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Appellate Division–First Department Case No. 2022-01029

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

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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December 16, 2022

Table of Contents

Page

Table of Authorities ii

NATURE OF THE ACTION 1

STANDARD OF REVIEW 3

ARGUMENT 5

POINT I THE APPELLATE DIVISION CORRECTLY HELD THAT APPELLANT'S COUNTERCLAIMS FAIL TO STATE A CAUSE OF ACTION UNDER THE DONNELLY ACT 5

POINT II THE APPELLATE DIVISION CORRECTLY HELD THAT APPELLANT'S COUNTERCLAIMS FAIL TO STATE A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS 16

CONCLUSION 20

Rule 500.1(f) Corporate Disclosure Statement 21

Table of Authorities

Page

CASES

BDCM Fund Adviser, L.L.C. v. Zenni,
103 A.D.3d 475 (1st Dep't 2013) 18

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 5, 15

Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.,
34 A.D.3d 91 (2d Dep't 2006) 6, 13

Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc.,
92 A.D.3d 570 (1st Dep't 2012) 14

Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.,
148 A.D.2d 352 (1989) (Sullivan, J., dissenting) ..... passim

DRMAL Realty LLC v. Progressive Credit Union,
133 A.D.3d 401 (1st Dep't 2015) 14

Global Reins. Corp.-U.S. Branch v. Equitas Ltd.,
18 N.Y.3d 722 (2012) 6

Guard-Life Corp. v. S. Parker Hardware Manuf. Corp.,
50 N.Y.2d 183 (1980) 17

LoPresti v. Massachusetts Mut. Life Ins. Co.,
30 A.D.3d 474 (2d Dep't 2006) 9, 10, 11

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) 6

Sands v. Ticketmaster-New York, Inc.,
207 A.D.2d 687 (1st Dep't 1994) 9

Shawe v. Kramer Levin Naftalis & Frankel LLP,
167 A.D.3d 481 (1st Dep't 2018) 18

Table of Authorities
(continued)

Page

State v. Mobil Oil Corp.,
38 N.Y.2d 460 (1976) 6, 8

Thome v. Alexander & Louise Calder Found.,
70 A.D.3d 88 (1st Dep't 2009), *lv denied* 15 N.Y.3d 703 (2010) 3, 8

Victoria T. Enterprises, Inc. v. Charmer Indus., Inc.,
63 A.D.3d 1698 (4th Dep't 2009) 9, 10

Yankees Ent. & Sports Network, LLC v. Cablevision Sys. Corp.,
224 F. Supp. 2d 657 (S.D.N.Y. 2002) 9

STATUTES

22 NYCRR § 500.22(b)(4) 4

CPLR 3211(a)(7) 2, 7

CPLR 3211(a)(8) 2

CPLR 5602(a)(1)(i) 3

N.Y. Gen. Bus. L. § 340(1) (the "Donnelly Act") ..... passim

Sherman Act 8

NATURE OF THE ACTION

Counterclaim Defendants-Respondents Taxi Tours, Inc., Open Top Sightseeing USA, Inc., Go City North America, LLC, and Go City, Inc., (collectively, the "Big Bus/Go City Respondents") respectfully submit this brief in opposition to counterclaim plaintiff-appellant Go New York Tours, Inc.'s Motion for Leave to Appeal dated December 7, 2022. As described below, the I.A.S. Court's dismissal of Appellant's counterclaims was correct, as recognized by the Appellate Division, First Department's unanimous affirmance. Thus, Appellant's motion should be denied.

Appellant seeks leave to appeal from the Decision and Order of the New York Supreme Court, Appellate Division, First Department, dated November 3, 2022 (the "Order Appealed From") which, after detailed briefing and oral argument, unanimously affirmed the order of the New York Supreme Court, New York County (Schecter, J.), entered January 3, 2022. The Order Appealed From (a) granted the motions by the Big Bus/Go City Respondents and counterclaim defendants-respondents Gray Line New York Tours, Inc., Twin America, LLC, and Sightseeing Pass LLC (collectively, the "Gray Line Respondents," collectively with the Big Bus/Go City Respondents, "Respondents") to dismiss Appellant's First Counterclaim for violation of New York's Donnelly Act (N.Y. Gen. Bus. L. § 340, *et seq.*) and Second Counterclaim for tortious interference with prospective

business relations (collectively, the "Counterclaims"), both for failure to state a cause of action pursuant to CPLR 3211(a)(7); and (b) granted the motion by counterclaim defendants Big Bus Tours Limited and Go City Limited to dismiss this action as against them for lack of personal jurisdiction pursuant to CPLR 3211(a)(8).[1]

The I.A.S. Court diligently and correctly applied well established New York law in dismissing Appellant's Counterclaims pursuant to CPLR 3211(a)(7) for failure to state a cause of action because (1) Appellant's proffered inferences of unlawful conspiracy based on the threadbare allegations in the Counterclaims were unsound and based entirely on speculation, and (2) the remaining allegations lacked sufficient factual material to provide a description of an unlawful antitrust conspiracy—the *sine qua non* of a Donnelly Act claim.

On appeal, after carefully reviewing the Record and the I.A.S. Court's considered decision, the Appellate Division, First Department, came to the same conclusion:

> 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

[1] Appellant does not seek leave to appeal from the Appellate Division's affirmance of the dismissal of claims against Big Bus Tours Limited and Go City Limited pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction.

> arrangement among Gray Line, Taxi Tours, and the attractions.

Order Appealed From at p.2 (*citing Thome v. Alexander & Louise Calder Found.*, 70 A.D.3d 88, 111 (1st Dep't 2009), *lv denied* 15 N.Y.3d 703 (2010)).

In its Motion for Leave to Appeal, Appellant rehashes the same arguments that were previously rejected by both the I.A.S. Court and the Appellate Division based on well settled pleading standards for claims based on alleged violations of the Donnelly Act—including this Court's own precedent. Simply put, Appellant has failed to raise an issue that is reviewable by this Court. Despite its strained attempt to argue otherwise, this matter does not present a novel legal issue, nor does Appellant credibly demonstrate that the Appellate Division misstated or misapplied applicable law. At bottom, Appellant simply disagrees with the I.A.S. Court's and Appellate Division's careful review of the Counterclaims and their stringent application of this Court's jurisprudence. But Appellant's disagreement is no reason for this Court to review or disturb the Order Appealed From.

The Big Bus/Go City Respondents respectfully request that the Court deny Appellant's Motion for Leave to Appeal.

STANDARD OF REVIEW

An appellant may seek leave to appeal a final order of the Appellate Division by permission of the Court of Appeals. CPLR 5602(a)(1)(i). In its motion seeking leave to appeal, an appellant must include a "concise statement of the

questions presented for review and why the questions presented merit review" by the Court of Appeals. 22 NYCRR § 500.22(b)(4). Generally, the Court of Appeals will only grant motions for leave to appeal that include issues that are "novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." *Id.* None of those prerequisites are present in this case.

Here, Appellant has failed to present an issue that is reviewable by this Court. As described above, Appellant merely takes issue with the Appellate Division's testing of its Counterclaims against well-established pleading standards—the issues presented here are not novel, do not address any conflict with this Court's prior jurisprudence, would not resolve any conflict among any departments of the Appellate Division, and do not implicate matters of such public importance to warrant review by this Court. As such, Appellant's Motion for Leave to Appeal should be denied.

ARGUMENT

POINT I

THE APPELLATE DIVISION CORRECTLY HELD THAT APPELLANT'S COUNTERCLAIMS FAIL TO STATE A CAUSE OF ACTION UNDER THE DONNELLY ACT

Appellant argues that the Appellate Division erred by holding that the Counterclaims fail to state a cause of action under New York's Donnelly Act (N.Y. Gen. Bus. L. § 340, *et seq.*), and erred by applying the more restrictive federal pleading standard under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), rather than New York's notice pleading standard, to reach that determination. In so doing, Appellant ignores this Court's own precedent, which both the I.A.S. Court and the Appellate Division strictly adhered to.

The Donnelly Act prohibits "[e]very 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 [c]ompetition . . . is or may be restrained." (N.Y. Gen. Bus. L. § 340(1)).

"To state a claim under the Donnelly Act, a party must: (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal

relationship between two or more entities." *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 94 (2d Dep't 2006).

"An antitrust claim under the Donnelly Act . . . must allege . . . concerted action by two or more entities." *Global Reins. Corp.-U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 731 (2012). Conclusory allegations "of a generalized conspiracy arising out of defendants' various contacts and arrangements or by referring to unilateral business actions taken by them" are insufficient. *Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 148 A.D.2d 352, 355-56 (1989) (Sullivan, J., dissenting), *dissent adopted*, 75 N.Y.2d 830 (1990).

In *State v. Mobil Oil Corp.*, the Court of Appeals described the nature of the requisite "concerted action" subject to the Donnelly Act in the context of the meaning of the term "arrangement," perhaps the most expansive of the terms specified in the statute:

> [T]he 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." Thus the Donnelly Act mandates that there be a conspiracy or reciprocal relationship between two or more entities before liability can be found.

38 N.Y.2d 460, 464 (1976). *See also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) ("concerted action" requires "evidence that reasonably tends to prove that [the antitrust defendants] and others had a conscious commitment to a

common scheme designed to achieve an unlawful objective") (internal quotation marks and citation omitted).

In dismissing Appellant's Donnelly Act claim pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the I.A.S. Court highlighted the absence of any factual content alleged in the Counterclaims to support Appellant's conclusory allegations of conspiracies between Respondents, and between Respondents and the various tourist attractions with which Appellant had sought to partner. The I.A.S. Court correctly reasoned:

> Again, that some attractions have relationships with the counterclaim defendant movants but choose not to do business with the plaintiff doesn't suffice for an inference of conspiracy to move forward. And there are no allegations of unlawful concerted actions by any particular counterclaim defendants. They are parroting the words of conspiracy, but there isn't any specified place, how, to who, or who did it. And it's not a function of giving specific detail, but it's really essential to assessing whether there is a cause of action itself. So the failure to identify any specific participants when it comes to allegations that could support a conspiracy, they are just not there. It's just not true that there is no rational basis for third-parties to do business with defendants and not plaintiffs other than a conspiracy. Conspiracy can't be the only reason, and it's just not sufficient to support a Donnelly Act claim.

(R. 30-31.)

On appeal, the Appellate Division agreed:

> 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 or an unlawful anticompetitive arrangement among Gray Line, Taxi Tours, and the attractions.

Order Appealed From at p.2 (*citing Thome*, 70 A.D.3d at 111, *lv denied* 15 N.Y.3d 703 (2010)).

The I.A.S. Court's and Appellate Division's reasoning was correct. There is no reason for this Court to disturb the Order Appealed From.

As a threshold matter, Appellant's contention that review of the Order Appealed From "is needed to clarify that the Donnelly Act has a greater reach than the [Federal] Sherman Act" (Appellant's Br. at 1, 13) is a strawman intended to invoke this Court's discretionary jurisdiction. That the Donnelly Act is broader than the Sherman Act in certain respects is undisputed. *See 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[.]").

The pleading standards applicable to Appellant's Donnelly Act claim—a second basis proffered by Appellant for invoking this Court's discretionary jurisdiction (Appellant's Br. at 1, 22)—are also well established. Conclusory

allegations are insufficient to state a claim for violation of the Donnelly Act. *See Creative Trading Co.*, 75 N.Y.2d at 830, *reversing and adopting dissent in* 148 A.D.2d 352; *Victoria T. Enterprises, Inc. v. Charmer Indus., Inc.*, 63 A.D.3d 1698 (4th Dep't 2009) (affirming dismissal of a Donnelly Act claim for lack of "a reference to date, time or place" of alleged conspiracy); *LoPresti v. Massachusetts Mut. Life Ins. Co.*, 30 A.D.3d 474, 475 (2d Dep't 2006) ("The plaintiff's cause of action alleging a violation of General Business Law § 340, commonly known as the Donnelly Act, was properly dismissed insofar as asserted against the respondents because the complaint contained only vague, conclusory allegations insufficient to adequately plead a conspiracy or reciprocal relationship between two or more entities."); *Sands v. Ticketmaster-New York, Inc.*, 207 A.D.2d 687, 688 (1st Dep't 1994) ("While plaintiff alleged a conspiracy, the conclusory allegations were legally insufficient to make out a violation of the Donnelly Act."); *Yankees Ent. & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 678 (S.D.N.Y. 2002) ("[C]onclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act.").

The First Department's decision in *Creative Trading Co.* is particularly instructive. The opinion adopted by the Court of Appeals in that case found that the Donnelly Act claim was deficient because the complaint failed to "specify[] the dates or places relevant to the alleged conspiracy," failed to "identify[] specific

participants" in the conspiracy, and only asserted "conclusorily" and "on information and belief" that the defendant trade show sponsor had "entered into reciprocal relationship[s]" with fashion designers who received more desirable exhibition spaces than plaintiff. *Creative Trading Co.*, 148 A.D.2d at 356 (*dissenting opinion, adopted by* 75 N.Y.2d at 830).[2]

Instead, when alleging a conspiracy in violation of the Donnelly Act, a plaintiff must "specify [] the dates or places relevant to the alleged conspiracy." *Creative Trading Co.*, 148 A.D.2d at 355-56 (Sullivan, J., dissenting), *dissent adopted*, 75 N.Y.2d 830 (1990). *See also Victoria T. Enterprises, Inc. v. Charmer Indus., Inc.*, 63 A.D.3d 1698 (2009) (affirming dismissal of a Donnelly Act claim for lack of "a reference to date, time or place" of alleged conspiracy).

As both the I.A.S. Court and the Appellate Division found, the Counterclaims allege only in the most conclusory manner that a conspiracy exists, but they do not allege any actual "facts" to support the existence of that alleged conspiracy, "arrangements," or other reciprocal relationship.

[2] Similarly, in *LoPresti*, the trial court dismissed a Donnelly Act claim where the complaint did "not specify which defendants entered into any agreements, when such agreements were made, or the nature and scope of any agreement." 5 Misc. 3d 1006(A) (Sup. Ct. 2004), *aff'd*, 30 A.D.3d 474 (2d Dep't 2006). The Appellate Division, Second Department affirmed the dismissal, concurring that "the complaint contained only vague, conclusory allegations insufficient to adequately plead a conspiracy or reciprocal relationship between two or more entities." 30 A.D.3d at 475.

The Counterclaims fail to satisfy Appellant's burden to plead facts as to the requisite "when, how, and where" any of the Respondents allegedly agreed to conspire with each other or with any attractions. The Counterclaims speculate that such an agreement exists between the Big Bus/Go City Respondents and the Gray Line Respondents, but fail to allege what the terms of that agreement might be, or when or how any such agreement was reached.

The Counterclaims repeatedly conclude that "Counterclaim Defendants"—a defined term consisting of three Gray Line entities and six Big Bus entities (R. 60 at ¶ 6, R. 61 at ¶¶ 10-11, R. 63 at ¶ 16)—"upon information and belief, conspired with each other." (R. 67 at ¶ 31, R. 70 at ¶¶ 39-40, R. 71 at ¶ 43, R. 72 at ¶ 45). But to survive a motion to dismiss, a plaintiff cannot just "parrot the words 'conspiracy and reciprocal relationship.'" *Creative Trading Co.*, 148 A.D.2d at 356. Instead, a complaint must offer direct evidence by alleging "facts that would tend to establish an unlawful conspiracy." *Id. See also LoPresti*, 30 A.D.3d at 475 ("The plaintiff's cause of action alleging a violation of General Business Law § 340, commonly known as the Donnelly Act, was properly dismissed insofar as asserted against the respondents because the complaint contained only vague, conclusory allegations insufficient to adequately plead a conspiracy or reciprocal relationship between two or more entities.").

In many instances, the Counterclaims do not even attempt to allege an agreement between the Big Bus/Go City Respondents and the Gray Line Respondents. For example, the Counterclaims assert that various "Attractions [] have inexplicably refused to work with Go New York" (R. 70 at ¶ 40), and, from that premise, go on to conclude that "Counterclaim Defendants, upon information and belief, have conspired together with these museums and each other to exclude Go New York." (R. 68 at ¶ 35, R. 70 at ¶ 40.) In other words, Appellant's Counterclaims acknowledge that the claimed concerted action between Respondents rests on nothing more than its own speculation, which is insufficient to state a claim under the Donnelly Act. *See Creative Trading Co.*, 148 A.D.2d at 354 (dismissal warranted where plaintiff "assert[s], 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").

Appellant's allegations of conspiracies between Respondents and various tourist attractions suffer from the same infirmity. The I.A.S. Court found that the closest Appellant came to alleging such a conspiracy was paragraph 47 of the 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, the I.A.S. Court concluded that these allegations are "just simply too conclusory and bereft of any factual foundation" to support a Donnelly Act claim because they contain no factual allegations about which tourist attractions, which executives, or even which of the nine entities comprising the various Respondents the paragraph refers to. (R. 26.) The I.A.S. Court concluded that these generalized allegations are insufficient even "in the context of New York's very liberal pleading standard." (R. 30.)

Stated simply, instead of being premised on alleged facts supporting the existence of a conspiracy or other unlawful "arrangement," Appellant's Donnelly Act claim is based on its deduction that there must be a conspiracy because it can think of no other reason for its failure to accomplish certain business goals. (R. 73 at ¶ 48.) The I.A.S. Court correctly rejected that faulty inference: "[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.)

Appellant's Donnelly Act claim was properly dismissed for a second independent reason not reached by either the I.A.S. Court or the Appellate Division: the Counterclaim's failure to "allege how the economic impact of that conspiracy is to restrain trade in the market in question." *See Benjamin of Forest Hills Realty*, 34 A.D. 3d at 94.

The Counterclaims are replete with the supposed damages that Appellant purports to have suffered as a result of Respondents' alleged misconduct, but that is insufficient to state a claim under the Donnelly Act. *See Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc.*, 92 A.D.3d 570 (1st Dep't 2012) ("the antitrust laws were enacted to protect competition, not competitors"). Instead, Counterclaim Plaintiff-Appellant must allege *harm to competition in the asserted relevant market*—the "hop-on, hop-off" tour bus industry in New York City—which it fails to do.

The Counterclaim's sole allegation with respect to the purported damage inflicted on consumers and the market by such alleged misconduct is contained in a single, conclusory paragraph containing zero factual detail:

> As a result of the foregoing, Counterclaim Defendants have caused and continue to cause harm to the consuming public by unfairly minimizing competition and inflating prices in the New York City hop-on, hop-off sightseeing tour bus market, as well as harm specifically to Go New York by reason of diminishment of its competitive advantage, including lost customers and sales and reputational damage.

(R. 73 at ¶ 49.)

The Counterclaims plead no facts to support such broad conclusions. And such "conclusory allegations will not serve to defeat a motion to dismiss." *DRMAL Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 404 (1st Dep't 2015).

Finally, Appellant's argument that both the I.A.S. Court and the Appellate Division erred by applying the federal pleading standard under *Twombly*, 550 U.S. 544, in dismissing Appellant's Donnelly Act claim (Appellant's Br. at 24-26) is simply wrong. The I.A.S. Court specifically held that the Counterclaims failed to state a viable Donnelly Act claim "under New York['s] more generous liberal pleading standard" (R. 26), and that under the Court of Appeal's precedent set forth in *Creative Trading Co.*, the claims "would be subject to dismissal regardless of whether it's federal or state [pleading standard] in terms of the sufficiency of the allegations" (R. 21). In affirming the Decision and Order, the Appellate Division likewise held that the I.A.S. Court applied the correct pleading standard: "Nor does the record support [Appellant]'s contention that Supreme Court applied the more restrictive federal pleading standard to the Donnelly Act claim." Order Appealed From at p.2.

Because the Appellate Division properly affirmed the dismissal of Appellant's Donnelly Act claim, Appellant's Motion for Leave to appeal from that prong of the Order Appealed From should be denied.

POINT II

THE APPELLATE DIVISION CORRECTLY HELD THAT APPELLANT'S COUNTERCLAIMS FAIL TO STATE A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

Appellant also contends that the Appellate Division erred by affirming the dismissal of its claim for tortious interference with prospective business relations. (Appellant's Br. at n.5.) The crux of Appellant's tortious interference claim is that Appellant would have entered into lucrative trade partner agreements with various attractions but for Respondents' supposed conspiracy to exclude Appellant from those attractions. (R. 67, *et seq.*, at ¶¶ 32-49.)

In its Motion for Leave, Appellant's sole basis for seeking reversal of the Appellate Division's affirmance of the dismissal of its claim for tortious interference with prospective business relations is the purported viability of its Donnelly Act claim:

> The First Department dismissed Go New York's claims for tortious interference, because they were predicated on the Donnelly Act Claims. If Go New York's antitrust claims under the Donnelly Act are reinstated, then so too should Go New York's claims for tortious interference.

(Appellant's Br. at n.1.) For the reasons stated above, the Appellate Division correctly affirmed the dismissal of Appellant's Donnelly Act claim.

Moreover, Appellant's Motion for Leave to Appeal ignores that the Appellate Division also affirmed the dismissal of Appellant's tortious interference claim for a second reason, namely, the Counterclaims fail to allege the requisite "wrongful means" (Order Appealed From at p.2), which the Court of Appeals has defined to include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." *Guard-Life Corp. v. S. Parker Hardware Manuf. Corp.*, 50 N.Y.2d 183, 191 (1980).

At most, the Counterclaims allege that Respondents successfully persuaded various tourist attractions to maintain exclusive relationships with them, rather than enter into new trade partner agreements with Appellant. But the Court of Appeals has held that "persuasion alone, although it is knowingly directed at interference" with plaintiff's potential business relationship, does not constitute "wrongful means" sufficient to support a claim for tortious interference. *Id.* at 191.

The Counterclaims also fail to state a claim for tortious interference with prospective business relations for another reason not reached by the Appellate Division: the Counterclaims do not allege the existence of any protectable relationship between Appellant and any of the tourist attractions with which Appellant sought to partner. Instead, the Counterclaims contain, at most, purely speculative allegations about potential future business relationships, which is insufficient to support a claim for tortious interference with prospective business

relations. *See Shawe v. Kramer Levin Naftalis & Frankel LLP*, 167 A.D.3d 481, 483 (1st Dep't 2018) ("Supreme Court correctly dismissed the tortious interference with prospective economic advantage claim because the complaint fails to allege that plaintiff had a relationship with Bank of America with which defendants interfered."); *see also BDCM Fund Adviser, L.L.C. v. Zenni*, 103 A.D.3d 475, 478 (1st Dep't 2013) (plaintiff must allege "reasonable probability of a business relationship" to state a claim for tortious interference with prospective business relations).

For example, the Counterclaims allege that Appellant has repeatedly attempted to add Top of the Rock as one of the attractions included in its Multi-Attraction Pass, but "during the past few years the operator of Top of the Rock has rebuffed repeated attempts by Go New York to establish a relationship with it." (R. 68 at ¶ 34.) Rather than having a "reasonable probability of a business relationship" with Top of the Rock, the Counterclaims allege the opposite: "Top of the Rock has consistently rejected Go New York as a trade partner." (R. 68 at ¶ 35.)

The Counterclaims concede that Appellant's attempts to establish business relationships with other attractions fared no better.

The Counterclaims allege that the operators of the Empire State Building Observatory, One World Observatory at the World Trade Center, 9/11 Memorial

and Museum, and the 9/11 Tribute Museum each declined Appellant's overtures in favor of pre-existing partnerships with certain of the Respondents. (R. 69 at ¶ 36) ("Go New York has also been shut out of the Empire State Building Observatory, . . . and the operator has told Go New York that it has an exclusive relationship with Leisure Pass's 'New York Pass.'"); (R. 69 at ¶ 37) ("Go New York has also been shut out of One World Observatory at the World Trade Center in Lower Manhattan . . . . 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."); (R. 70 at ¶ 40) (the 9/11 Memorial and Museum and the 9/11 Tribute Museum in Lower Manhattan "have inexplicably refused to work with Go New York").

As for Madame Tussauds, the Counterclaims allege that Appellant approached the wax museum operator "to try to forge a trade partner relationship, but was eventually told that Madame Tussauds was not onboarding additional trade partners." (R. 70 at ¶ 41.)

Because the Appellate Division properly affirmed the dismissal of Appellant's claim for tortious interference with prospective business relations, Appellant's Motion for Leave to appeal from that prong of the Order Appealed From should be denied.

CONCLUSION

For the foregoing reasons, counterclaim defendants-respondents Taxi Tours, Inc., Open Top Sightseeing USA, Inc., Go City North America, LLC, and Go City, Inc. respectfully request that Appellant's Motion for Leave to Appeal be denied.

Dated: New York, New York
December 19, 2022

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Rule 500.1(f) Corporate Disclosure Statement

Counterclaim Defendants-Respondents Taxi Tours, Inc., Open Top Sightseeing USA, Inc., Go City North America, LLC, and Go City, Inc. are not publicly held corporations. Taxi Tours, Inc. and Open Top Sightseeing USA, Inc. are affiliates of Big Bus Tours Limited (organized under the laws of the United Kingdom). Go City North America, LLC and Go City, Inc. are affiliates of Go City Group Limited (organized under the laws of the United Kingdom).

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 16, 2022

deponent served the within: **OPPOSITION TO MOTION FOR LEAVE TO APPEAL**

upon:

SEE ATTACHED SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on December 16, 2022

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
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