New York County Clerk's Index No. 653012/19
Appellate Division, First Department Case No. 2022-01029

Court of Appeals

STATE OF NEW YORK

TAXI TOURS INC.,

—against— *Plaintiff-Counterclaim Defendant,*

GO NEW YORK TOURS, INC.,

Defendant-Appellant.

GO NEW YORK TOURS, INC.,

Counterclaim Plaintiff-Appellant,

—against—

BIG BUS TOURS LIMITED, GO CITY LIMITED, GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA, LLC, SIGHTSEEING PASS LLC,

Counterclaim Defendants-Respondents,

—and—

GO CITY NORTH AMERICA, LLC, GO CITY, INC., TAXI TOURS INC., OPEN TOP SIGHTSEEING USA, INC.,

Counterclaim Defendants.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

NATURE OF THE ACTION

This is the sixth time Go New York has raised its very same "antitrust" claim. The five previous state and federal decisions have all rejected the claim for the same reason: Go New York's pleadings contain no facts supporting an antitrust violation – nothing at all to suggest any kind of "arrangement" or conspiracy among the Counterclaim Defendants-Respondents. The Motion Court correctly applied settled New York law to dismiss Counterclaim Plaintiff-Appellant Go New York's Donnelly Act and related tortious interference claims, and the First Department unanimously affirmed. There is no conflict among the departments and nothing even arguably inconsistent with this Court's rulings. Leave to appeal should be denied.

STATEMENT OF FACTS

BACKGROUND

Each of the parties to this case offers "hop-on, hop-off" bus tours in New York City. R. 59-62.[1] Go New York, the counterclaim plaintiff below, appellant, and movant here, "has enjoyed significant growth" since it was founded in 2012 and is "comparable in terms of size and revenues" to its main competitors, Gray Line and Big Bus, the Counterclaim Defendants-Respondents. R. 63-65, ¶¶ 18, 20,

[1] References ("R.") to the record refer to the record on appeal filed with the Appellate Division, First Department. Citations to Go New York's motion for leave to appeal are indicated with "Mtn." Citations to the parties' briefing below are indicated with the party's name, and "Br."

22. Go New York's pleadings allege that it has disrupted Gray Line's and Big Bus's business models, regularly undercuts them on price, has grown year-to-year in terms of number of riders and revenue, and gained market share over time. R. 64-65, ¶¶ 20, 22.

Go New York, Leisure Pass (which shares ownership with Big Bus), and Sightseeing Pass (which shares ownership with Gray Line), each offer some variant of a "Multi-Attraction Pass," which provides access to multiple tourist attractions with a single ticket, also offered in a package deal with the parties' tour bus tickets. R. 65, ¶ 24. These tickets allow consumers to pay a lower price than they would if paying individually for each tourist attraction. *Id.* The parties to this case compete for partnerships with tourist attractions to include in their Multi-Attraction Passes. R. 66-67, ¶¶ 27-29.

PROCEDURAL HISTORY

Go New York has repeatedly and unsuccessfully pursued the same antitrust claim against Counterclaim Defendants-Respondents since 2019, first in federal court, and then in state court. It alleges that Counterclaim Defendants-Respondents have conspired with each other and tourist attractions to persuade and pressure attractions not to partner with Go New York for inclusion in its Multi-Attraction Passes. Judge Kaplan in the Southern District of New York dismissed Go New York's Sherman Act claims twice, first with leave to amend, and then

with prejudice, finding that it had failed to remedy any of its complaint's defects. R. 302-03, 699-703. Judge Kaplan rejected Go New York's "faulty inference" of an antitrust conspiracy from the allegations that tourist attractions had turned down or ended partnerships with Go New York because "there are many logical and permissible business reasons that the third parties might have chosen not to do business with [Go New York]." R. 701.

The Second Circuit affirmed, noting that "Defendants' allegedly anticompetitive acts would have been objectively rational even if done independently of one another, and [that Go New York] pleads no facts suggesting that they in reality "stemmed from an agreement." *Go N.Y. Tours, Inc. v. Gray Line N.Y. Tours, Inc.*, 831 F. App'x 584, 586-87 (2d Cir. 2020) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007)), *cert. denied*, 141 S. Ct. 2571 (2021). The Supreme Court denied certiorari. 141 S. Ct. 2571 (2021).

After the Second Circuit's decision, Go New York filed counterclaims alleging the same antitrust theory under the Donnelly Act in an unrelated New York state court case about fake online reviews filed by Big Bus, and added Gray Line as a counterclaim defendant. R. 59. The counterclaims recycled Go New York's federal pleadings, and were in key sections identical to the allegations dismissed in the federal case. R. 201-03. Again, Go New York alleges that the Counterclaim Defendants-Respondents conspired with each other, and a handful of

tourist attractions that turned down or ended partnerships with Go New York, to pressure and / or persuade the tourist attractions not to partner with Go New York for inclusion in its Multi-Attraction Passes. R. 65-73, ¶¶ 24-49. Go New York's Donnelly Act claims assert, like its federal claims, that there must be an antitrust conspiracy because the handful of non-party tourist attractions it alleges turned down or ended a partnership with it (out of all the tourist attractions in New York) have "no rational business reason" or "no apparent rational business reason" to turn down partnerships with Go New York. R. 68-69, 70-71, ¶¶ 35-36, 41, 43.

Like the federal courts that examined the case before, Judge Schecter at the Motion Court rejected the basic logic of Go New York's inference of conspiracy, ruling that "[i]t's just not true that there is no rational basis for third-parties to do business with defendants and not plaintiffs other than a conspiracy." R. 31. Judge Schecter ruled that while Go New York's claims were not barred as *res judicata* in light of the prior federal dismissals of the same claims, R. 20-21, Go New York's allegations failed to state a Donnelly Act claim, because, applying the First Department's standard, "there has to be a description of the nature of the conspiracy," and it is "just not there." R. 21, 31. The Motion Court dismissed Go New York's Donnelly Act claim and its derivative tortious interference with prospective business relations claim, finding both insufficient "in the context of New York's very liberal pleading standard of [CPLR] 3013[.]" R. 30; Mtn. at 26,

n.5 (tortious interference claim based on Donnelly Act claim). Judge Schecter considered and rejected Go New York's argument that it could avoid dismissal because of New York's more liberal standard for pleading collusion. R. 21, 30.

Go New York appealed to the First Department, arguing that Judge Schecter implicitly and incorrectly applied the equivalent of the federal pleading standard in dismissing its antitrust claims, despite the Motion Court's explicit application of state law, consideration of New York's liberal pleading standard, and ruling that the claims were not barred in light of the prior federal dismissals. R. 20, 21, 26, 30; *see infra* p. 16. Go New York also argued for the first time on appeal that Judge Schecter erred in dismissing its claims because the Donnelly Act prohibits anti-competitive "arrangements" in addition to contracts and conspiracies, and that it properly alleged an "arrangement" under the Donnelly Act. Go New York Br. at 21, 24-26.

The First Department unanimously affirmed, rejecting both Go New York's argument that its factual allegations were sufficient to support an inference of conspiracy, and its argument that the Motion Court implicitly implied federal law. It ruled (1) that Go New York had made no factual allegations that would permit an inference of conspiracy or arrangement in violation of the Donnelly Act, and (2) that the record provided no support for Go New York's argument that the

Motion Court somehow applied the more restrictive federal pleading standard in dismissing its claims:

> 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 . . . . 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.

Mtn. Ex. A at 4.

Go New York now seeks leave to appeal the First Department's decision on two bases: (1) that the Court of Appeals should clarify whether the Donnelly Act has a greater reach than the Sherman Act (a question not presented by the case below, and in any case cleanly answered by *State v. Mobil Oil Corp.*, 38 N.Y.2d 460 (1976)), and (2) that the Court of Appeals should clarify the factual allegations required to state a Donnelly Act claim under New York pleading standards.

Go New York's motion for leave to appeal should be denied. Its motion never explains why its pleadings amount to an "arrangement" under the Court of Appeals' controlling decision in *State v. Mobil*, which defines the term "arrangement" under New York law, clarifies that the Donnelly Act still requires allegations of a bilateral commitment or agreement, and holds clearly that the Donnelly Act has a greater reach than the Sherman Act. *Mobil Oil*, 38 N.Y.2d at 464. Its confused and contradictory motion for leave repeatedly and mistakenly

mixes up federal and state pleading standards, seeks to create ambiguity and complexity where none exist, and relies on outdated and irrelevant case law that does not support its arguments while ignoring key precedent set by the Court of Appeals in *State v. Mobil*. It points to no conflict among the departments of the Appellate Division, and no conflict between the decisions below and prior Court of Appeals decisions. 22 NYCRR § 500.22(b)(4). Despite its vague arguments to the contrary, its motion also presents no issue of novel or public importance, as the case was decided under uncontroversial settled law and boils down to a business dispute in which Go New York only alleges harm to itself. *Id.*; *see* Gray Line Br. at 4, 29; R. 73, 79, ¶¶ 49, 69.

The six New York judges to examine this case to date have all concluded based on settled law that Go New York has no Donnelly Act claim. The Court of Appeals should deny Go New York's motion for leave to appeal. Further attention to Go New York's persistent filings related to its failed antitrust claims - which no judge, state or federal, has ever found viable - would be a waste of the Court of Appeals' resources, time, and attention.

STANDARD OF REVIEW

An appellant may move for leave to appeal a final order of the Appellate Division with permission of the Court of Appeals. CPLR § 5602(a)(1)(i). A motion for leave to appeal 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, to warrant review, a motion for leave to appeal must present "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.*

ARGUMENT

I. That the Donnelly Act Has a Greater Reach than the Sherman Act is Not a Question Presented by the Decisions Below, and is Already Clear from a Court of Appeals Decision Appellant Ignores in its Motion for Leave.

That the Donnelly Act is broader than the Sherman Act is uncontroversial and does not require clarification by the Court of Appeals. The Court of Appeals in *State v. Mobil* held clearly that the Donnelly Act has a greater reach than the Sherman Act: "[U]undoubtedly the sweep of Donnelly may be broader than that of Sherman[.]" *Mobil Oil*, 38 N.Y.2d at 464. Go New York acknowledges as much in its motion. Mtn. at 15. *State v. Mobil* clearly settles the question Go New York asks this Court to resolve.

The case below presented no question about the breadth of the Donnelly Act. The Donnelly Act may be broader than the federal Sherman Act because it proscribes anticompetitive arrangements, in addition to contracts, combinations, and conspiracies. *Mobil Oil*, 38 N.Y.2d at 464. The First Department's decision took into account presence of the term "arrangement" in the Donnelly Act:

"[g]iven the lack of any allegation 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." Mtn. Ex. A at 4 (emphasis added). The First Department's decision accounted for exactly the way in which the scope of the Donnelly Act exceeds that of the Sherman Act in holding that Go New York pled no arrangement. No further clarification of the scope of the Donnelly Act is necessary in light of *State v. Mobil*, and such clarification would make no difference in the outcome of the case below, as the First Department ruled clearly that Go New York stated no claim in relation to the conduct prohibited by the Donnelly Act but not the Sherman Act.

Go New York's motion identifies no decision on the scope of the Donnelly Act in conflict with the decisions below. "Reciprocal relationship" - the key phrase in the Court of Appeals' definition of arrangement - has been integrated into the pleading standards for Donnelly Act claims that appellate courts in New York have used for decades. *See, e.g., Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 136 A.D.2d 461, 462 (1st Dep't 1988) ("[T]he Donnelly Act mandates that there be a conspiracy or ***reciprocal relationship*** between two or more entities before liability can be found[.]") (emphasis added); *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 94 (2d Dep't 2006)

("To state a claim under the Donnelly Act, a party must . . . show a conspiracy or ***reciprocal relationship*** between two or more entities[.]") (emphasis added). The statutory term "arrangement" is thus fully accounted for in New York case law.

The Court of Appeals need not further address the question of whether the Donnelly Act is broader than the Sherman Act because (1) the answer is already clear under New York law, (2) the First Department's decision below took into account the exact way in which the scope of the Donnelly Act exceeds that of the Sherman Act, consistent with the Court of Appeals' key decision on the issue, and (3) there is no conflict among lower courts on this question. Go New York's motion for leave should be denied as to its first question presented on this basis.

II. The First Department Correctly and Unanimously Held That Go New York Failed to Plead the Essential Elements of a Donnelly Act Claim Under Settled New York Law.

Review is not needed to clarify the factual allegations required for pleading a Donnelly Act claim under New York's pleading standard. Beyond its entirely unreliable recitation of the applicable law, Go New York's motion boils down to claiming that the First Department and Motion Court incorrectly applied a more stringent standard based on federal law, and that its claims should survive under New York law. This argument is not a basis to grant leave to appeal, because the First Department unanimously and correctly held under settled New York law that the claim failed under even the most liberal of standards. Mtn. Ex. A. at 4.

Go New York tries to make this case more complicated than it is. Go New York pled no facts at all to support the existence of a conspiracy or arrangement in violation of the Donnelly Act. Controlling Court of Appeals' decisions on the pleading standards on a motion to dismiss are also clear that conclusory pleadings - like Go New York's counterclaims - are insufficient to survive a motion to dismiss. *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009) ("Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations--claims consisting of bare legal conclusions with no factual specificity--are insufficient to survive a motion to dismiss."). Every court to examine Go New York's pleadings has come to the same conclusion, whether under federal or state law: they do not contain facts to suggest any antitrust violation.

A. The First Department Correctly Held that Go New York Pled No Facts Supporting an Anticompetitive Arrangement or Conspiracy.

New York courts routinely dismiss Donnelly Act cases where the claimant does not plead facts that describe or tend to establish a Donnelly Act violation, and that is what the First Department and Motion Court did here. Mtn. Ex. A, at 4; *see also* Gray Line Br. at 18-21 (collecting cases). The Court of Appeals need not answer the question of the specific facts required to state a Donnelly Act claim under New York pleadings standards, because Go New York failed to satisfy the basic substantive requirements to plead a Donnelly Act claim.

"An antitrust claim under the Donnelly Act . . . must allege . . . concerted action by two or more entities[.]" *Glob. Reinsurance Corp. v. Equitas Ltd.*, 18 N.Y.3d 722, 731 (2012). To state a Donnelly Act claim, New York law also requires allegations of a conspiracy or "arrangement," which the Court of Appeals has defined as a "reciprocal relationship of commitment between two or more legal or economic entities." *Mobil Oil*, 38 N.Y.2d at 464; *Creative Trading*, 136 A.D.2d at 462 ("[T]he Donnelly Act mandates that there be a conspiracy or reciprocal relationship between two or more entities before liability can be found.") Pleading an arrangement requires a bilateral commitment or agreement between the parties alleged to have violated the Donnelly Act. *Mobil Oil*, 38 N.Y.2d at 464. The First Department's ruling that Go New York pled no facts regarding specific conspiratorial acts or discussions by alleged co-conspirators, and thus failed to state a Donnelly Act Claim, was entirely consistent with this precedent. Mtn. Ex. A at 4.

Go New York's pleadings are silent as to any bilateral commitment, agreement, relationship, communications, or any meeting of the minds between the Counterclaim Defendants-Respondents, and thus contain no facts that would meet the requirements of the controlling law cited above. The counterclaims contain no facts to answer basic questions about the nature of the alleged conspiracy or arrangement, specific acts or discussions to further it, or what the reciprocal

relationship between the Counterclaim Defendants-Respondents was - facts necessary for a court to determine if concerted action, conspiracy, or a reciprocal relationship of commitment has been pled. *See* Gray Line Br. at 18-21. The First Department correctly dismissed Go New York's claims under the controlling law.

Go New York argued on appeal for the first time that even if it had not alleged a conspiracy, it had alleged an "arrangement" under the Donnelly act. Go New York Br. at 21, 24-26. The First Department correctly rejected this argument, because Go New York has pled no facts that support an "arrangement" or "reciprocal relationship of commitment" between any of the Counterclaim Defendants-Respondents or between any Counterclaim Defendant-Respondent and any tourist attraction. Go New York tries to avoid the relevant Court of Appeals precedent by omitting any discussion *State v. Mobil*'s definition of "arrangement" as a reciprocal relationship of commitment from its motion for leave. *See* Mtn. at 17-22. This strategy creates a clearly inaccurate picture of the applicable law, and tries to paint a picture of complexity and ambiguity in the law where the bottom line is that Go New York has not pled facts that suggest an arrangement as defined by the Court of Appeals in a case that is settled precedent about which there is no dispute. Pleading an arrangement requires allegations of a bilateral commitment or agreement – a "reciprocal relationship of commitment." *Mobil Oil*, 38 N.Y.2d at 464. Go New York makes no attempt anywhere in its motion for leave to explain

why its counterclaims contain facts to support the existence of an arrangement or reciprocal relationship of commitment as defined by the Court of Appeals. *Mobil Oil*, 38 N.Y.2d at 464.

The cases Go New York cites in its motion for leave also provide zero support for its argument that it has pled an arrangement. Go New York cites *Eagle Spring*'s broad definition of arrangement, Mtn. 18-19, but this trial court decision predates the Court of Appeals' clear definition of arrangement in *State v. Mobil*, is not binding on the Court of Appeals, was issued after a trial on the merits, and says nothing about the standard for pleading an arrangement under the Donnelly Act. *Eagle Spring Water Co. v. Webb & Knapp*, 236 N.Y.S.2d 266 (N.Y. Sup. Ct., N.Y. Cnty. 1962). Go New York's citation to *People v. American Ice Co.*, Mtn. 17-19, is also irrelevant to the disposition of this case. Go New York's misleading citation of that 1909 trial court decision hides the fact that that court there was defining "arrangement" by reference to the definitions of the word listed in the New English Dictionary. *People v. Am. Ice Co.*, 120 N.Y.S. 443, 449 (N.Y. Sup. Ct., N.Y. Cnty. Dec. 10, 1909). A 1909 trial court's definition of "arrangement" with reference to a list of dictionary definitions is obviously superseded by the Court of Appeals' explicit definition of the term in *State v. Mobil* in 1976, and does nothing for Go New York's argument. *Alexander's Department Stores v. Ohrbachs, Inc.*, 40 N.Y.S.2d 631 (N.Y. Sup. Ct., Bronx Cnty. Jan. 27, 1943) is

similarly unhelpful to plaintiffs, as it only stands for the uncontroversial proposition that an arrangement may be unlawful under the Donnelly Act if it does not involve contractual obligations, and in any case, as a 1943 trial court decision, does not help Go New York get around *State v. Mobil*. Finally, *H.L. Hayden Co. of NY, Inc. v. Siemens Medical Sys.* directly undermines Go New York's argument, as the federal district court in that case *rejected* a plaintiff's argument that its Donnelly Act claims should be distinguished from its Sherman Act claims because of the Donnelly Act's broader scope, and the footnote movants cite to explicitly recites the Court of Appeals' definition of arrangement from *State v. Mobil*, which movants have tried to avoid in their motion for leave. *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 672 F. Supp. 724, 745, n.28 (S.D.N.Y. 1987), *aff'd*, 879 F.2d 1005 (2d Cir. 1989).

B. Neither the Motion Court Nor the First Department Applied Federal Law, and Go New York's Analysis of the Applicable Legal Standards is Confused and Inaccurate.

Despite Go New York's confused attempt to make the relationship between state and federal law in this case seem more complex than it is, the case below presents no question for review for the reason the First Department noted: the record simply does not "support Go New York's contention that Supreme Court applied the more restrictive federal pleading standard to the Donnelly Act claim." Mtn. Ex. A at 4. The First Department correctly decided this issue because it is

clear from the motion court's decision that Judge Schecter explicitly applied New York Law, and not federal law, in dismissing Go New York's claims.

Judge Schecter explicitly ruled that *res judicata* did not bar Go New York's claims in light of the federal dismissals; clearly distinguished New York's more liberal pleading standard from the federal pleading standard; and dismissed the case under the First Department's decision in *Creative Trading.* R. 20 ("I am convinced that res judicata does not apply."); R. 26 ("[E]ven under New York['s] more generous liberal pleading standard, it won't survive either."); R. 30 ("[I]n the context of New York's very liberal pleading standard of 3013, I am going to grant dismissal of the counterclaims."); R. 21 ("[U]nder *Creative Trading Co*. [the claims] would be subject to dismissal regardless of whether it's federal or state in terms of the sufficiency of the allegations").

Nor does any language in the Motion Court's decision support the argument that Judge Schecter implicitly applied federal law in dismissing Go New York's claims. Go New York argues that the lower courts' references to "concerted action" and "conspiracy" reflect reliance on the language of the Sherman Act and an inappropriate application of federal law. Mtn. 9-10, 13-14. This argument is plainly incorrect and should be rejected. New York Law specifically requires concerted action to state a Donnelly Act claim. *Glob. Reinsurance Corp.*, 18 N.Y.3d at 731 (2012) ("An antitrust claim under the Donnelly Act . . . must allege .

. . concerted action by two or more entities[.]") New York state cases explicitly describe Donnelly Act pleading requirements in terms of conspiracy, and Go New York's own pleadings repeatedly allege conspiracy in violation of the Donnelly Act. *Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 148 A.D.2d 352, 355 (1st Dep't 1989) (Sullivan and Carro, JJ., dissenting) ("Notwithstanding our directive, plaintiffs have now failed, for the second time, to supply the allegations of unlawful concerted action essential to a claim under the Donnelly Act. Instead of alleging facts that would tend to establish an unlawful conspiracy, they repeatedly parrot the words 'conspiracy and reciprocal relationship', without specifying the dates or places relevant to the alleged conspiracy."), *rev'd*, 75 N.Y.2d 830 (1990); Gray Line Br. at 11; R. 67, 69-73, 78, ¶¶ 31, 36-37, 39, 40-41, 43, 45, 48, 66.

Inexplicably, although Go New York's brief on appeal protested that the Motion Court incorrectly applied the federal "plausibility" pleading standard established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), its motion for leave specifically cites the Twombly standard as applicable to its Donnelly Act claims. Go New York Br. at 2-3, 28; Mtn. at 23. Go New York quotes language from *Telerep, LLC v. U.S. International Media, LLC* stating that, "[w]hile no probability requirement is imposed during the pleading stage, there must be enough facts 'to raise a reasonable expectation that discovery will reveal evidence

of illegal agreement.'" *Telerep v. U.S. Intl. Media, LLC*, No. 600831/2019, 2011 NY Slip Op 33905(U), at *7 (N.Y. Sup. Ct., N.Y. Cnty. Apr. 11, 2011). Unfortunately for Go New York, the language it quotes recites the precise standard it argued *did not apply* to its Donnelly Act claims on appeal, Go New York Br. at 2-3, 28, because it is exactly the federal pleading standard set out by the Supreme Court in *Twombly*:

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."

Bell Atlantic, 550 U.S. at 556 (citation omitted).

Go New York then goes on to argue - again, confusingly, and erring as to the applicable law - that the motion court incorrectly applied a standard *more stringent than the plausibility standard, i.e.*, that "the motion court explicitly referenced the actual 'concerted action' federal standard" and "went beyond the requirement of demonstrating 'plausible' concerted action, to require 'actual concerted' action." Mtn. at 24. Go New York again here mistakenly argues that the federal plausibility standard applies to its Donnelly Act claims and introduces yet another error in its recitation of the applicable law: there is no distinction in federal or New York state law between a "plausible concerted action" and an "actual concerted

action" standard. *Id.* Go New York cites no case law to support the existence of this distinction, and cannot, because the distinction does not exist. *Id.* The upshot of these inaccuracies is that Go New York's motion for leave errs completely as to the applicable law in this case.

None of the language in the Motion Court's or First Department's decisions reflects federal law, and Go New York's strained and confusing arguments to the contrary should be rejected. Nor do the Motion Court's references to Judge Kaplan's decision, R. 21, 26, 30, indicate that Judge Schecter implicitly applied federal law. Judge Schecter recognized, like Judge Kaplan, that there is no logical or rational reason at all to infer conspiracy from the facts Go New York pled. R. 21. Go New York's inferential allegations of conspiracy depend on accepting the premise that tourist attractions have no rational basis to turn down a partnership with Go New York. As Judge Schecter explained, this premise is false: "[i]t's just not true that there is no rational basis for third-parties to do business with defendants and not plaintiffs other than a conspiracy." R. 31. Without this step in its reasoning, Go New York's inferential allegation of conspiracy falls apart. Judge Schecter's recognition that the premise of Go New York's proposed inference of conspiracy was logically "just not true" has nothing to do with the applicable pleading standard, and does not reflect an application of federal law.

CONCLUSION

This case presents no conflict among the departments of the Appellate Division, no conflict between the decisions below and any Court of Appeals decision, and no legal issue of any novelty or public significance. Six New York judges and five previous federal and state decisions have all concluded that Go New York has no antitrust claim based on the facts pled. Allowing the case to proceed further would be a waste of the Court of Appeals' resources, time, and attention. For the foregoing reasons, further review of the First Department's decision is not warranted, and Go New York's motion for leave to appeal should be denied.

Dated: December 16, 2022

Respectfully submitted,

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