act claim at the pleading stage has no preclusive effect, in light of the heightened pleading requirements for antitrust claims in federal court Although plaintiff has not pleaded direct evidence of a conspiracy, the allegations, which include statements alleged to have been made by defendants and other market participants that defendants boycotted the use of plaintiff's structure to issue ASF bonds, are sufficient to raise an inference of conspiracy.

Id. at 521-522 (internal citations omitted). As properly stated by the First Department, it was an error for the motion court to opine on whether the "most rational" inference from Go New York's pleading was a "conspiracy." (R. 31). Instead, what the court should have looked at is if from the "four corners [of the counterclaims, any] factual allegations are discerned which taken together manifest *any cause of action* cognizable at law..." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). *See also Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (holding same). The final sentence of the above paragraph lays bare the error of the motion court's holding: "Conspiracy can't be the only reason, and it's just not sufficient to support a Donnelly Act claim." (R. 31) While, by the plain language of the Donnelly Act, a conspiracy to restrain trade or interfere with the free market *is* sufficient to support a Donnelly Act claim, it is also not required – an **agreement,**

arrangement or attempt to restrain trade or interfere with the free market suffices as well.

Despite Appellant pointing out that the motion court had applied incorrect standards, the First Department found:

> The antitrust counterclaim under the Donnelly Act failed to state a cause of action, as it did not contain facts sufficient to support the allegations that Gray Line **conspired** with defendant Taxi Tours, a nonparty to this appeal, to disrupt the tour bus market by pressuring various popular New York City tourist attractions to forego partnerships with counterclaim plaintiff Go New York. Given the lack of any allegations concerning specific **conspiratorial acts or discussions** by the alleged coconspirators, the court properly declined to infer the existence of a **conspiracy**… Nor does the record support Go New York's contention that Supreme Court applied the more restrictive federal pleading standard to the Donnelly Act claim.

(R. 744 (emphasis added)) Go New York was not required to allege particularized facts to support that Respondents engaged in a "conspiracy" to monopolize the New York City Hop-On, Hop-off Market, rather, Go New York was merely required to allege that Respondents and others engaged in an "arrangement" which unreasonably restricted trade or unreasonably interfered with the free exercise of commerce, trade, or business. As clearly demonstrated *supra*, this arrangement need not rise to the level of a formal contract to be cognizable at law – rather, the allegations of a relationship between competitors to unreasonably shut out a third party, whether informal or formal, give rise to an "arrangement."

Go New York alleged that Respondents arranged to unreasonably restrain the New York City Hop-on, Hop-off Market by horizontally excluding Go New York from offering Multi-Attraction Passes as part of its offerings. This was effectuated by including exclusivity provisions in Trade Partnership Agreements with New York Key Attractions and discouraging New York Key Attractions from doing business with Go New York through disparagement and threats. (R. 69-72) Consequently, each Respondent was able to diminish competition in the New York City Hop-on, Hop-off Market prices by controlling access to Key Attractions. *Id.* Furthermore, Go New York alleges actual arrangements between the Gray Line Defendants, the Big Bus Defendants, and certain attractions, such as One World Observatory and Madame Tussaud's, whereby one of the Big Bus Defendants or the Gray Line Defendants would enter into allegedly exclusive relationships with said attraction, but allow the other Hop-On, Hop-Off Tour Bus company into the "exclusive" relationship, while at least implicitly agreeing with each other and the attraction to forbid access for Go New York. (R. 69-71) These attempts at unreasonably restraining the New York City Hop-on, Hop-Off market clearly give rise to a "cognizable action at law." Go New York was not required to allege the detail required by the lower courts, such as specific *conversations,* when the facts, as alleged by Go New York clearly "fit *within any cognizable legal theory*…" *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994).

If left unchecked, New Yorkers will be powerless to bring claims where there are plausible allegations of anticompetitive conduct, simply because a court can find "another rational reason" behind attempts at unreasonable restraint. Such judicial overreach greatly narrows the bundle of rights given to the citizens of New York by the state legislature in the Donnelly Act.

CONCLUSION

Appellant has substantially demonstrated that the lower courts applied the incorrect pleading standard, as well as too narrow an interpretation of the Donnelly Act. For those reasons, the motion to dismiss should be reversed.

Dated: April 14, 2023
New York, New York

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WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 9,392 words.

This brief was prepared on a computer using:

- Microsoft Word
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Dated: April 14, 2023
New York, New York

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Compendium

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

GO NEW YORK TOURS, INC.,

Plaintiff,

-against-

19-cv-02832 (LAK)

GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA, LLC, SIGHTSEEING PASS LLC, BIG BUS TOURS GROUP HOLDINGS LIMITED, BIG BUS TOURS GROUP LIMITED, BIG BUS TOURS LIMITED, OPEN TOP SIGHTSEEING USA, INC., TAXI TOURS, INC., LEISURE PASS GROUP HOLDINGS LIMITED, LEISURE PASS GROUP LIMITED, LEISURE PASS GROUP, INC.,

Defendants.

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MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

The Court previously dismissed plaintiff's Sherman Act § 1 claim because the first amended complaint failed to allege the necessary "plus factors" amounting to a horizontal conspiracy between defendants. The second amended complaint, which is virtually identical in relevant part, contains no new allegations that cure this defect. The claim is dismissed with prejudice.

Plaintiff has abandoned the previously dismissed Sherman Act § 2 claim by not asserting it in the second amended complaint. Thus, the Court does not reach this claim.

The remaining claims in this action, all of which previously were dismissed under Rule 12(b)(6) or withdrawn by plaintiff, arise under New York law. The only jurisdictional basis plaintiff asserts for these claims is supplemental jurisdiction.[1] Other than the previous motion, there have been no substantial proceedings in this case. No useful purpose would be served by retaining the state law claims.

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[1] The complaint cites to 28 U.S.C. § 1337, which does not confer supplemental jurisdiction. Dkt. 84 at 6. The Court presumes this is a clerical error and plaintiff intended to refer to 28 U.S.C. § 1367.

The motion to dismiss [DI-87] is granted to the extent that the federal claims are dismissed with prejudice.[2] The Court exercises its discretion to dismiss the remaining state law claims for lack of supplemental jurisdiction.

SO ORDERED.

Dated: March 4, 2020

Lewis A. Kaplan
United States District Judge

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2 Defendants have consented to personal jurisdiction by opting not to renew their motion to dismiss on that ground, which the Court previously denied as moot. *See* Dkt. 88 at 3 n.3 ("The [so-called] Foreign Defendants are not filing a renewed motion to dismiss the [second amended compliant] on jurisdictional grounds . . . ."); *see also* Fed. R. Civ. P. 12(h)(1) (stating that a defense under Rule 12(b)(2) is waived when a party fails to assert it in a responsive pleading).