No. _____

IN THE

# Supreme Court of the United States

GO NEW YORK TOURS, INC.,

*Petitioner*,

—v.—

GRAY LINE NEW YORK TOURS, INC., *et al.*,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

MAURICE N. ROSS
*Counsel of Record*
LAURA-MICHELLE HORGAN
RANDALL L. RASEY
BARTON LLP
711 Third Avenue, 14th Floor
New York, New York 10017
(212) 687-6262
mross@bartonesq.com

*Attorneys for Petitioner*

## QUESTIONS PRESENTED

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations[.]"

In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), this Court addressed the application of the Rule 8(a)(2) pleading standard to antitrust conspiracy claims under Section 1, reinterpreting that standard to require that a plaintiff plead sufficient "factual matter" to provide "plausible grounds to infer an agreement". *Id.*, at 556. *Twombly* made clear that, in the absence of direct evidence of an agreement, it was no longer sufficient to rely solely on parallel anticompetitive conduct by the alleged conspirators at the pleading stage. But courts of appeals have differed as to the kind and degree of additional evidence which must be alleged to plead plausible grounds for a conspiracy under Section 1.

The questions presented are:

1. Whether a plaintiff must allege evidence of "plus factors" in addition to parallel anticompetitive conduct in order to plead an antitrust conspiracy under Section 1 of the Sherman Act.

2. Whether allegations of circumstantial evidence falling short of dispositive "plus factors" may be sufficient to plead an antitrust conspiracy under Section 1 of the Sherman Act.

## PARTIES TO THE PROCEEDING

The petitioner is Go New York Tours, Inc.

Respondents are 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, and Leisure Pass Group, Inc..

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner Go New York Tours, Inc. states that it has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

Go New York Tours, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The Summary Order of the Court of Appeals is published at 831 Fed. Appx. 584 (2d Cir. 2020) and included in Petitioner's Appendix ("Pet. App.") at A. The Memorandum and Order of the District Court dated March 4, 2020, granting the motion to dismiss the federal claims in the second amended complaint, is included in Pet. App. at B. The Memorandum and Order of the District Court dated November 7, 2019 dismissing the first amended complaint appears at 2019 WL 8435369 (Nov. 7, 2019), and is included in Pet. App. at C.

## JURISDICTION

On November 7, 2019, the District Court granted Defendants' motion to dismiss the first amended complaint, with lead to replead. On March 4, 2020, the District Court granted the Defendants' motion to dismiss the second amended complaint to the extent of dismissing the federal claims with prejudice and dismissing the remaining state law claims without prejudice. Plaintiff Go New York Tours, Inc. filed a timely appeal to the Second Circuit Court of Appeals, which affirmed the dismissal on December 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AT ISSUE

Federal Rule of Civil Procedure 8(a) provides, in relevant part: "A pleading that states a claim for relief must contain … a short and plan statement of the

claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2).

Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, provides:

> Every contract, combination 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 make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

## STATEMENT OF THE CASE

This case concerns anticompetitive conduct by the two dominant operators in the New York City hop-on, hop-off sightseeing tour bus market (the "NYC Market"), operating under their brand names "Gray Line" and "Big Bus", directed toward their competitor Go New York Tours, Inc. ("Go New York"), which operates under its own brand name "TopView". Hop-on, hop-off sightseeing tour buses are open-top, double-decker buses which travel on predetermined routes through areas of New York City that are of general interest to tourists, allowing tourists and other customers to "hop off" a tour bus at attractions that are of interest to them, and then to "hop on" another tour bus operated by the same company when they are ready to resume their tour.

The NYC Market is highly price sensitive. The consumer base consists of tourists and other visitors to New York City interested in sightseeing; the services of the three hop-on, hop-off sightseeing tour bus operators are fundamentally similar and largely interchangeable; and a tourist is unlikely to purchase the services of more than one hop-on, hop-off sightseeing tour bus operator during a single visit to New York City. Thus, consumers tend to choose among the respective services offered by the three operators based heavily on price.

While just a few years ago there were multiple participants competing against each other in the NYC Market, Gray Line and Big Bus have consolidated the market through acquisition of their competitors, leaving them and Go New York's TopView as the three main participants in the NYC Market. Go New York alleges that Defendants, the operators of Gray Line and Big Bus and their respective affiliates, used their dominant market positions to quelch competition in order to maintain higher price structures than would be sustainable in a truly competitive NYC Market. And, indeed, in 2012 the United States Department of Justice and New York State Attorney General jointly sued Twin America, LLC, which operates Gray Line, and related companies for various antitrust violations, including maintaining artificially high prices for consumers, after acquiring Gray Line's then-largest competitor in the NYC Market. The action resulted in a consent judgment entered in 2015, whereby Twin America, LLC was required to forfeit 47 Manhattan

sightseeing bus stops to make them available for competitors and to disgorge $7.5 million of profits.[1]

Go New York alleges that it disrupted the higher price structures of Gray Line and Big Bus by finding operating efficiencies which have enabled it to offer comparable hop-on, hop-off sightseeing tour bus services at substantially lower prices. But rather than compete with Go New York on price, Defendants conspired to protect their higher price structures through unfair tactics to diminish Go New York's ability to offer competitive service packages.

As alleged, Defendants leveraged their dominant market positions to require and/or persuade operators of major New York City tourist attractions to refuse to enter into trade partner relationships with Go New York and to deal instead only with Gray Line and Big Bus and their respective affiliates. Such trade partner relationships are necessary for the creation of "Multi-Attraction Passes", which bundle hop-on, hop-off sightseeing tour bus passes with admissions to popular tourist attractions for a single, discounted price, and have become an essential facility for the hop-on, hop-off sightseeing tour bus companies to market and sell their services to budget-conscious tourists in the NYC Market. Gray Line and Big Bus did so in order to prevent Go New York from offering competitively priced Multi-Attraction Passes that include the major attractions which most tourists wish to visit. As a result, consumers wishing to purchase Multi-Attraction Passes that include most of New York City's major attractions are limited to the higher priced options offered by Defendants for their Gray

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[1] *See United States of America, et al., v. Twin America, LLC, et al.*, Case No. 12-CV-8989, 2015 WL 9997203 (S.D.N.Y. Nov. 17, 2015).

Line and Big Bus-branded services, and denied the lower-priced options that Go New York could have offered, while Go New York loses revenues and customers.

As is often the case for plaintiffs asserting a claim under Section 1 of the Sherman Act, Go New York alleged facts to show that Defendants engaged in parallel anticompetitive conduct, but lacked direct evidence of an agreement or overt conspiracy among them. Nevertheless, Go New York alleged their common motive to conspire, a prior history of Section 1 violations by the operator of Gray Line, market conditions indicating the economic plausibility and practicality of the alleged conspiracy, and conduct of and statements by the various tourist attractions, which, taken as a whole, Go New York submits provide "plausible grounds to infer an agreement" and "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

The District Court dismissed the Section 1 claim upon finding that Go New York had failed to allege the "plus factors" which the court deemed necessary to infer a conspiracy under *Twombly*. The Court of Appeals found that Go New York had pled at least one significant "plus factor" and additional circumstances supporting the inherent rationality of the alleged conspiracy, but nevertheless determined that Go New York had not alleged "sufficiently powerful 'plus factors' " from which to infer a conspiracy, and affirmed the dismissal. Pet. App., at 5a.

Go New York submits that the Court of Appeals' emphasis on "plus factors" imposes an overly restrictive pleading standard which is not mandated by *Twombly* and unnecessarily prevents plaintiffs

from pursuing plausible Section 1 claims which could be proved through discovery. Where, as here, a plaintiff has alleged an inherently logical, rational conspiracy and circumstantial indicia that the anticompetitive conduct at issue resulted from more than just parallel conduct, the plaintiff should not be required to allege additional "plus factors" in order to plead a plausible antitrust conspiracy under Section 1 of the Sherman Act.

### A. Summary of Factual Allegations

Defendants Gray Line New York Tours, Inc., its parent Twin America, LLC (referred to herein collectively as "Gray Line"), and Sightseeing Pass LLC are related companies based in New York City. Gray Line operates in New York City under the "Gray Line" brand name, and is a franchisee or licensee of Gray Line Worldwide, which represents itself as "the largest provider of sightseeing tours on the planet" with "thousands of tours and experiences in more than 700 locations, spanning six continents". Sightseeing Pass LLC creates and sells Multi-Attraction Passes. As noted above, Twin America, LLC has previously been found to have maintained an artificially high price structure through acquisition of a competitor in the NYC Market.[2]

Defendants Big Bus Tours Group Holdings Limited, Big Bus Tours Group Limited, and Big Bus Tours Limited are based in the United Kingdom and part of the "Big Bus" group of companies which operates hop-on, hop-off sightseeing tour buses in cities around the world. Defendants Open Top Sightseeing USA, Inc. and Taxi Tours, Inc. are New York-based subsidiaries of the Big Bus group, and operate hop-on, hop-off

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[2] *See* Note 1, *supra*.

sightseeing tour buses in New York City under the "Big Bus" brand name. The Big Bus group represents itself as "the largest operator of open-top sightseeing tours in the world, providing sightseeing tours in 19 cities across three continents".

Defendants Leisure Pass Group Holdings Limited and Leisure Pass Group Limited are based in the United Kingdom and part of the "Leisure Pass" group companies which offers sightseeing services, including Multi-Attraction Passes, in cities around the world, and share common ownership and control with the Big Bus group. Defendant Leisure Pass Group, Inc. is a New York-based subsidiary of the Leisure Pass group which creates and sells Multi-Attraction Passes in New York City.

Plaintiff Go New York was founded in New York City in 2012 by its current principal, Asen Kostadinov, and its operations have been focused mainly on the New York City metropolitan area. Lacking the international organizational advantages and brand name recognition of Big Bus and Gray Line, Go New York grew its TopView sightseeing tour bus business by finding operating efficiencies enabling it to offer its tour bus services at significantly lower prices than offered by Big Bus or Gray Line. For example, Go New York introduced recorded audio guides via headsets in lieu of live tour guides, and introduced a mobile app with which its customers could track TopView buses in real time so that they can better plan their activities. The prices at which Go New York is able to offer its TopView sightseeing tours to consumers regularly undercut the prices offered by Big Bus and Gray Line for equivalent services by around 20 to 40 percent.

Go New York, Gray Line, and Big Bus each market and sell their tour bus services through Multi-

Attraction Passes (among other sales channels), which bundle passage on their respective tour buses with admissions to various attractions and other activities for a single price that costs the consumer substantially less than if the bundled components were purchased separately. Big Bus's affiliates in the Leisure Pass group and Gray Line's affiliate Sightseeing Pass LLC also sell Multi-Attraction Passes which include Big Bus and Gray Line tour bus passes, respectively.

To be able to offer a Multi-Attraction Pass that is attractive to tourists, a company must enter into trade partner agreements with popular attractions, whereby the trade partner makes admission to its attraction available at a discounted "net rate" when bundled into its partner's Multi-Attraction Pass, with the seller of the pass paying its trade partner at an agreed rate for each pass used at that attraction and retaining a commission-type fee for each such use. Thus, the attraction benefits by gaining additional paying customers, while the seller of the Multi-Attraction Pass attracts more paying customers for its own or its affiliate's tour buses in addition to its commissions. The Multi-Attraction Pass is a natural fit for hop-on, hop-off sightseeing tour bus companies, whose very business model involves transporting tourists efficiently between tourist attractions, and has become an essential facility for the sale of their tour bus services in the NYC Market.

As alleged, multiple major New York City tourist attractions have refused to work with Go New York or ended existing trade partner relationships with Go New York, even though they continue to work with both Gray Line and Big Bus. In many instances, the attractions expressly told Go New York that their refusals to work with it were necessary to preserve their relationships with Gray Line and Big Bus. These

attractions include the popular "Top of the Rock" observatory and tourist facility at Rockefeller Center, the Empire State Building observatory and tourist facility, the One World Observatory at the World Trade Center, the Intrepid Sea, Air, and Space Museum (the "Intrepid") docked at the west side piers in midtown Manhattan, the 9/11 Memorial and Museum, the 9/11 Tribute Museum, the Museum of Modern Art, and Madame Tussauds wax museum located in Times Square, as well as Broadway Inbound, an online platform for travel service providers to sell tickets to Broadway shows.

In some cases, Go New York proposed that it would not take any commission or fee, passing the entire discounted rate on to the attraction such that it could charge more to Go New York's customers than to Gray Line's and Big Bus's, but the attraction still refused to enter into a trade partner agreement with Go New York. Some attractions told Go New York that they had an exclusive relationship with Gray Line or Big Bus, but then continued to work with both of them while still excluding Go New York. Some attractions told Go New York that representatives of Big Bus or Gray Line had expressly threatened to terminate their trade partner agreements if the attraction worked with Go New York.

In almost every case, the attractions continued working with both Gray Line and Big Bus, but not Go New York, undermining any inference that Gray Line and Big Bus were pursuing exclusivity independently of each other. Even Madame Tussauds, which shares common ownership with Big Bus and Leisure Pass and allows them to maintain sales desks within its lobby, continued to work with Gray Line as well as Big Bus.

### B. Proceedings in the District Court and Court of Appeals

Go New York filed suit on March 29, 2019, and subsequently amended its complaint as of right. Go New York's first amended complaint asserted a claim for relief under Section 1 of the Sherman Act, alleging that Defendants acted in concert and conspired to exclude Go New York from trade partner relationships with various New York City tourist attractions and from their respective affiliates' Multi-Attraction Passes, in order to prevent Go New York from being able to offer competitively priced Multi-Attraction Passes, and thereby to maintain artificially high prices for consumers and to reduce competition in the New York City hop-on, hop-off sightseeing tour bus market. Go New York also asserted a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, based on a theory of duopoly, alleging that Gray Line and Big Bus misused their combined dominance of the market to the same ends. In addition, Go New York asserted claims under New York's Donnelly Act and common law.

The District Court dismissed the first amended complaint, albeit without prejudice to Go New York's filing a second amended complaint. In dismissing Go New York's Section 1 claim, the court stated that in the absence of direct evidence of a horizontal agreement among defendants,

> [a] court may infer a conspiracy based on "conscious parallelism, when … interdepending conduct is accompanied by circumstantial evidence and plus factors." [quoting *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.,* 709 F.3d 129, 136 (2d Cir. 2013) (quoting in turn *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001)).] "Plus factors" can include "a common motive to conspire, evidence that shows the

parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." [quoting *Mayor & City Council of Baltimore,* 709 F.3d at 136 (quoting *Twombly v. Bell Atl. Corp.,* 425 F.3d 99, 114 (2d Cir. 2005), *rev'd on other grounds*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).]

Pet. App., at 17a. The court held that Go New York had not plausibly alleged "the existence of any plus factors or similar indicia of a conspiracy". *Id.* The court also dismissed Go New York's Section 2 claim on the ground that Section 2 does not apply to a "shared monopoly" or duopoly theory of liability. *Id.*, at 18a-19a.

Go New York then filed its second amended complaint, adding new factual allegations in support of the Section 1 claim and omitting the Section 2 claim. The District Court dismissed the repleaded Section 1 claim, stating that that it did not cure the defects of the claim as pleaded in the first amended complaint. *Id.*, at 12a. The court then declined to retain supplemental jurisdiction over the remaining state law claims, and dismissed them on that ground.

The Court of Appeals affirmed. The court found that Go New York had sufficiently pled one "plus factor", in that "it is reasonable to infer that Defendants had a shared interest in protecting their comparatively high prices by minimizing Go New York's market share." *Id.*, at 6a. The court found further that it was "objectively rational for Defendants to make *joint* efforts to defame plaintiff and to pressure tourist attractions not to deal with Plaintiff, since such joint efforts are presumably more likely succeed than separate ones." *Id.* Nevertheless, the court held that "Go New York has failed to plead a Section 1 Sherman

Act claim against Defendants because it has not alleged the existence of sufficiently powerful 'plus factors' to 'raise [Plaintiff's] right to relief above the speculative level.' *Id.*, at 5a (quoting *Mayor & City Council of Baltimore,* 709 F.3d at 135).

## REASONS FOR GRANTING THE PETITION

### I.
### REQUIRING PLAINTIFF TO ALLEGE "PLUS FACTORS" CONTRADICTS THIS COURT'S STATEMENT IN *TWOMBLY* THAT THERE IS NO HIGHTENED REQUIREMENT FOR PLEADING SPECIFIC FACTS.

In *Twombly*, this Court rejected the notion that it was ""transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid Rule 12(b)(6) pleading standard[.]" *Twombly*, 550 U.S. at 569. This Court stated that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

Nevertheless, in this case the Second Circuit Court of Appeals did just that, holding that Go New York had not "alleged the existence of sufficiently powerful 'plus factors' to 'raise [Plaintiff's] right to relief above the speculative level." Pet. App., at 5a (quoting *Mayor & City Council of Baltimore*, 709 F.3d at 135). Further, the Court of Appeals did so after finding that Go New York had adequately alleged one "plus factor", namely the Defendants' common motive to conspire, and after acknowledging that their alleged conspiracy was rational in the circumstances alleged. The Court of Appeals' insistence on pleading of more "powerful 'plus factors' ", notwithstanding factual allegations of at least one "plus factor" and other circumstances that

lend plausible support to the existence of a conspiracy, effectively constitutes a standard requiring "heightened fact pleading of specifics", contradicting what this Court stated in *Twombly*.

"Plus factors" are "circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Mayor & City Council of Baltimore*, 709 F.3d at 136 n.6. They " 'may 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.' " *Id.* at 136 (quoting *Twombly v. Bell Atl. Corp.,* 425 F.3d at 114).

The problem with requiring a plaintiff to allege evidence of "plus factors" in lieu of direct of evidence of a conspiracy, even where the circumstances and context support a reasonable inference of a conspiracy, is that "plus factor" evidence may not yet be available. As the First Circuit Court of Appeals has noted:

> While [plus factors] are certainly helpful in guiding a court in its assessment of the plausibility of agreement in a § 1 case, other, more general allegations informing the context of an agreement may be sufficient. This is particularly true given the increasing complexity and expert nature of "plus factor" evidence which would not likely be available at the beginning stages of litigation.

*Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 47 (1st Cir. 2013).

Thus, the First Circuit "has cautioned against converting *Twombly's* mandates into a requirement that antitrust plaintiffs provide evidentiary support or

set forth other 'plus factors' to demonstrate the plausibility of their Sherman Act claims." *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 549 (1st Cir. 2016). It is sufficient that a complaint "allege the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible." *Evergreen Partnering Grp.*, 720 F.3d at 46.

In contrast, the Third Circuit Court of Appeals has expressly held that a plaintiff must allege at least one "plus factor" in order to sufficiently plead a conspiracy. *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010) ("plaintiffs relying on parallel conduct must allege facts that, if true, would establish at least one "plus factor," since plus factors are, by definition, facts that "tend[ ] to ensure that courts punish concerted action", quoting *In re Flat Glass Antitrust Litigation,* 385 F.3d 350, 360 (3d Cir. 2004)).

"Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Go New York submits that the more holistic, "context-specific" approach of the First Circuit, rather than the rigid reliance on "plus factors" articulated by the Third Circuit, is consistent with the pleading standards articulated by this Court in *Twombly* and *Iqbal*.

## II.
## CIRCUMSTANTIAL EVIDENCE SHORT OF RECOGNIZED "PLUS FACTORS" MAY ADEQUATELY ALLEGE A PLAUSIBLE ANTITRUST CONSPIRACY

"*Twombly's* requirement to plead something 'more' than parallel conduct does not impose a probability standard at the motion-to-dismiss stage." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015) (citing *Iqbal,* 556 U.S. at 678). An antitrust plaintiff can meet its burden at the pleading stage by alleging "circumstantial facts supporting the *inference* that a conspiracy existed." *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2020), *cert. denied*, 136 S. Ct. 1376 (2016). "[C]ourts examine the existence of a conspiracy 'as a whole' taking into consideration the totality of the evidence, as opposed to 'dismembering it and viewing its separate parts.'" *Ross v. Am. Exp. Co.*, 35 F. Supp. 3d 407, 438 (S.D.N.Y. 2014), *aff'd sub nom., Ross v. Citigroup, Inc.*, 630 F. App'x 79 (2d Cir. 2015) (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699 (1962)). As discussed above, the totality of the evidence dose not necessarily have to include recognized "plus factors" in order to allege sufficient circumstantial facts from which to infer the existence of a conspiracy.

Here, the Court of Appeals found, in addition to the Defendants' common motive to conspire against Go New York, that it was "objectively rational for Defendants to make joint efforts to defame Plaintiff and to pressure tourist attractions not to deal with Plaintiff, since such joint efforts are more likely to succeed then separate ones." Pet. App., at 6a. "[C]ourts are more likely to infer an illegal agreement

as the economic plausibility of anticompetitive conduct grows." *Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 319 (6th Cir. 2015) (citing *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 62-63 (2d Cir. 2012), *cert. denied*, 568 U.S. 1123 (2013)). "[B]roader inferences are permitted, and the 'tends to exclude' standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and 'the challenged activities could not reasonably be perceived as procompetitive.' " *In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 63 (quoting *In re Flat Glass Antitrust Litigation,* 385 F.3d at 358).

The conspiracy alleged by Go New York is both economically sensible and practically feasible, permitting broader inferences of plausibility. It makes obvious economic sense for Defendants to seek to maintain their higher prices, and as two of the three main actors in the NYC Market, it is both rational and practical for Defendants to agree to act in concert to pressure sightseeing attractions not to do business with Go New York. *Cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (noting argument that alleged predatory pricing conspiracy was "economically irrational and practically infeasible.") On the other hand, it is far from obvious that either Gray Line or Big Bus, working independently, could have orchestrated a virtual boycott of Go New York by major New York City attractions, as the attractions would have been able to continue working with two of the three tours bus operators regardless of whether they participated in the boycott. It may be possible that Defendants' interference in Go New York's trade partner relationships with sightseeing attractions reflects only parallel conduct. But in the circumstances and

contexts alleged in this case, it is certainly plausible that Defendants did so jointly pursuant to an agreement.

"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." *Twombly*, 550 U.S. at 556–57. "To present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012), *cert. denied*, 568 U.S. 1087 (2013). "[A]t the pleading stage, the plaintiff is not required to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct." *Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 868 (6th Cir. 2012).

"The Supreme Court took pains to stress in both *Twombly* and *Iqbal* that what is required at the pleading stage is a plausible, not probable, entitlement to relief." *Id., at* 868–69 (citing *Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678). "It is not for the court to decide, at the pleading stage, which inferences are more plausible than other competing inferences, since those questions are properly left to the factfinder." *Evergreen Partnering Grp.,* 720 F.3d at 45 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 766 n.11 (1984)). Taking Go New York's well pleaded factual allegations as true, as required on a motion under Fed. R. Civ. P. 12(b)(6), one can reasonably infer that Defendants engaged in conspiratorial conduct proscribed by Section 1 of the Sherman Act.

## CONCLUSION

The petition for a writ of certiorari should be *granted*.

Respectfully submitted,
Maurice N. Ross
*Counsel of Record*
Laura-Michelle Horgan
Randall L. Rasey
BARTON LLP
711 Third Avenue, 14th Floor
New York, NY 10017
(212) 687-6262
mross@bartonesq.com
lmhorgan@bartonesq.com
rrasey@bartonesq.com

*Counsel for Petitioner*

March 22, 2021

# APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of December, two thousand twenty.**

PRESENT: JOSÉ A CABRANES,
MICHAEL H. PARK,
WILLIAM J. NARDINI,
*Circuit Judges.*

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20-1022-cv

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GO NEW YORK TOURS, INC.,

*Plaintiff-Appellant,*

—v.—

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, LEISURE PASS GROUP HOLDINGS LIMITED, LEISURE PASS GROUP LIMITED, LEISURE PASS GROUP, INC., OPEN TOP SIGHTSEEING USA, INC., TAXI TOURS, INC.,

*Defendants-Appellees,*

BIG BUS LLC,

*Defendant.**

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**FOR PLAINTIFF-APPELLANT:**

MAURICE NEWMARK ROSS, Randall L. Rasey, Barton LLP, New York, NY.

**FOR DEFENDANTS-APPELLEES:**

JUSTIN EPNER, Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati, Washington, D.C., New York, NY; Michael Lacovara, Virginia F. Tent, Sindhu Boddu, Latham & Watkins LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*).

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* The Clerk of Court is respectfully directed to amend the official caption as listed above.

**UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the order of the District Court be and hereby is **AFFIRMED**.

Plaintiff-Appellant Go New York Tours, Inc. ("Go New York" or "Plaintiff"), a tour-bus company, appeals the District Court's dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of Plaintiff-Appellant's Second Amended Complaint ("Complaint") against two competitors and related companies, Defendants-Appellees Gray Line New York Tours, Inc, Twin America, LLC, and Sightseeing Pass LLC (together "Gray Line"), and Defendants-Appellees 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, and Leisure Pass Group, Inc. (together "Big Bus") (Defendants-Appellees collectively, "Defendants"). Plaintiff alleges that Defendants, in violation of Section 1 of the Sherman Antitrust Act of 1890 ("Sherman Act"), 15 U.S.C. § 1 *et seq.*,[1] conspired to persuade or coerce tourist attractions to refuse or withdraw from trade partnership agreements with Go New York to offer multi-attraction passes.[2] The District Court held that Go New York failed to state a claim under the

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[1] Section 1 of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1.

[2] Multi-attraction passes are sightseeing passes that permit the bearer entrance to multiple tourist attractions for a single, discounted price. *See, e.g.,* App'x at 58-59 (Complaint, ¶ 40).

Sherman Act because it did not plausibly allege the existence of an anticompetitive agreement between the Defendants.[3] Go New York argues on appeal that the District Court improperly applied an unduly restrictive version of the "plausibility" pleading standard established by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* a district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6), "accept[ing] all factual allegations as true and draw[ing] every reasonable inference from those facts in the plaintiff's favor." *Mayor & City Council of Baltimore, v. Citigroup, Inc.*, 709 F.3d 129, 135. (2d Cir. 2013). To survive a motion to dismiss, a complaint must plausibly plead a claim to relief—i.e., allege facts that do more than "create[] *a suspicion* [of] a legally cognizable right of action," *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) (quoting *Twombly*, 550 U.S. at 555) (second alteration in original), and "raise a right to relief above the speculative level," *Mayor & City Council of Baltimore*, 709 F.3d at 135 (quoting *Twombly*, 550 U.S. at 555), such that a court can "draw the reasonable inference that the defendant is liable for the

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[3] Go New York also brought state-law claims for antitrust violations, unfair competition, tortious interference with contract, and tortious interference with prospective business relations. Having dismissed the Sherman Act claims, the District Court declined to exercise supplemental jurisdiction over the state-law claims.

misconduct alleged," *Anderson News*, 680 F.3d at 182 (quoting *Iqbal*, 556 U.S. at 678).

To adequately plead a conspiracy under Section 1 of the Sherman Act, a plaintiff must allege facts from which it can be inferred that the anticompetitive conduct "stem[s] from ... an agreement, tacit or express" and not from "independent decision." *Id.* (quoting *Twombly*, 550 U.S. at 553). Where, as here, the plaintiff does not allege direct evidence of an agreement, the plaintiff may adequately plead a Section 1 claim by making "allegations of interdependent conduct [by the conspirators], accompanied by circumstantial evidence and plus factors." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781 (2d Cir. 2016) (quotation marks omitted). "'[P]lus factors' may 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." *Mayor & City Council of Baltimore*, 709 F.3d at 136.

Go New York has failed to plead a Section 1 Sherman Act claim against Defendants because it has not alleged the existence of sufficiently powerful "plus factors" to "raise [Plaintiff's] right to relief above the speculative level." *Id.* at 135.[4] To be sure, Go New York has adequately pled the existence of one "plus factor," namely a motive to conspire. Go

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[4] It is unclear what conduct Go New York means to identify as "interdependent" or "parallel" action by Defendants. We assume Go New York relies on Defendants' alleged use of economic pressure and disparagement to discourage tourist attractions from dealing with Go New York.

New York alleges that it "disrupted" the New York hop-on-hop-off bus tour market by charging substantially lower prices than Defendants for roughly comparable services. Taking those allegations as true, it is reasonable to infer that Defendants had a shared interest in protecting their comparatively high prices by minimizing Go New York's market share. It is objectively rational for Defendants to make *joint* efforts to defame Plaintiff and to pressure tourist attractions not to deal with Plaintiff, since such joint efforts are presumably more likely to succeed than separate ones. Nonetheless, the motive to conspire is not here so obvious or compelling that it suffices to create more than a "*suspicion* [of] a legally cognizable right of action." *Anderson News*, 680 F.3d at 182 (quoting *Twombly*, 550 U.S. at 555) (alteration in original). Defendants' allegedly anticompetitive acts would have been objectively rational even if done independently of one another, and Plaintiff pleads no facts suggesting that they in reality "stem[med] from … an agreement." *Id.* (quoting *Twombly*, 550 U.S. at 555).

We disagree with Go New York's assertion that it has pleaded a second "plus factor" by alleging that the tourist attractions acted against their economic self-interest in boycotting Go New York. The "actions against self-interest" plus factor relates specifically to the interdependent or parallel actions by the alleged conspirators, rather than third parties like the tourist attractions. *See Mayor & City Council of Baltimore*, 709 F.3d at 136 ("'[P]lus factors' may include … evidence that shows that the parallel acts were against the apparent individual economic self-interest of *the alleged*

*conspirators* ....") (internal citation and quotation marks omitted, emphasis added).[5] Here, Go New York does not plead that Defendants took any actions against their own economic self-interest.[6] Because Go New York has failed to state a claim under Section 1 of the Sherman Act, we affirm the judgment of the District Court.

## CONCLUSION

We have reviewed all of the arguments raised by Go New York on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the March 6, 2020 judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

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[5] It makes sense to consider only the antitrust defendants' alleged conduct, because "plus factors" are allegations supporting the inference that *defendants* acted pursuant to an agreement. When a business acts contrary to its ostensible economic self-interest, it may be reasonable to infer that it is acting in concert with others.

[6] Go New York's allegations regarding actions against self-interest by the tourist attractions may support the inference that the Defendants *in fact* influenced the attractions' behavior, but they do not support the inference that Defendants *conspired* to do so.

**United States Court of Appeals**
**for the Second Circuit**
**Thurgood Marshall U.S. Courthouse**
**40 Foley Square**
**New York, NY 10007**

**DEBRA ANN LIVINGSTON**
**CHIEF JUDGE**

Date: December 22, 2020
Docket #: 20-1022cv
Short Title: Go New York Tours, Inc. v. Gray Line New York Tours, Inc.

**CATHERINE O'HAGAN WOLFE**
**CLERK OF COURT**

DC Docket #: 19-cv-2832
DC Court: SDNY (NEW YORK CITY)
DC Judge: Kaplan

## BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a

cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals**
**for the Second Circuit**
**Thurgood Marshall U.S. Courthouse**
**40 Foley Square**
**New York, NY 10007**

**DEBRA ANN LIVINGSTON**
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**CLERK OF COURT**

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DC Court: SDNY (NEW YORK CITY)
DC Judge: Kaplan

## VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39(c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix

(necessary copies _____ ) _____

Costs of printing brief

(necessary copies _____ ) _____

Costs of printing reply brief

(necessary copies _____ ) _____

**(VERIFICATION HERE)**

_____

Signature

Appendix B

UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

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DATE FILED: 3/4/2020

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19-cv-02832 (LAK)

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GO NEW YORK TOURS, INC.,
*Plaintiff,*

—v.—

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.

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

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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.

[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.

dismiss the remaining state law claims for lack of supplemental jurisdiction.

SO ORDERED.

Dated: March 4, 2020

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

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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).

Appendix C

UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

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DATE FILED: 11/7/2019

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19-cv-02832 (LAK)

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GO NEW YORK TOURS, INC.,
*Plaintiff,*

—v.—

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*.

Plaintiff, a New York City "hop on, hop off" tour bus company, brings federal and New York State antitrust claims and New York State tort claims against two competitors and affiliated companies. Several of these defendants moved to dismiss the First Amended Complaint ("FAC") on res judicata grounds [DI-68]. Several others moved to dismiss for lack of personal jurisdiction [DI-63]. And all defendants moved to dismiss for failure to state a claim [DI-66].

"*Res judicata* bars re-litigation if (1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action."[1] The third element is satisfied when the second lawsuit involves "the same claim – or nucleus of operative facts – as the first suit."[2] This inquiry involves consideration of "(1) whether the underlying facts are related in time, space, origin, or motivation; (2) whether the underlying facts form a convenient trial unit; and (3) whether their treatment as a unit conforms to the parties' expectations."[3]

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[1] *Soules v. Connecticut, Dep't of Emergency Servs. & Pub. Prot.*, 882 F.3d 52, 55 (2d Cir. 2018) (citation and quotation marks omitted).

[2] *Id.* (citation omitted).

[3] *Id.* (citation omitted).

The defendants that claim res judicata refer to a prior lawsuit between themselves and plaintiff that resulted in a stipulated dismissal with prejudice.[4] While that lawsuit is an adjudication on the merits involving the same parties, it arose from an entirely different set of facts. It concerned allegations that the relevant defendants' ticket agents disparaged and defamed plaintiff to potential customers. The claims in this lawsuit concern defendants' allegedly anticompetitive practices surrounding the "Multi-Attraction Passes" offered by plaintiff and certain defendants. There is no common nucleus of operative facts and, hence, the claims in this lawsuit neither were nor could have been raised in the prior action such that res judicata precludes plaintiff from raising them here.

The motion to dismiss for failure to state a claim challenges the sufficiency of each of the FAC's claims:

*I. Sherman Act § I.*[5] Plaintiff alleges that its two competitors conspired with each other (a "horizontal conspiracy") to restrain trade in a New York City "Multi-Attraction Pass" market. The closest the FAC comes to alleging a horizontal agreement is a conclusory allegation that, "[u]pon information and belief, [defendants], among themselves and/or together with some or all of their

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[4] *See Go New York Tours, Inc. v. Grey Line New York Tours, Inc.*, No. 18-cv-06915 (RA) (S.D.N.Y.).

[5] The parties agree that plaintiff's New York antitrust claims are subject to the same analysis as the federal antitrust claims. I assume without deciding that this is correct. The analysis of the Sherman Act claims applies therefore to the New York antitrust claims, as well.

respective affiliated companies, have unlawfully conspired to exclude [plaintiff] from trade partner relationships."[6] 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."[7] "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."[8] On a generous reading of the FAC, the existence of any plus factors or similar indicia of a conspiracy is implausible. Plaintiff must make more than inferential allegations that the success of defendants' businesses relative to plaintiff's implies the existence of an unlawful conspiracy.

With regard to the alleged "vertical conspiracies" between defendants and third parties with which plaintiff wishes to do business, plaintiff relies on an inference that "there is no rational business reason for [the third-parties] to reject [plaintiff] as a trade partner, other than that [defendants] demanded exclusivity."[9] In fact, there are many logical and permissible business reasons that the

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6 FAC ¶ 72.

7 *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001)).

8 *Id.* (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir.2005), *rev'd on other grounds*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

9 FAC ¶ 52.

third parties might have chosen not to do business with plaintiff. This faulty inference and the FAC's otherwise sparse details about the alleged vertical conspiracies do not amount to a plausible claim for unlawful restraint of trade.

Plaintiff alleges also the existence of conspiracies within the two corporate networks of defendants – in other words, conspiracies between companies under common ownership. Intraenterprise conspiracy suffices under Section 1 only where the conspiring entities employ "independent centers of decisionmaking."[10] Plaintiff makes no allegation of such independence. In fact, the FAC repeatedly states that the alleged conspirators are "owned *and controlled*" by the same parent companies.[11]

*2. Sherman Act § 2.* Plaintiff alleges that each of the two groups of defendants has monopoly power and has exercised it in violation of Section 2 of the Sherman Act. But as the prefix "mono" suggests – and as anyone who has been price gouged at a hotel on Park Place or Boardwalk in the game "Monopoly" is aware – there can be only one monopolist. Section 2 does not permit a "shared monopoly" theme of the kind plaintiff alleges.[12] To

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[10] *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 194 (2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)).

[11] *See* FAC ¶¶ 6-16 (emphasis added).

[12] *See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993) ("While § 1 of the Sherman Act forbids contracts or conspiracies in restraint of trade or commerce, § 2 addresses the actions of *single firms* that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize." (emphasis added)). It may be

the extent the FAC could be reinterpreted to allege on an alternative basis that one of the *two* networks of defendants forms a monopoly, such a theory would fail as well. The FAC paints an unambiguous picture of a market consisting of two large competitors and plaintiff, a smaller upstart.[13]

*3. Tortuous Inducement of Breach of Contract.*[14] "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, [the] defendant's knowledge of that contract, [the] defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom."[15] Plaintiff alleges defendants interfered with its contract with the Intrepid Sea, Air, & Space Museum, but it does not plead that the Intrepid breached the contract or explain how defendants induced any presumed breach.[16] Absent allegations of this kind, the claim fails.

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that shared monopoly is never a viable theory under Section 2. Some courts, however, have speculated that such a claim may survive if the goal of a conspiracy was forming a single entity. *See Klickads, Inc. v. Real Estate Bd. of New York, Inc.*, No. 04-cv-8042 (LBS), 2007 WL 2254721, at *9 (S.D.N.Y. Aug. 6, 2007) (citing cases). I express no opinion on the viability of this theory, as plaintiff does not allege that its competitors had such plans.

[13] *See, e.g.*, FAC ¶ 1.

[14] The parties assume New York law applies to the tort claims. I make the same assumption.

[15] *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996).

[16] Plaintiff concedes this defect to some degree. *See* Plaintiff's Memorandum in Opposition to Defendants' Joint Motion to Dismiss the Complaint 16 n.2.

*4. Tortuous Interference with Prospective Business Relations.* Tortious interference with prospective business relations requires allegations that "(i) the plaintiff had business relations with a third party; (ii) the defendants interfered with those business relations; (iii) the defendants acted for a wrongful purpose or used dishonest, unfair, or improper means; and (iv) the defendants' acts injured the relationship."[17] To satisfy the third element, the plaintiff must allege that the defendant employed "wrongful means," which can include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure."[18] The FAC makes only a cursory allegation that defendants "induced the Intrepid's breach by persuading the Intrepid [to back out of its contract with plaintiff] . . . for the improper purpose of harming competition."[19] "[P]ersuasion alone," even if "knowingly directed at interference with the [prospective] contract," does not suffice.[20]

* * *

The motion to dismiss on res judicata grounds [DI-68] is denied. The joint motion to dismiss for failure to state a claim [DI-66] is granted. The motion to dismiss motion for lack of personal jurisdiction [DI-63] is denied as moot.

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[17] *Scutti Enters., LLC. v. Park Place Entm't Corp.*, 322 F.3d 211, 215 (2d Cir. 2003) (citation omitted).

[18] *Id.* at 216 (quoting *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc.*, 87 N.Y.2d 614, 622 (1996)).

[19] FAC ¶ 101.

[20] *Scutti Enters.*, 322 F.3d at 216 (second brackets in original) (quoting *NBT Bancorp*, 87 N.Y.2d at 624).

This action is dismissed without prejudice[21] to plaintiff, on or before December 5, 2019, filing a second amended complaint. If plaintiff exercises this option, the parties shortly thereafter should propose a briefing schedule for any motions to dismiss.[22]

SO ORDERED.

Dated: November 7, 2019

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

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[21] Plaintiff raised, but withdrew, a claim for unfair competition under New York law. Plaintiff's Memorandum in Opposition to Defendants' Joint Motion to Dismiss the Complaint 2 n.1. That claim is dismissed with prejudice.

[22] Such a briefing schedule should ensure that all motions to dismiss and responsive papers are filed on the same timeline. Thus, if the defendants that moved under Rule 12(b)(2) intend to file a similar motion with regard to a possible second amended complaint, the briefing schedule should ensure that this and any other motions to dismiss are due after the close of any further jurisdictional discovery.