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OPINIONS AND ORDERS

CASE DOCUMENTS

OPINION, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT (MARCH 27, 2025)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GO NEW YORK TOURS INC,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 24-2392-cv

Appeal from a judgment of the United States District Court for the Southern District of New York (Ramos, J.).

Before: Denny CHIN, Michael H. PARK, Sarah A. L. MERRIAM, Circuit Judges.

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 27th day of March, two thousand twenty-five.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Go New York Tours, Inc. ("Go New York") brought antitrust claims against its competitors in the New York City tour-bus and attraction-pass markets in May 2023. Defendants-Appellees are Gray Line New York Tours, Inc., Twin America LLC, and Sightseeing Pass LLC (collectively "Gray Line") and Big Bus Tours Group Limited, Open Top Sightseeing USA, Inc., Taxi Tours, Inc., Leisure Pass Group Holdings Limited, Leisure Pass Group Limited, Leisure Pass Group Inc., and Big Bus Tours Limited (collectively, "Big Bus").

Go New York had previously brought claims under Sections 1 and 2 of the Sherman Act against Big Bus and Gray Line in 2019 (the "Prior Federal Action"). The district court dismissed Go New York's first amended complaint asserting those claims without prejudice in November 2019, *see Go N.Y. Tours, Inc. v. Gray Line N.Y. Tours, Inc.*, No. 19-CV-2832, 2019 WL 8435369 (S.D.N.Y. Nov. 7, 2019), and later dismissed Go New York's December 2019 second amended complaint with prejudice, *see* App'x at 119. We affirmed. *See Go N.Y. Tours, Inc. v. Gray Line N.Y. Tours, Inc.*, 831 F. App'x 584, 587 (2d Cir. 2020).

As in the Prior Federal Action, the Amended Complaint in this suit alleges that Big Bus and Gray Line conspired to fix the prices of "hop-on, hop-off" bus

services and attraction passes and to prevent other organizations from doing business with Go New York. It also now alleges a merger "memorialized in a Summer 2020 Memorandum of Understanding (the "MOU"), which . . . effectively turned Gray Line and Big Bus into a single entity." App'x at 297. The Amended Complaint further alleges that "[i]n order to implement the MOU, there have been several other agreements between Big Bus and Gray Line, both formal and informal." *Id.*

The district court dismissed Go New York's Sherman Act claims as barred by the doctrine of res judicata.[1] Go New York appeals, arguing that the Amended Complaint advances different claims based on the alleged merger and that the district court applied an unduly restrictive "plausibility" pleading standard in deciding the Rule 12(b)(6) motion. We assume the parties' familiarity with the remaining underlying facts, procedural history of the case, and issues on appeal.

I. Standard of Review

"We review *de novo* a district court's dismissal of a complaint under Rule 12(b)(6). . . . When reviewing a district court's dismissal of a complaint for failure to

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[1] The district court also dismissed Go New York's claims under the Clayton Act and declined to exercise supplemental jurisdiction over its remaining state-law claims. Go New York abandoned these claims by failing to adequately present arguments challenging the dismissals in its opening appellate brief. *See Schlosser v. Kwak*, 16 F.4th 1078, 1080 (2d Cir. 2021) ("A vague sentence fragment that notes an issue without advancing an argument relating to that issue is ordinarily not sufficient to preserve an argument on appeal.").

state a claim under Rule 12(b)(6), we accept all factual allegations as true and draw 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). "Our review of a district court's application of *res judicata* is also *de novo*." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 498 (2d Cir. 2014).

II. Res Judicata

"A court may consider a *res judicata* defense on a Rule 12(b)(6) motion to dismiss when the court's inquiry is limited to the plaintiff's complaint, documents attached or incorporated therein, and materials appropriate for judicial notice." *Id.* at 498.

"Under the doctrine of *res judicata*, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* at 499 (quotation marks omitted). "To prove the affirmative defense of *res judicata* a party must show that (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." *Id.* (cleaned up). Res judicata applies "where some of the facts on which a subsequent action is based post-date the first action but do not amount to a new claim." *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 384 (2d Cir. 2003).

Here, the Prior Federal Action involved the same parties and resulted in an adjudication on the merits. *See Berrios v. N.Y.C. Hous. Auth.*, 564 F.3d 130, 134

(2d Cir. 2009) ("As the sufficiency of a complaint to state a claim on which relief may be granted is a question of law, the dismissal for failure to state a claim is a final judgment on the merits and thus has res judicata effects." (citations omitted)).

Moreover, Go New York's attraction-pass claims "were . . . raised in the prior action." *TechnoMarine*, 758 F.3d at 499. The Amended Complaint alleges, nearly verbatim, the same facts alleged in the Prior Federal Action—*i.e.*, a conspiracy between Big Bus and Gray Line to pressure attractions not to do business with Go New York. *Compare* App'x at 102-09 (second amended complaint in the Prior Federal Action), *with id.* at 300-07 (Amended Complaint here). The district court thus correctly concluded that res judicata bars Go New York's attraction-pass claims and related factual allegations because they were adjudicated in the Prior Federal Action.

Go New York argues that res judicata should not apply because "the [alleged] merger had not taken place when Go New York brought its other claims." Appellant's Br. at 19 n.7. But Go New York fails to argue that this "later conduct can support a cause of action on its own." *TechnoMarine*, 758 F.3d at 503 (emphasis added). And regardless whether res judicata bars Go New York's merger-based claims, the new conduct alleged in the Amended Complaint does not support a plausible claim to relief.

III. Failure To State a Claim

"[W]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than

labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. To survive dismissal, a complaint must provide enough facts to state a claim to relief that is plausible on its face." *Baltimore*, 709 F.3d at 135 (cleaned up).

Go New York's Amended Complaint does not contain sufficient facts to state a claim under the Sherman Act. First, the Amended Complaint does not plausibly allege a merger or attempted merger because its allegations are internally inconsistent. Go New York's merger allegations rest on the August 2020 MOU and the conclusory statement that "[i]n order to implement the MOU, there have been several other agreements between Big Bus and Gray Line, both formal and informal." App'x at 297. But the MOU, which Go New York says, "effectively turned Gray Line and Big Bus into a single entity," *id.*, is an agreement between two firms engaging in an arm's-length transaction. If Big Bus and Gray Line had merged into a "single entity," there would be no need for the MOU's trademark-licensing or ticket-sale agreements. The Amended Complaint further contradicts the existence of a merger by alleging that the MOU "formalize[d] and extend[ed] a pre-existing conspiracy among" Big Bus and Gray Line. *Id.* at 300 (emphasis added). A conspiracy cannot exist among a "single entity."

Second, the Amended Complaint does not plausibly allege a monopoly or attempted monopoly in violation of Sherman Act § 2. Monopolization claims under Section 2 require "the possession of monopoly power in the relevant market" or, for attempted monopoly,

an intent to acquire such power. *Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council*, 857 F.2d 55, 73-74 (2d Cir. 1988). Such claims require that one firm hold or seek monopoly power. Because Go New York does not plausibly allege that Big Bus and Gray Line merged into a single entity, its monopoly claims are insufficient.

Third, the Amended Complaint does not plausibly allege a conspiracy in restraint of trade in violation of Sherman Act § 1. To adequately plead such a conspiracy under Section 1, a plaintiff must allege facts from which it can be inferred that the anticompetitive conduct "stems from . . . an agreement, tacit or express," and not from "independent decision." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (cleaned up). Absent direct evidence of an agreement, a conspiracy "may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors." *Baltimore*, 709 F.3d at 136 (quotation marks omitted).

Go New York argues that "the MOU and the other related agreements among Respondents alleged in the Amended Complaint are actual agreements in restraint of trade." Appellant's Br. at 34. But, setting aside the attraction-pass allegations barred by res judicata, the Amended Complaint merely offers conclusory facts about "other related agreements" and the MOU. The August 2020 MOU also contradicts Go New York's allegation that Big Bus and Gray Line agreed to "fix the prices at which tickets to hop-on, hop-off bus services . . . are sold." App'x at 282. The MOU provides that Big Bus "shall continue to sell its products . . . at prices determined solely by" Big Bus and its parent company. *Id.* at 48.

Go New York finally argues that there are sufficient "plus factors" to support a conspiracy because "[i]t would be hard to conceive of a stronger common motive to conspire than an agreement whereby alleged competitors sell tickets for use by customers in a combined operation." Appellant's Br. at 35. Not so. The ticket-seller arrangement in the MOU gives Gray Line little incentive to fix prices because Gray Line simply sells Big Bus's tickets at Big Bus's prices, and it no longer offers bus tours of its own. The rest of Go New York's "common motive" plus-factor arguments turn on incentives to exclude it from the attraction-pass market, but those recycled allegations are barred by res judicata.

In sum, the district court properly dismissed Go New York's Sherman Act §§ 1 and 2 claims even if we overlook res judicata limits on its merger allegations because the claims do not satisfy the Rule 12(b)(6) pleading standard.

* * *

We have considered the remainder of Go New York's arguments and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Clerk of Court

**OPINION AND ORDER,
U.S. DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
(AUGUST 27, 2024)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GO NEW YORK TOURS INC,

Plaintiff,

v.

GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA LLC, SIGHTSEEING PASS LLC, 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.,

Defendants.

No. 23-cv-4256 (ER)

Before: Edgardo RAMOS, U.S.D.J.

RAMOS, D.J.:

Go New York Tours, Inc., a "hop-on, hop-off" tour bus service that also bundles admission to numerous New York City tourist attractions, brings this action against three competitors and related companies: Big

Bus Tours Group Limited, Big Bus Tours Limited, Open Top Sightseeing USA, Inc., Taxi Tours, Inc. (collectively, the "Big Bus Defendants"); Go City Holdings (f/k/a Limited Leisure Pass Group Holdings Limited), Go City Limited (f/k/a The Leisure Pass Group Limited), Go City, Inc. (f/k/a Leisure Pass Group, Inc.) (collectively the "Go City Defendants"); and Twin America, LLC ("Twin America"), Gray Line New York Tours, Inc. ("Gray Line") and Sightseeing Pass LLC ("Sightseeing Pass") (collectively the "Gray Line Defendants," and with the entities listed above, the "Defendants"). Go New York alleges that the Defendants violated multiple federal and New York state antitrust laws, and asserts a claim for unfair competition under New York common law. *See* Doc. 59 (First Amended Complaint).

Before the Court is Defendants' motion to dismiss the First Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Doc. 66. Big Bus Tours Group Limited, Big Bus Tours Limited, Leisure Pass Group Holdings Limited, and The Leisure Pass Group Limited, all of which are incorporated in the United Kingdom (the "Foreign Defendants"), have moved separately to dismiss the First Amended Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Doc. 64. For the following reasons, Defendants' motion is GRANTED and the Foreign Defendants' motion is DENIED as moot.

I. Background

A. Factual Background[1]

1. The Parties

Go New York launched its New York-based hop-on, hop-off double-decker bus tour business in 2012. ¶ 27. In the approximately 12 years since then, it has grown its bus tour business substantially and also added other related business lines, such as bicycle and boat tours, bike rentals, and multi-attraction passes. ¶¶ 24, 27.

Twin America is the parent company of Gray Line and Sightseeing Pass. ¶¶ 3-5. Gray Line also previously operated hop-on, hop-off double-decker bus tours in New York City.[2] ¶ 30. Sightseeing Pass negotiates with operators of tourist attractions and bundles multi-attraction passes that include bus tours and admission to other attractions. ¶ 43.

The Big Bus and Go City Defendants are commonly owned and controlled by Exponent Private Equity LLP, a U.K.-based private equity firm that is not a party to this case. ¶¶ 6-9, 15. The seven Big Bus/Go City companies include the four Foreign Defendants. ¶¶ 9, 10, 14, 16. The remaining three entities—Open Top Sightseeing USA, Inc., Taxi Tours, Inc., and Go City, Inc.—are incorporated in the United

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[1] Unless otherwise noted, citations to "¶ _" refer to the First Amended Complaint, Doc. 59.

[2] Gray Line ended its bus tour services in 2020. Doc. 71 at 8.

States and operate in New York.[3] ¶¶ 12, 13, 17. Big Bus operates hop-on, hop-off double-decker tour buses, and Go City offers multi-attraction passes that include bus tours and admission to other tourist attractions for a single price. 11 33, 43.

2. The Parties' Business in New York City

Go New York and Big Bus (and until the summer of 2020, Gray Line) each operate double-decker tour buses that travel in continuous circuits, allowing customers to "hop off" at the destinations of their choice, and later "hop on" other buses operated by the same tour company to resume their tour and visit other attractions. ¶ 24. The three competitors market their tours through uniformed sales agents stationed near popular tourist attractions, through their respective websites, in their offices and visitor centers, and through hotel concierge services. ¶¶ 37-40.

Go New York, Go City, and Sightseeing Pass each create and sell multi-attraction passes, which bundle admission to multiple tourist attractions and other services throughout New York City using a single ticket sold for a single price. ¶¶ 42-43. For each visitor admitted to a particular attraction, the seller of the multi-attraction pass later pays the attraction operator the admission fee for that visitor, minus a prearranged commission. ¶¶ 45-46. The companies that create and market multi-attraction passes have an incentive to contract with many attractions, so they can offer the

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[3] Specifically, Open Top Sightseeing USA, Inc. and Go City Inc. are Delaware corporations, and Taxi Tours, Inc. is a New York corporation. ¶¶ 12, 13. 17.

most attractive bundled pricing to tourists while still maximizing margins. ¶¶ 43, 45-53.

Go New York competes with Gray Line and the Big Bus Defendants in offering bus tour services to customers in New York City. Go New York also alleges that it competes with Sightseeing Pass and the Go City Defendants in creating and selling multi-attraction passes.

3. Prior Federal Action

In March 2019, Go New York filed a civil action against the same Defendants entitled *Go New York Tours, Inc. v. Gray Line New York Tours, Inc.*, No. 19-cv-02832 (LAK) (the "Prior Federal Action"). On May 23, 2019, Go New York filed a first amended complaint in the Prior Federal Action, alleging that the Defendants conspired to restrain trade in the hop-on, hop-off tour bus and multi-attraction pass markets in New York City by fixing prices and preventing Go New York from securing trade partner agreements with certain tourist attractions with whom Defendants had already partnered. *See* Doc. 56. To support its allegations, Go New York identified nine attractions with which it was unsuccessful at securing agreements: (1) the Top of the Rock at Rockefeller Center, Doc. 56 ¶ 52; (2) the Empire State Building Observatory, *id.* ¶ 53; (3) One World Observatory at the World Trade Center, *id.* ¶ 55; (4) the Intrepid Sea, Air, and Space Museum, *id.* ¶ 59; (5) the 9/11 Memorial and Museum and 9/11 Tribute Museum, *id.* ¶ 60; (6) the Museum of Modern Art, *id.*; (7) Madame Tussauds Wax Museum, *id.* ¶ 61; (8) Broadway Inbound (an online platform for buying tickets to Broadway shows), *id.* ¶ 63; and (9) Coach

USA and Short Line's shuttle bus service to Woodbury Common Premium Outlets, *id.* ¶ 64.

Go New York asserted claims for antitrust violations pursuant to §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; § 4 of the Clayton Act, 15. U.S.C. § 15, and the Donnelly Act, New York state's antitrust law, N.Y. Gen. Bus. L. § 340. *Id.* ¶¶ 67-94. The first count alleged Defendants unlawfully conspired to exclude Go New York from trade partner relationships, in violation of the Sherman Act § 1 and Clayton Act § 4. *Id.* ¶¶ 67-78. The second count alleged that Gray Line and Big Bus each possessed monopoly power in the New York City hop-on, hop-off tour bus market and, in violation of the Sherman Act § 2 and Clayton Act § 4, and sought to increase their monopoly positions by working together to exclude Go New York from beneficial trade partner relationships. *Id.* ¶¶ 79-88. The third count alleged that Defendants' conduct violated the Donnelly Act. *Id.* ¶¶ 89-94. Finally, counts four through six asserted state-law claims for unfair competition, tortious interference with contract, and tortious interference with prospective business relations. *Id.* ¶¶ 95-105.

In a Memorandum and Order dated November 7, 2019, Judge Kaplan dismissed Go New York's first amended complaint for failure to state a claim pursuant to Federal

Rule of Civil Procedure 12(b)(6). Doc. 83. First, Judge Kaplan rejected Go New York's argument that the Defendants created conspiracies to restrain trade or commerce in violation of the Sherman Act § 1. Judge Kaplan found the first amended complaint failed to allege the necessary "plus factors" amounting to a horizontal conspiracy. Doc. 83 at 2-3. Absent these

plus factors, Judge Kaplan found "the closest the [first amended complaint] comes to alleging a horizonal agreement is a conclusory allegation" that defendants unlawfully conspired to exclude Go New York from trade partner relationships. *Id*. at 2. Nor was Judge Kaplan persuaded by Go New York's argument that the only rational reason for the trade partners' rejection was due to alleged vertical conspiracies between Defendants and the trade partners, noting "there are many logical and permissible business reasons" for such a rejection. *Id*. at 3.

Second, Judge Kaplan rejected Go New York's argument that Gray Line and Big Bus each exercised monopoly power in violation of the Sherman Act § 2, stating that the law "does not permit a 'shared monopoly' theory of the kind [Go New York] alleges."[4] *Id.* Third, noting that Go New York raised an unfair

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[4] "Section 2 of the Sherman Act prohibits monopolization, attempted monopolization and conspiracy to monopolize any part of trade or commerce." *Klickads, Inc. v. Real Estate Board of New York, Inc*., No. 04-cv-8042 (LBS), 2007 WL 2254721, at *8 (S.D.N.Y. Aug. 6, 2007). As pled in the Prior Federal Action, Go New York argued that each of Gray Line and Big Bus "possesses monopoly power in the New York City hop-on, hop-off tour bus market[.]" Doc. 56 ¶ 80. But as Judge Kaplan pointed out, monopoly power is, by definition, power held unilaterally. Doc. 83 at 3 & n.12 ("[A]s the prefix 'mono' suggests . . . there can only be one monopolist."); *see also H.L. Hayden Co. v. Siemens Med. Systems, Inc*., 879 F.2d 1005, 1018 (2d Cir. 1989) ("in order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a particular defendant.") (citations omitted); *In re Crude Oil Commodity Futures Litig*., 913 F. Supp. 2d 41, 57 (S.D.N.Y. 2012) ("A claim for conspiracy to monopolize under section 2 requires a showing of . . . proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly[.]").

competition claim under New York law which they then withdrew, Judge Kaplan dismissed this claim with prejudice.[5] *Id.* at 5 n.21. Fourth, because the complaint did not sufficiently explain how Defendants induced a breach of contract or induced a breach through wrongful means, Judge Kaplan dismissed the tortious interference with contract and tortious interference with prospective business relations claims. *Id.* at 4-5. Finally, Judge Kaplan dismissed the Donnelly Act claim for the same reasons discussed above. *Id.* at 2 n.5. The November 7, 2019 Memorandum and Order did not reference the Clayton Act § 4 claims.

On December 5, 2019, Go New York filed a second amended complaint in the Prior Federal Action that withdrew the Sherman Act § 2 claim but otherwise asserted the same six causes of action. Doc. 84. In a Memorandum and Order dated March 4, 2020, Judge Kaplan dismissed the second amended complaint. Doc. 92. Judge Kaplan found the Sherman Act § 1 claim was "virtually identical in relevant part" to the previous version of the complaint. Doc. 92 at 1. Because the Sherman Act § 2 claim was not re-alleged in the second amended complaint, Judge Kaplan deemed it "abandoned." *Id.* Finally, Judge Kaplan declined to exercise supplemental jurisdiction over the remaining New York state law claims, including the Donnelly

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[5] Specifically, Go New York included a footnote in their opposition brief stating it "withdrew" its unfair competition claim and otherwise did not defend this claim in the brief. *See* Doc. 76 at 2 n.1. Courts in this Circuit "routinely dismiss with prejudice claims at the motion to dismiss stage that are not defended and deemed abandoned." *Alterescu v. New York City Dep't of Educ.*, No. 21-cv-925 (KPF), 2022 WL 3646050, at *4 (S.D.N.Y. Aug. 23, 2022), *appeal dismissed* (Jan. 25, 2023).

Act claim, which were dismissed without prejudice.[6] *Id*. at 2. Judge Kaplan dismissed the Sherman Act §§ 1 and 2 claims with prejudice.[7] *Id.*

On December 22, 2020, the Second Circuit affirmed Judge Kaplan's dismissal. *See Go New York Tours, Inc. v. Gray Line New York Tours, Inc.*, 831 F. App'x 584 (2d Cir. 2020). On April 26, 2021, the United States Supreme Court denied Go New York's petition for a writ of certiorari. *See Go New York Tours, Inc. v. Gray Line New York Tours, Inc.*, 141 S. Ct. 2571 (2021).

4. The 2020 MOU

In the meantime, Gray Line and Big Bus merged their operations into a "single operating entity" pursuant to an agreement under which Gray Line ceased its tour bus business in New York City and began selling tickets for Big Bus. ¶¶ 54-55. This merger was formalized in a memorandum of understanding signed in August 2020 (the "MOU"), which states in relevant part:

> [Twin America and Gray Line] and [Big Bus] propose to enter into an arrangement pursuant to which [Twin America and Gray Line] will sell sightseeing tour bus tickets and private hire services. The sightseeing tours will be on [Big Bus]'s route network,

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[6] Go New York renewed the Donnelly Act claim as counterclaims in a pending action in New York State court. *See Taxi Tours Inc. et al, v. Go New York Tours Inc. et al*, New York County Supreme Court Index No. 653012/2019.

[7] The March 4, 2020 Memorandum and Order did not expressly include the Clayton Act § 4 claims in its analysis.

> operated solely by [Big Bus]. . . . [Big Bus] will continue to sell its products through its current distribution channels and at prices determined solely by [Big Bus], as will [Twin America and Gray Line]. . .
>
> As additional core [Big Bus] products[8] (excluding third-party attractions) are added to [Big Bus]'s line-up in the New York City market, they will be made available for re-sale to [Twin America and Gray Line] at a [redacted]% discount of the headline, full-price retail. . .
>
> [Big Bus] grants to [Twin American and Gray Line] the non-exclusive, royalty-free, worldwide, revocable license to use its Intellectual Property solely to the extent necessary for the resale of tickets[.]

Doc. 53-1 at 2-3.

In order to implement the MOU, Go New York claims that there have been several other agreements between Gray Line, Big Bus, and Go City. As examples, the First Amended Complaint alleges that Gray Line and Big Bus actually cross license trademarks (as opposed to Big Bus allowing Gray Line to use its intellectual property, as described in the MOU), ¶ 56, that Gray Line permitted Big Bus to use bus stops that the New York City Department of Transportation previously assigned for Gray Line's exclusive use, ¶ 58, and "must" work together to allocate commissions to their respective sale representatives. ¶ 60.

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8 Examples of these products include Big Bus' classic, night tour, and promotional special tickets. Doc. 53-1 at 2.

While Go City is not directly named in the MOU, Go New York claims that the merger "formaliz[ed] and extend[ed] a pre-existing conspiracy" among Big Bus, Gray Line, and Go City to "deny Go New York access to critical trade partners" and to fix the prices of attraction passes by not undercutting each other pricing for comparable attraction passes. ¶ 61. As a result of the merger between Gray Line and Big Bus, Go New York claims that consumers have been forced to pay higher prices for attraction passes, and that it has been unable to effectively and fairly compete in the attraction pass market. *Id.*

5. Allegations Defendants Unreasonably Restrained Trade

Go New York also alleges that the Defendants entered into horizontal and vertical agreements (with each other, and with tourist attractions and related services) to exclude it from the New York City bus tour and multi-attraction pass markets. ¶¶ 1, 105-111. For example, the First Amended Complaint alleges that both Gray Line and Big Bus have agreements[9] with hotels and/or concierge and guest service providers to market and sell their tour tickets and multi-attraction passes, and Go New York has been "largely shut out of such arrangements and improperly prevented from having its services and products marketed" in this way. ¶¶ 40-41.

Go New York also identified the nine attractions—the same ones referenced in the Prior Federal Action—

[9] The First Amended Complaint does not state when the agreements were signed.

which it has been unsuccessful in entering into partnerships with. ¶¶ 67-81. For example, Gray Line and Big Bus include admission to "Top of the Rock" in their multi-attraction passes, but Go New York has been unable to negotiate for the inclusion of this attraction in its own multi-attraction pass. ¶ 65. The operator of "Top of the Rock" has "rebuffed repeated attempts by Go New York to establish a relationship with it" as a result of "deliberate pressure" by Gray Line and Big Bus to exclude Go New York. ¶¶ 65, 66. Go New York alleges that Defendants "conspired" with each other and with these attractions to exclude Go New York "for the purpose of rendering Go New York's [a]ttraction [p]asses less attractive to tourists and less competitive." ¶ 80.

B. Procedural Background

Go New York field this action on May 22, 2023. Doc. 1. On October 11, 2023, it filed the First Amended Complaint, Doc. 59, which alleges seven causes of action: (1) monopolization in violation of the Sherman Act § 2, ¶¶ 86-92; (2) attempted monopolization in violation the Sherman Act § 2, ¶¶ 93-97; (3) conspiracy to monopolize in violation of the Sherman Act § 2, ¶¶ 98-104; (4) unreasonable restraint of trade in violation of the Sherman Act § 1, ¶¶ 105-111; (5) anticompetitive merger in violation of the Clayton Act § 7, 15 U.S.C. § 18, ¶¶ 112-115; (6) unreasonable restraint of trade in violation of the Donnelly Act,

¶¶ 116-121; and (7) unfair competition under New York common law, ¶¶ 122-124.[10]

On November 13, 2023, all Defendants filed their motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and the Foreign Defendants filed their motion to dismiss the complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Docs. 64, 66.

II. Legal Standard[11]

When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *See Koch*

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[10] Each Sherman and Clayton Act claim also alleges violation of the Clayton Act § 4, which relates to the availability of treble damages for antitrust violations. *See* 15 U.S.C. § 15.

[11] Ordinarily, courts address challenges to personal jurisdiction before deciding the merits of a cause of action. *See In re Rationis Enters., Inc. of Panama*, 261 F.3d 264, 267-68 (2d Cir. 2001). However, "in cases such as this one with multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiff's cause of action, [a court] may address first the facial challenge to the underlying cause of action and, if [it] dismiss[es] the claim in its entirety, decline to address the personal jurisdictional claims made by some defendants." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012); *see also In re London Silver Fixing, Ltd., Antitrust Litig.*, Nos. 14 MDL 2573, 14 Misc. 2573 (VEC), 2018 WL 3585277, at *5 n.5 (S.D.N.Y. July 25, 2018) ("Under the circumstances, the Court exercises its discretion to address [defendants'] motion to dismiss for failure to state a claim before addressing personal jurisdiction.") Because Go New York fails to state a claim, as will be explained, the Court declines to address the Foreign Defendants' motion to dismiss for lack of personal jurisdiction.

v. Christie's International PLC, 699 F.3d 141, 145 (2d Cir. 2012). However, the Court is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also id.* at 681 (citing *Twombly*, 550 U.S. at 551, 127 S. Ct. 1955). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). More specifically, the plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

The question in a Rule 12 motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 615 (S.D.N.Y. 2012) (quoting *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 278 (2d Cir. 1995)) (internal quotation marks omitted). "[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits,'" and without regard for the weight of the evidence that might be offered in support of the plaintiff's claims.

Halebian v. Berv, 644 F.3d 122, 130 (2d Cir. 2011) (quoting *Global Network Communications, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006)).

Furthermore, "only a complaint that states a plausible claim for relief survives a motion to dismiss" and "[d]etermining 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." *Iqbal*, 556 U.S. at 679, 129 S. Ct. 1937. "[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (internal quotation marks omitted).

"A court may consider a res judicata defense on a Rule 12(b)(6) motion to dismiss when the court's inquiry is limited to the plaintiff's complaint, documents attached or incorporated therein, and materials appropriate for judicial notice." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 498 (2d Cir. 2014) (citing *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992)). Generally, res judicata is an affirmative defense that is pleaded in the defendant's answer. *See Day v. Moscow*, 955 F.2d 807, 811 (2d Cir.1992) (citing Fed. R. Civ. P. 8(c)). However, "when all relevant facts are shown by the court's own records, of which the court takes notice, the defense may be upheld on a Rule 12(b)(6) motion without requiring an answer." *Id.* (citing *W.E. Hedger Transp. Corp. v. Ira S. Bushey & Sons*, 186 F.2d 236, 237 (2d Cir. 1951)). In considering a motion to dismiss, a court is permitted to take judicial notice of public records, which includes complaints and other documents filed in federal court.

See Harrison v. Diamonds, No. 14-cv-484 (VEC), 2014 WL 3583046, at *2 (S.D.N.Y. July 18, 2014) (quoting *Yan Won Liao v. Holder*, 691 F. Supp. 2d 344, 351-52 (E.D.N.Y. 2010)) (internal quotation marks omitted). When a court takes judicial notice of such documents, it does so "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991). Given that Defendants' motion is predicated on prior litigation in this District, the Court takes judicial notice of the documents filed in connection with the Prior Federal Action.

III. Discussion

A. Go New York's Claims Pursuant to the Sherman Act and its Unfair Competition Claim are Barred by Res Judicata

Defendants argue that Go New York's Sherman Act claims and common law unfair competition claim are barred by res judicata due to the dismissal of these claims with prejudice in the Prior Federal Action. Doc. 67 at 19-24. Go New York argues that res judicata does not bar its claims in this action because they are premised, in part, on agreements which postdate Judge Kaplan's final judgment. Doc. 71 at 15-18.

Res judicata, also called claim preclusion, prevents parties from relitigating issues that were or could have been decided on the merits in a previous action. *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 157 (2d Cir. 2017). To prove that res judicata bars a subsequent action, a party must show that the earlier decision was "(1) a final judgment on the merits, (2) by

a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action." *EDP Medical Computer Sys. v. United States*, 480 F.3d 621, 624 (2d Cir. 2007). If these elements are met, a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* "Dismissal with prejudice as a result of a successful motion to dismiss is usually considered a final adjudication on the merits." *Medcalf v. Thompson Hine LLP*, 84 F. Supp. 3d 313, 322 (S.D.N.Y. 2015); *see also Mitchell v. Nat'l Broadcasting Co.*, 553 F.2d 265, 268 (2d Cir.1977) ("It is well settled that . . . a motion to dismiss for failure to state a claim upon which relief can be granted and without reservation of any issue, is presumed to be upon the merits[.]").

Go New York does not dispute that the Prior Federal Action was a final adjudication on the merits by a court of competent jurisdiction and that it involved the same parties as in the instant action. Accordingly, the only remaining issue is whether Go New York's claims in the instant litigation and the Prior Federal Action involve the same causes of action.

1. New Factual Allegations

In both the Prior Federal Action and in the instant action, Go New York alleges violations of §§ 1 and 2 of the Sherman Act and a common law unfair competition claim. However, Go New York argues that the causes of action pled here are different from those it raised in the prior suit because the "core" of its new allegations are premised on Defendants' entry into the 2020 MOU (and other unspecified "subsequent related

operating agreements"). Doc. 71 at 16. According to Go New York, because the prior action predated the 2020 MOU, it could not have brought its monopolization and attempted monopolization theories before Judge Kaplan nor alleged "the existence of a formal agreement between Big Bus Line pursuant to which the parties agreed to share trade partners with each other while excluding Go New York from access to such trade partners." *Id.* at 16-17.

While Go New York could not make factual allegations about the MOU and alleged subsequent operating agreements in the Prior Federal Action, the relevant question is whether "the later conduct can support a cause of action on its own[.]" *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 503 (2d Cir. 2014). If so, it is "the basis of a new cause of action not precluded by the earlier judgment." *Id.* Stated differently, res judicata applies "where some of the facts on which a subsequent action is based post-date the first action but do not amount to a new claim." *Storey v. Cello Holdings*, L.L.C., 347 F.3d 370, 384 (2d Cir. 2003).

The Court finds *Waldman v. Village of Kiryas Joel* instructive on the issue of what constitutes new conduct that supports a subsequent cause of action. In that case, Waldman initially sued the Village of Kiryas Joel, New York, for discrimination and constitutional violations ("*Waldman I*"). *Waldman v. Village of Kiryas Joel*, No. 97-cv-74 (JSR) (S.D.N.Y. Apr. 9, 1997). As part of a settlement, the parties agreed to dismissal of the claims with prejudice. *Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 107 (2d Cir. 2000). In a second filed-action ("*Waldman II*"), Waldman accused the Village of "excessive entanglement with religion"

and sought its dissolution under the Establishment Clause. 207 F.3d 105, 107-108 (2d Cir. 2000). The Second Circuit determined that:

> it is simply not plausible to characterize Waldman's claim as one based in any significant way upon the post-*Waldman I* facts. The new allegations made in the present complaint do not, either by themselves or to any degree not already demonstrated by the overlapping facts, establish the sort of pervasive and otherwise irremediable entanglement between church and state that would justify a drastic remedy like the dissolution of the Village. . . . We conclude that, in seeking the dissolution of [the Village], Waldman has based his action principally upon the common nucleus of operative facts shared with *Waldman I*.

Waldman II at 113. Therefore, the Second Circuit held that facts post-dating the first action did "not create a 'new' cause of action that did not exist when the prior suits were brought" and that Waldman's claim was barred by res judicata. *Id*. at 112. While the Second Circuit left open the possibility that future actions could support a new cause of action, it stated that Waldman could not use "the mere inclusion of a few post-*Waldman I* Village acts . . . to resurrect a claim[.]" *Id.* at 114.

Much like in *Waldman II,* Go New York's new factual allegations do not support its causes of action. First, the MOU does not plausibly support the antitrust claims. To summarize, Go New York alleges that the MOU resulted in the merger of Defendants' companies and formalized Defendants' alleged conspiracy "to monopolize and fix prices within the market for New

York City Hop-on, Hop-off tour bus services, and to effectively shut Go New York out of the Attraction Pass sub-market, making it difficult if not impossible for Go New York to offer and sell competitive attraction passes." ¶¶ 44, 61. But the text of the MOU fails to support these allegations, as it only describes an agreement for Gray Line to resell tickets for Big Bus tour bus services and to license intellectual properly "solely" to the extent necessary for such resale. *See* Doc. 53-1. The MOU does not purport to combine or merge Defendants' businesses into a "single entity," nor does it reflect an agreement between Defendants "to fix prices" and prevent competition in the tour bus and multi-attraction pass industries in New York City. Doc. 71 at 26. Go New York's claim that the MOU "formalize[s] and extend[s] a pre-existing conspiracy among Big Bus, Gray Line and Go City to deny Go New York access to critical trade partners within New York City," *id.* at 11, is also implausible. The MOU, by its own terms, expressly excludes third-party attractions from its scope. *See* Doc. 53-1 at 2.

Second, Go New York's reference to "subsequent related operating agreements" fails to bolster its argument. The allegations are wholly conclusory. The First Amended Complaint does not allege the terms of these agreements, the parties to them, when they were entered into, or even their subject matter. ¶ 56. *See Iqbal*, 556 U.S. at 662 (citing *Twombly*, 550 U.S. at 544) (pleadings must allege facts that are plausible and not merely conclusory statements).[12]

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[12] To the extent Go New York means the other agreements it describes in the First Amended Complaint, namely Gray Line and Big Bus' cross-licensing of trademarks, use of certain bus

Third, Go New York argues that its claims in this action are distinguishable from its previously dismissed claims because the complaint in the Prior Federal Action was "based almost exclusively" and "alleged primarily" that Big Bus and Gray Line were attempting to dominate the attraction pass market by shutting Go New York out of arrangements with third-party attractions. Doc. 71 at 13, 19. Meanwhile, here, the allegations here are based on a "formal agreement" to merge operations pursuant to the MOU. Doc. 71 at 17-18. The Court is unpersuaded. In the Prior Federal Action, Go New York alleged that Gray Line and Big Bus each "possess[] monopoly power in the New York City hop on, hop off tour bus market," such that the companies have worked together to "improperly prevent[] or impede[] Go New York's ability to compete in said market by offering competitive Multi-Attraction Passes." ¶¶ 80-83 (emphasis added). Accordingly, the Prior Federal Action did allege antitrust claims on the basis of conduct in the New York tour bus market, as alleged in the instant case. Judge Kaplan dismissed these claims with prejudice. *See* Doc. 92 at 2-3.

Thus, the Court finds that the new conduct alleged in the instant action—specifically, the MOU and the unspecified subsequent operating agreements—do not support a new cause of action for the Sherman Act violations and the unfair competition claim. *See TechnoMarine SA*, 758 F.3d 503, *Storey*, 347 F.3d 384. Like in *Waldman II*, it is simply not "plausible" to characterize Go New York's antitrust claims as based,

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stops, and payments to sales representatives, these allegations are also not sufficient evidence of a merger.

"in a significant way" on facts that occurred after the Prior Federal Action. *Waldman*, 207 F.3d at 113.

2. Other Factual Allegations

Turning to the remaining factual allegations, Go New York's claims are premised on the same facts it alleged in the Prior Federal Action: an alleged conspiracy between Defendants to impede Go New York's ability to compete in the tour bus and multi-attraction pass markets in New York City by, among other things, persuading various tourist attractions and service operators not to do business with Go New York. To support its claim, Go New York references the same nine tourist attractions as in the Prior Federal Actions, and in fact brings nearly verbatim allegations. *Compare Go New York Tours, Inc.*, No. 19-cv-02832 (LAK), Doc. 84 (second amended complaint in Prior Federal Action) *with Go New York Tours, Inc.*, No. 23-cv-4256 (ER), Doc. 59 (First Amended Complaint in the instant action).

When analyzing the "same cause of action" requirement, courts in this Circuit consider whether the subsequent action concerns "the same claim—or nucleus of operative facts—as the first suit applying three considerations: "(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." *Channer v. Dep't of Homeland Security*, 527 F.3d 275, 280 (2d Cir. 2008) (internal quotation marks omitted). "[T]he facts essential to the barred second suit need not be the same as the facts that were necessary to the first suit. It is instead enough that the facts essential to the

second were [already] present in the first." *Id.* (internal quotation marks and citations omitted).

The facts underlying the claims in this action are "related in time, space, origin, or motivation" to the nearly identical factual allegations in the Prior Federal Action. *See Channer*, 527 F.3d at 80. The claims in this action would have formed a convenient trial unit with the Prior Federal Action, as both involve substantially the same allegations. *Id.* Finally, the Court finds that treating the facts as a single unit would have conformed to the parties' expectations, as the legally relevant facts largely overlap. *Id.* The instant case therefore only presents "subtle differences" with the allegations in the Prior Federal Action, which are "not enough to overcome the many similarities, that, in their totality, render the respectively complaints sufficiently 'related in time, space, origin, or motivation' to trigger res judicata." *Beijing Neu Cloud Oriental Sys. Tech. Co. v. International Business Machines Corp.*, No. 22-3132, 2024 WL 3529080, at *8 (2d Cir. July 25, 2024) (citations omitted); *Id.* at *7 (applying res judicata when "[f]undamentally, both [cases] allege the same injury based on the same series of events" and the complaints "rely on nearly identical allegations[.]"). Thus, the Court finds that the instant case concerns the same nucleus of operative facts as the Prior Federal Action.

In sum, res judicata bars consideration of Go New York's Sherman Act claims as well as its unfair competition claim.

B. Go New York's Remaining Claims are Dismissed Without Prejudice

Go New York's remaining federal claim challenges the alleged merger between Gray Line and Big Bus pursuant to the Clayton Act § 7.[13] ¶¶ 112-15. A merger violates § 7 if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such [merger] may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 prohibits certain mergers between competitors in a market, *United States v. Continental Can Co.*, 378 U.S. 441 (1964), certain acquisitions of a market competitor by a noncompetitor, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578-580 (1967), and certain mergers that eliminate a potential competitor, *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964).

None of the proceeding situations apply here. As evidence of the alleged merger, Go New York only relies on the MOU, cross licenses of trademarks, and the fact Gray Line allegedly allows Big Bus to use its bus stops. ¶¶ 55-58. For the reasons described above, the MOU does not plausibly allege a merger between Gray Line and Big Bus. And any agreements to cross license trademarks or to use certain bus stops do not show that the Defendants have entered into a merger

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[13] Go New York also brings claims for violations of § 4 of the Clayton Act, but this provision relates to the availability of treble damages for antitrust violations and is "designed primarily as a remedy." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Neither party expressly references § 4 in their arguments. *See* Docs 67, 71, 76. Accordingly, the Court does not engage in a separate analysis of § 4.

or acquisition agreement.[14] Accordingly, the Court finds that Go New York's allegations of a merger are unsupported by the factual allegations, and therefore dismisses its Clayton Act claim without prejudice.[15]

Finally, Go New York asserts that Defendants violated the Donnelly Act, New York's antitrust statute. ¶¶ 116-121. Federal district courts have supplemental jurisdiction over state law claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The doctrine of supplemental jurisdiction is traditionally "a doctrine of discretion, not of plaintiff's right." *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). Subsection (c) of § 1367 enumerates circumstances in which a

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[14] Although not expressly alleged in the Clayton Act claim, the Court also finds that Go New York's claim that Gray Line and Big Bus "must" allocate revenue and commissions also does not support the argument that they have merged. ¶ 60. Go New York does not allege the existence of a formal agreement to provide such revenue allocations, and even if it did, the agreement does not purport to create a merger.

[15] Defendants request that the First Amended Complaint be dismissed with prejudice. Doc. 76 at 6. The Second Circuit has counseled strongly against the dismissal of claims with prejudice prior to "the benefit of a ruling" that highlights "the precise defects" of those claims. *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190-91 (2d Cir. 2015). To be clear, while Go New York did bring a Clayton Act § 4 claim in the Prior Federal Action seeking treble damages, it did not bring a Clayton Act § 7 claim. Accordingly, this is the Court's first opportunity to highlight the precise defects of the Clayton Act § 7 claim. The Court will therefore not dismiss the claim with prejudice.

district court "may decline to exercise supplemental jurisdiction over a claim under subsection (a)." 28 U.S.C. § 1367(c). One such circumstance is where, as here, "the district court has dismissed all claims over which it has original jurisdiction." *Id.*

Once a district court's discretion is triggered under § 1367(c)(3), it balances the traditional "values of judicial economy, convenience, fairness, and comity" in deciding whether to exercise jurisdiction. *Kolari*, 455 F.3d at 122 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). The Supreme Court has noted that in a case where all federal claims are eliminated before trial, "the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* (internal quotation marks omitted); *see also Gibbs*, 383 U.S. at 726 ("[I]f the federal law claims are dismissed before trial . . . the state claims should be dismissed as well."). As Go New York's federal claims have been dismissed, the Court declines to exercise jurisdiction over the Donnelly Act claim, which is dismissed without prejudice.

IV. Conclusion

The Court **GRANTS** Defendants' motion to dismiss the complaint. Accordingly, the Foreign Defendants' motion is **DENIED** as moot. As noted above, the Court declines to exercise jurisdiction over the remaining state law claim.

The Clerk of Court is respectfully directed to terminate the motions, Docs. 64 and 66, and to close the case.

SO ORDERED.

/s/ Edgardo Ramos
U.S.D.J.

Dated: August 27, 2024
New York, New York

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT (NOVEMBER 11, 2024)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GO NEW YORK TOURS INC,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

24-2392-CV

On Appeal from the United States District Court
for the Southern District of New York

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PRELIMINARY STATEMENT

This case is part of a pattern which has been noted several times by this Court, as well as sister circuits around the United States, of misinterpreting the Supreme Court's holding in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) by making improper determinations on disputed issues of material facts at the pleading stage. *See, e.g, SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 434 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015) (reversing a dismissal of a Sherman Act claim because "the district court . . . erred by applying a summary-judgment standard to SawStop's group boycott claim and by confusing 'plausibility' with 'probability.'"). *Twombly* is sound policy insofar it permits courts to discard obviously frivolous litigation at the outset. However, this Court has noted several times that the

plausibility standard espoused by *Twombly* is a lower pleading standard than probability, and therefore, courts are not permitted to resolve disputed issues of material fact at the pleading stage. That is precisely what occurred in this case.

Go New York alleged that, based on the facts on the ground in the market, Respondents merged their operations into a single operating entity. A. 297-300.[1] However, the District Court accepted Respondents' assertion that a memorandum of understanding between them was a mere ticket selling arrangement and, therefore, there was no merger. In so doing, the District Court unreasonably disregarded other well-pleaded allegations supporting the existence of agreements among Respondents to merge into a single operating entity. In view of these allegations, supported by concrete on-the-ground evidence, it was, to say the least, implausible for Respondents to deny that they merged their operations. The District Court impermissibly resolved disputed issues of material fact on a motion to dismiss prior to allowing discovery concerning Appellant's well-pleaded allegations. *See Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 776 (2d Cir. 2016). This was reversible error. *Id.*

This Court repeatedly has been clear that under *Twombly*: "At the pleading stage, the court must accept the allegations in the complaint as true, unless they are conclusory and contradicted by extrinsic material incorporated into the complaint." *Davis v. Metro N. Commuter R.R.*, No. 23-1041-CV, 2024 WL 1434284, at *2 (2d Cir. Apr. 3, 2024) (reversing J. Ramos on the grounds that "the district court erred by engaging in

[1] Citations to the appendix in this brief are in the "A. []" format.

impermissible factfinding"). Further, the Court "must draw all reasonable inferences in the plaintiff's favor." *Williams v. Richardson*, 425 F. Supp. 3d 190, 200 (S.D.N.Y. 2019) (*citing Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007))." In the case at hand, the District Court improperly drew inferences *against* the non-moving party, rather than for it. Failing to reverse the District Court would set a dangerous precedent by allowing trial courts to simply ignore well-pled allegations and improperly resolve disputed issues of material fact at the pleading stage.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Go New York stated federal claims under the Sherman Act and Clayton Act, specifically 15 U.S.C. §§ 1, 2, and 15. The district court entered the Order appealed from on August 27, 2024. Appellant filed a notice of Appeal on September 9, 2024. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is from a final judgment dismissing the case.

ISSUES PRESENTED FOR REVIEW

Did the district court err by granting a motion to dismiss without providing all reasonable inferences to the non-moving party and by impermissibly making findings of material disputed issues of fact at the pleading stage?

Answer: Yes. On a motion to dismiss under Fed. R. P. 12(b)(6) a district court must accept as true all well-pleaded facts and resolve competing inferences in the plaintiff's favor. Thus, when well-pleaded facts as alleged by the plaintiff are in dispute on a motion to

dismiss, a district court may not resolve them against the non-moving party.

STATEMENT OF THE CASE

This case was precipitated by an anticompetitive, monopolistic merger between, at the time, the first and second largest hop-on, hop-off sightseeing bus companies in New York City, Respondents Twin America, LLC ("Twin America"), Gray Line New York Tours, Inc., and Sightseeing Pass LLC ("Sightseeing Pass" and collectively with Gray Line New York Tours, Inc. and Twin America, "Gray Line") and Respondents Open Top Sightseeing USA, Inc., Taxi Tours, Inc., and Leisure Pass Group, Inc.[2] (collectively known as "Big Bus" and collectively with Gray Line, "Respondents"), respectively. However, Respondents' anticompetitive behavior goes back much further than the merger, as the merger was merely an intensification and continuation of a previous conspiracy to restrain trade in the New York City hop-on, hop-off sightseeing tour bus market. A. 15. As alleged by Go New York, Respondents had effectuated that conspiracy by using their combined market power to coerce certain non-parties into not doing business with Go New York. However, in or about the summer of 2020, when the hop-on, hop-off tour bus industry was shut down because of the COVID-19 pandemic, Respondents took advantage of the situation to merge their operations for the purpose of creating a monopoly in the New York City hop-on, hop-off tour bus market. A. 15. Thus, on or about May 22, 2023, Go New York brought

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[2] Leisure Pass Group, Inc., recently changed its name to Go City, Inc.

suit seeking damages, and to enjoin Respondents' monopolistic and otherwise anti-competitive behavior.

I. The Previous Antitrust Case

As previously alluded to, however, this is not the first case between the parties involving anticompetitive behavior. Go New York first asserted antitrust claims against Respondents in March 2019, in a previous action, *Go New York Tours, Inc. v. Gray Line New York Tours, Inc.*, *et al.*, S.D.N.Y. Case No. 19-cv-02832. A. 50. On May 23, 2019, Go New York filed a first amended complaint in that action asserting claims under the Sherman Act, §§ 1-2, and its state law corollary, the Donnelly Act, based almost exclusively on Big Bus and Gray Line's attempts to dominate the Attraction Pass sub-market of the New York City hop-on, hop-off market by shutting Go New York out of arrangements with non-party attractions. A. 56-82. Big Bus, Gray Line, and Go New York all sell their hop-on, hop-off services largely through "attraction passes," wherein a hop-on, hop-off bus operator bundles admission to its buses with admission to other attractions around the city. A. 66-67. In order to offer a competitive "attraction pass" a tour bus operator must partner with attractions to buy wholesale lots of tickets for a discounted "net rate," which they can then include with their "attraction pass." *Id.* Access to the most popular attractions is highly valuable. *Id.*

In that action, Go New York alleged that Big Bus and Gray Line had acted in concert to deny Go New York access to critical trade partners, both shutting Go New York out of the market for attraction passes and setting prices for attraction passes. A. 68-74. Go New York alleged that Respondents did this by (1)

entering "exclusive" trade partner agreements with certain attractions, which they then waived for the benefit of the other party, (2) refusing to work with attractions who also worked with Go New York and (3) denigrating Go New York's services to those attractions. *Id.*

However, unlike the present case, in the prior antitrust litigation Go New York did not allege the existence of a written agreement among Respondents, nor did it allege that Respondents had merged their operations. The first amended complaint was dismissed by the Honorable Lewis Kaplan without prejudice, with leave for Go New York to replead. A. 88.

Judge Kaplan's stated reasons for dismissing Go New York's Sherman Act § 1 claim included that Go New York had not provided direct evidence of a horizontal agreement or alleged sufficient "plus factors" to give rise to an inference of a horizontal conspiracy to restrain trade. A. 85-86. Judge Kaplan specified that "'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.'" *Id.* (*quoting Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). Judge Kaplan dismissed Go New York's Sherman Act § 2 claim on the grounds that a monopoly requires a single monopolist and that "Section 2 does not permit a 'shared monopoly . . . " A. 87-88.

On December 5, 2019, Go New York filed a second amended complaint in that action which also focused on Respondents' exclusive arrangements with non-party attractions and correspondingly depriving Go

New York access. A. 90-117. Notably, that complaint omitted the previous claims for monopolization in violation of § 2 of the Sherman Act. On March 4, 2020, Judge Kaplan dismissed the second amended complaint for many of the same reasons he dismissed the first, namely lack of direct evidence of a horizontal agreement or specific "plus factors" to infer a conspiracy to restrain trade.[3] A. 119. This Court affirmed Judge Kaplan's decision.

II. The Instant Action

After learning that Respondents entered into post-pandemic agreements merging their operations in an attempt to monopolize the market, Go New York brought the current action. Go New York's Amended Verified Complaint (the "Amended Complaint") contains fundamentally different claims and allegations from those in the proceeding antitrust litigation. In the prior action, Go New York alleged primarily only a conspiracy and combination in restraint of trade in the New York City Hop-on, Hop-off Market. A. 90-117. Indeed, Go New York's previous Second Amended Complaint upon which the final dismissal was based on, did not allege a violation of § 2 of the Sherman Act. *Id.*

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[3] Judge Kaplan dismissed Go New York's Donnelly Act claims without prejudice. Go New York renewed those claims as counterclaims in New York State Court. *See Taxi Tours Inc. et al, v. Go New York Tours Inc. et al*, New York County Supreme Court Index No. 653012/2019. While the lower New York Courts dismissed those counterclaims, the Court of Appeals reversed the lower courts and reinstated them in March of 2024. *See Taxi Tours Inc. v. Go New York Tours, Inc.*, 41 N.Y.3d 991, 993, 236 N.E.3d 159, 160 (2024). They are presently being litigated.

In sharp contrast, in the present action, Go New York alleges actual and attempted monopolization as well as a restraint on trade of the New York City hop-on, hop-off market, under both §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15 A. 308-311. Go New York also alleges similar claims under New York's corollary state antitrust laws, the Donnelly Act. A. 313. The present action is predicated upon Go New York's discovery of agreements and observations (supported by photographic evidence) of conduct on the streets in the New York market pursuant to which Big Bus and Gray Line merged their New York operations. A. 298-299. As alleged by Go New York, Big Bus and Gray Line now operate as a single, monopolistic entity in the New York City hop-on, hop-off market, fixing prices and restraining competition in the New York City hop-on, hop-off market. *Id.*

A. The Motion to Dismiss

On or about September 20, 2023, Respondents moved to dismiss this action. On or about October 11, 2023, Go New York both opposed the motion to dismiss and filed an amended complaint in lieu of its original one (the "Amended Complaint"). A. 281-316 The Amended Complaint did not substantially change Go New York's core allegations, rather, it added more detail to Go New York's allegations and included additional evidence supporting them. *Compare* A. 15-43 *with* A. 281-316.

Respondents again moved to dismiss Go New York's Amended Complaint, on or about November 13, 2023. A. 319. Respondents' motion was based primarily on a declaration from one of Big Bus' executives, Julia

Conway, wherein Ms. Conway attached a "Memorandum of Understanding" (the "MOU") between Big Bus and Gray Line, and declared that "This is the 'written agreement' referenced—although mischaracterized—in Paragraph 44 and 55 of the Amended Verified Complaint." A. 321. Go New York rigorously disputes that the MOU was the entirety of the agreements among Respondents referenced in its Amended Complaint. Indeed, Go New York's Amended Complaint included allegations of additional agreements among Respondents necessary for implementing the merger. A. 298-301. Ms. Conway's assertion that the MOU was the only agreement among Respondents conflicts with several clear allegations in the Amended Complaint and therefore raises material issues of disputed facts. Yet the District Court accepted Ms. Conway's allegations as true, which was plainly improper on a motion to dismiss.[4]

The MOU attached to the Conway Declaration is referred to by Respondents and the District Court as "reselling arrangement" whereby a subsidiary of Gray Line, Twin America, agreed to sell tickets for Big Bus' hop-on, hop-off bus tours in New York City. A. 321. According to its text, its original term was only six months, and it contemplated Big Bus granting Gray Line a "non-exclusive, royalty-free, worldwide, revocable license to use its Intellectual Property solely to the extent necessary for the resale of tickets . . . " A. 48-49. Go New York's Amended Complaint, however,

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[4] While it was proper for the District Court to consider the MOU on the motion to dismiss, the District Court clearly erred insofar as it relied on Ms. Conway's assertion that the MOU was the only relevant agreement among Respondents, and was nothing more than a ticket selling agreement.

alleged that the MOU was one component among several agreements, oral and written, pursuant to which Respondents merged their operations. A. 281 In this regard, even Respondents admit that four years after they first entered into the MOU (which included a term of only six months (A.48)), they continue to operate together under the MOU. As alleged in the Amended Complaint, there is substantial evidence demonstrating that Respondents entered into other agreements pursuant to which they have merged their operations. A. 297-300.

Perhaps most important of all, it is undisputed that subsequent to entering into the MOU and continuing to date, only Big Bus has continued to operate tour buses, and Gray Line has ceased operating buses. A. 299. Thus, one combined entity now operates buses that service customers who hold tickets sold on websites and otherwise by Gray Line and Big Bus. A. 299. While Gray Line continues to sell tickets for its own Attraction Passes, all of Gray Line's customers travel on Big Bus' buses. Neither party disputes that Gray Line no longer runs buses-which is not a required provision in the MOU. *Compare* A. 48-49 *with* A. 298-299. Examining the facts on the ground in fair context, and as alleged in the Amended Complaint, it is abundantly clear that in the New York City hop-on, hop-off market, Gray Line and Big Bus have effectively combined their businesses into a single operating entity. Many other facets of the business relationship among Respondents also go far beyond the explicit terms of the MOU.

For instance, crucially, each of the parties licensed their trademarks and brand names for use by the merged entity. Although the MOU only explicitly

contemplates *Gray Line* using *Big Bus*'s intellectual property "solely to the extent necessary for the resale of tickets," (A. 49), the merged entity has resulted in the use of the famous brand names of both parties to drive sales. A.297. Indeed, for example, the Amended Complaint asserts, with photographic evidence included in the text of the Amended Complaint, that *Big Bus* has been putting *Gray Line*'s logo in prominent places on its buses, publicly holding out its operations as one joint integrated entity in the New York City hop-on, hop-off market. *See* Amended Complaint, A. 298-299. Both Big Bus and Gray Line have modified their respective websites and marketing materials to take advantage of the power of the combination of their famous brands. A. 300. Coordination of their joint operation so that it benefits from the fame of the pre-existing famous brands of both companies is a key component of Respondents' attempt to monopolize the market.

As alleged by Go New York, in addition to the foregoing, Gray Line permitted Big Bus to use bus stops previously assigned for exclusive use of Gray Line by the New York City Department of Transportation ("DOT"). A. 299. To confer this valuable benefit on the merged entity, Gray Line falsely represented to the DOT that it intended to resume its hop-on, hop-off operations, when in fact, Gray Line had already merged its hop-on, hop-off bus operations with Big Bus, and had no intention to separately resume operation of buses. *Id.* Gray Line made these misrepresentations to the DOT in order confer on the merged entity its exclusive rights to the DOT-assigned bus stops. *Id.* Gray Line's misrepresentations to the DOT concerning its operating status were made for

the purpose of conferring monopoly power on its merged entity with Big Bus.

Furthermore, the process of ticket selling itself involves allocating money through several channels. A. 300 Not only do Big Bus and Gray Line work together to allocate revenues among the stakeholders of the new joint partnership, but Respondents must also cooperate in the payment of commissions to sales representatives and others responsible for selling tickets for the benefit of the new joint enterprise. *Id.* Thus, as alleged in the Amended Complaint, Big Bus and Gray Line necessarily also integrated together accounting and management functions. *Id.* In addition, each of Gray Line and Big Bus has adjusted its websites and other key marketing materials in order to facilitate their merged operations, making references to their combined famous and powerful trademarks and notifying customers and trade partners that only buses operated by Big Bus are available to carry passengers. *Id.*

Go New York also alleged that that the merger of Big Bus and Gray Line resulted in an intensification and expansion of the previous conspiracy to restrain trade in the attraction pass market alluded to above. A. 300. Indeed, the hop-on, hop-off bus tour is a central part of the attraction pass products, as it is the core offering which transports passengers between attractions. Gray Line ceasing its own hop-on, hop-off bus tour while putting all its customers on buses run by Big Bus itself is a dramatic escalation in the coordination regarding Respondents' respective attraction passes, to say nothing of the other subsidiary agreements to restrain trade that were previously alleged by Go New York.

As discussed below, a fair reading of the District Court's opinion must inevitably lead to the conclusion that the District Court simply ignored most of the foregoing allegations, instead crediting the assertion in the Conway Declaration that the MOU was a mere ticket selling agreement, and that the MOU was the only agreement among Respondents. The Amended Complaint clearly alleges, however, that Respondents' conduct on the ground shows that they entered into several agreements, the essence of which was to combine their operations into a single operating entity. A. 297-300, 308-310.

B. The Order Appealed From

In an opinion and order of August 27, 2024, Judge Ramos dismissed Go New York's Amended Complaint, relying primarily on Respondents' representations concerning the allegedly limited scope of their agreements pursuant to the MOU. SPA. 1-20.[5] Specifically, Judge Ramos held that:

> Go New York's new factual allegations do not support its causes of action. First, the MOU does not plausibly support the antitrust claims. To summarize, Go New York alleges that the MOU resulted in the merger of Defendants' companies and formalized Defendants' alleged conspiracy "to monopolize and fix prices within the market for New York City Hop-on, Hop-off tour bus services, and to effectively shut Go New York out of the Attraction Pass sub-market, making it difficult

[5] Citations to the Special Appendix which includes the order appealed from are in the "SPA []" format.

> if not impossible for Go New York to offer and sell competitive attraction passes." ¶¶ 44, 61. But the text of the MOU fails to support these allegations, as it only describes an agreement for Gray Line to resell tickets for Big Bus tour bus services and to license intellectual properly "solely" to the extent necessary for such resale. *See* Doc. 53-1. The MOU does not purport to combine or merge Defendants' businesses into a "single entity," nor does it reflect an agreement between Defendants "to fix prices" and prevent competition in the tour bus and multi-attraction pass industries in New York City. Doc. 71 at 26. Go New York's claim that the MOU "formalize[s] and extend[s] a pre-existing conspiracy among Big Bus, Gray Line and Go City to deny Go New York access to critical trade partners within New York City," *id.* at 11, is also implausible. The MOU, by its own terms, expressly excludes third-party attractions from its scope. *See* Doc. 53-1 at 2.
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> Second, Go New York's reference to "subsequent related operating agreements" fails to bolster its argument. The allegations are wholly conclusory. The First Amended Complaint does not allege the terms of these agreements, the parties to them, when they were entered into, or even their subject matter. ¶ 56. *See Iqbal*, 556 U.S. at 662 (citing *Twombly*, 550 U.S. at 544) (pleadings must allege facts that are plausible and not merely conclusory statements) . . .

SPA. 15-16.

SUMMARY OF THE ARGUMENT

"In considering a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff's favor." *Williams v. Richardson*, 425 F. Supp. 3d 190, 200 (S.D.N.Y. 2019) (*citing Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007)). However, in this case, the District Court did the opposite, discarding Appellant's allegations because it felt they were improbable and instead adopting Respondents' position-essentially drawing inferences in Respondents' favor. Go New York's allegations that Respondents had merged their New York hop-on, hop-off operations were well pled, based on observations concerning on the ground conduct supported by photographic evidence, and detailed factual allegations concerning agreements regarding the sharing of intellectual property, combined on-the-ground bus operations, sharing of bus stops, website notifications to customers and trade partners concerning the combined bus operations, accounting mechanisms and procedures, and other key infrastructure. A. 297-301. Go New York's Amended Counterclaims even included photographs which supported Go New York's on-the-ground observations concerning Respondents' combined bus operations and sharing of their combined famous brand names. A. 298-299. Instead, the District Court mischaracterized Go New York's claims and accepted Respondents' conclusory and implausible allegations that the relationship between the Respondents was a mere ticket reselling agreement – contentions that in fair context, simply make no sense and directly contradict the evidence on the ground, and as alleged in the Amended Complaint. SPA. 15. In so doing, the

District Court compounded its error by heavily relying upon a Big Bus executive, Julia Conway's, unsupported declaration that entire relationship among Respondents was memorialized the MOU, a position that was both conclusory and implausible, as the MOU does not even accord with the facts on the ground, much less the facts as alleged by Go New York. *Compare* A. 48-49 *with* A. 298-299. While the District Court could properly review the MOU at the pleading stage, reliance on Conway Declaration and the text of the MOU to refute Go New York's well-pleaded merger allegations was clearly improper, resulting in premature, impermissible findings of fact.

The District Court's flawed analysis is evident when one examines the text of the MOU compared to the allegations in the Amended Complaint. For instance, by its terms, the MOU was only a six-month agreement (A. 48)—yet it is undeniable that Respondents have has continued to jointly operate, in part pursuant to the terms of the MOU, for more than four years. It is also undeniable that at the same time the MOU was entered into, Gray Line ceased operating buses, and Big Bus began to carry all of Gray Line's customers—yet the MOU is silent concerning this development. *Compare* A. 48-49 *with* A. 297. However, the Amended Complaint alleges that, separate from the MOU, Respondents agreed that Gray Line would cease operating buses and only Big Bus would continue to operate buses on behalf of their merged operations. A. 297. Moreover, the Amended Complaint alleges numerous other agreements between Big Bus and Gray Line, such as an agreement to cross-license intellectual property for use in both the merged entity and with partner attractions, as well as agreements

involving the apportionment of revenue from the merged operations. A. 299-300. It is undisputed that the pictures included in the Amended Complaint reflect a far greater shared use of Respondents' respective famous brand names, and far greater coordination in the use of their brand names than was authorized by the text of the MOU (A. 298-299)[6]—yet the District Court accepted Respondents' position that their relationship was a mere ticket reseller agreement. SPA. 18.

The District Court accepted Conway's position that the relationship between Respondents was a mere ticket reselling agreement based on its assertion that Go New York allegedly failed to supply "the terms of [subsequent] agreements, the parties to them, when they were entered into, or even their subject matter." It was error for the District Court to label Go New York's allegations "conclusory" when Go New York's allegations lacked details regarding the nature of the merger but had ample details regarding the merger's outcomes. Indeed, this Court has said that it is incorrect to "argue that *Twombly* requires that a plaintiff identify the specific time, place, or person related to each conspiracy allegation." *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 325 (2d Cir. 2010). In this case, the District Court missed the forest for the proverbial trees, focusing not on the effects of the merger in the market but the process of how the merger was effectuated.

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[6] The MOU authorized Gray Line to use Big Bus intellectual property such as brand names, but it did not authorize Big Bus to use Gray Line's intellectual property. But in practice, as alleged in the Amended Complaint, the combined entity uses both sets of famous brand names to drive customer sales.

The District Court incorrectly accepted Respondent's position that the relationship between the parties was a mere "ticket reselling agreement," (SPA. 15) essentially drawing inferences in favor of *Respondents* solely based on one of their executive's unsupported contentions regarding the process of implementing the merger, but it did not afford any favorable inferences to Appellant's well-plead allegations based off the outcomes of the merger. The Court's refusal to grant Appellant favorable inferences and instead granting Respondents favorable inferences was clear, reversible error.[7]

ARGUMENT

The applicable standard of review when examining a grant of a motion to dismiss is *do novo*. *See Muto v. CBS Corp.*, 668 F.3d 53, 56 (2d Cir. 2012)("We review *de novo* a district court's grant of a motion to dismiss, accepting as true all factual allegations in the complaint and drawing all reasonable inferences in favor of the plaintiffs . . . ").

I. *Twombly* Does Not Permit A Court to Impose a Probability Requirement at the Pleading Stage

The Supreme Court's seminal holding in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) empowering courts to dismiss claims on the grounds that they were not "plausible" was sound policy insofar that it permitted courts to discard frivolous litigation at the

[7] To the extent that the District Court relied on *res judicata* in dismissing Go New York's arguments, that was clear error as well, as the merger had not taken place when Go New York brought its other claims.

outset. However, since that holding, court of appeals around the country, including this Court, have noticed a pattern of district courts misapplying the "plausible" standard, and instead applying a standard closer to the summary judgment standard of probability, especially in antitrust cases. *See Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 189-90 (2d Cir. 2012)("the question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible. As discussed in Part II.A. above, the plausibility standard is lower than a probability standard, and there may therefore be more than one plausible interpretation of a defendant's words, gestures, or conduct."); *Davis v. Metro N. Commuter R.R.*, No. 23-1041-CV, 2024 WL 1434284, at *2 (2d Cir. Apr. 3, 2024). *See also SmileDirectClub*, *LLC v. Tippins*, 31 F.4th 1110, 1121 (9th Cir. 2022)("But because we do not consider the Board Actors' competing facts at the pleadings stage, and because Rule 12 does not require the Complaint to exclude the possibility of lawful conduct, we hold that the Complaint plausibly alleges a conspiracy to restrain trade."); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 45 (1st Cir. 2013) ("*Twombly* also clarified that '[a]sking 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.' 550 U.S. at 556, 127 S.Ct. 1955. 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. "); *SD3, LLC v. Black & Decker*

(U.S.) Inc., 801 F.3d 412, 434 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015) (reversing a dismissal of a Sherman Act claim because "the district court . . . erred by applying a summary-judgment standard to SawStop's group boycott claim and by confusing 'plausibility' with 'probability.'"). As expressed in the quotations above, the misapplication of *Ashcroft* and *Twombly* most often takes the form of deciding a critical disputed issue of material fact which implies plausible competing inferences in favor of the defendant, not the plaintiff. That is precisely what occurred in this case.

II. Go New York Plausibly Alleged Respondents Merged Their Operation

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Appellant advanced facially plausible allegations that Respondents had conspired to restrain trade in and monopolize the New York City hop-on, hop-off market, as the following key facts all support a reasonable inference that Respondents had effectively merged their New York City hop-on, hop-off operations:

- Gray Line agreed that it would not operate hop-on, hop-off tours, and has ceased operating those tours. A. 296-297. Indeed, Gray Line has auctioned off its hop-on, hop-off bus fleet in New York.
- Between Gray Line and Big Bus, only Big Bus is operating buses, and for four years or more, continuing to date, all customers of the

merged entity ride on buses operated by Big Bus, regardless of if they technically buy tickets from the website of one corporate Respondent or the other. *Id.*

- These allegations cannot be disputed; indeed the Amended Complaint even includes pictorial evidence showing buses currently running in New York City bearing both Gray Line and Big Bus' famous logos. A. 298-299.
- Gray Line misrepresented its operating status to the New York City Department of Trans portation (the "DOT") to ensure that the DOT would not reassign the bus stops assigned to it. Access to the bus stops is extremely valuable. Had Gray Line been forthright that it was no longer operating buses, the DOT would have reassigned these bus stops to a competitor, potentially Go New York. A. 299-300. Instead, Gray Line permitted Big Bus to stop at its stops, showing how the merged entity was able to utilize the combined market power of both corporate Respondents to shut others out of the market. *Id.*
- The Amended Complaint also alleged other operating agreements necessary to effectuate the merged operation evidenced in the pictures included in the Complaint. A. 298-299. These operating agreements included:
    - Agreements involving the cross-licensing of trademarks and intellectual property. The Amended Complaint's pictures show the merged operation using both Gray Line

and Big Bus' famous, trademarked, brands. A. 297. Indeed, the heart of the Amended Complaint is that in the New York City hop-on, hop-off market, Gray Line and Big Bus run buses with each other's famous trademarks on them, while in other cities, Big Bus and Gray Line are still ostensible competitors. A. 297-299. This is no small detail—it is as though Coca-Cola and Pepsi, or Microsoft and Apple, agreed to place their valuable intellectual property on one soda or one electronic device. The fact that two ostensible direct competitors have agreed to share famous and valuable trademarks leads to the obvious conclusion that discovery would likely reveal the existence of either an oral or formal written agreement regarding the use of these trademarks. However, the Court merely ignored this fact and the pictures in the Complaint which prove it.

- Agreements involving the sharing of revenue from the combined operations. Big Bus and Gray Line each operate their own attraction pass but are also investors in the combined operation. A. 300. The parties must have an agreement regarding revenue derived from buses and derived from attractions according to their respective investments in the combined operation. Furthermore, not only do Big Bus and Gray Line work together to fairly allocate revenue, but critically, as alluded to above one of the key sales channels for hop-on,

hop-off tours and Attraction Passes are sales representatives who work on commission. *Id.* Because the sales representatives' commissions are based on the amount of sales they make, Big Bus and Gray Line must work together in the merged entity in order to fairly allocate commissions to their uniformed salespeople. *Id.* Discovery would likely reveal the details concerning these agreements, which are obviously necessary for the joint operations between Big Bus and Gray Line.

- The District Court also ignored that, as alleged by Go New York, a major impact of this merger was to formalize and extend a pre-existing conspiracy among Big Bus, Gray Line and Go City to deny Go New York access to critical trade partners within New York City, thereby (a) either shutting Go New York out of the Attraction Pass market or making it extremely difficult if not impossible for Go New York to compete in the Attraction Pass market, and (b) fixing the prices of Attraction Passes such that none of Big Bus Gray Line or Leisure Pass would undercut each other on prices for comparable Attraction Passes. A. 300-301. Critically, it appears that the District Court failed to appreciate that hop-on hop-off tours are the core component of the Attraction Pass—they are of course what transports customers between attractions. The fact that Big Bus and Gray Line (ostensibly) offer separate Attraction Passes featuring the same or

> similar routes and groups of tourist attractions necessitates a great deal of coordination. For instance, Gray Line must ensure that Big Bus' buses stop at all of the attractions that are included in its attraction pass products, Big Bus must ensure its employees know the Gray Line attractions in addition to its own, and the merged operation will need to coordinate dropping off passengers from both corporate entities at locations of different attractions which are included in their respective attraction pass products. All of these developments necessitate at least close communications, and most likely written agreements, which discovery would reveal.

However, the District Court ignored all of these allegations and instead misstated them. The District Court wrote: "To summarize, Go New York alleges that the MOU resulted in the merger of Defendants' companies and formalized Defendants' alleged conspiracy 'to monopolize and fix prices within the market for New York City Hop-on, Hop-off tour bus services . . . " SPA. 14. That was not Go New York's allegation, rather, that was Respondents' mischaracterization and misrepresentation of Go New York's allegations, primarily advanced by the declaration of Julia M. Conway. A. Go New York has never alleged that the merger grew solely from the MOU. To quote this Court, the assertion by Respondents that the MOU is the sole agreement relating to the alleged merger "is a disputed factual issue that must be reserved for the proof stage." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 776 (2d Cir. 2016) (reversing a dismissal of a Sherman Act claim). The District Court, thus, ignored

numerous allegations in the Amended Complaint concerning how Respondents merged their operations, and their various agreements other than the MOU for implementing this merger. Go New York plausibly alleged that the facts on the ground demonstrated that a merger had taken place, even including in the Amended Complaint photographs showing how the parties had merged their operations and shared the valuable and famous brand names for use in the merged operation.

III. The District Court Wrongly Resolved Competing Inferences in *Respondents' Favor*

In her declaration, Ms. Conway declares that the MOU "is the 'written agreement' referenced—although mischaracterized—in Paragraph 44 and 55 of the Amended Verified Complaint." A. 46. Crucially, nowhere does Ms. Conway state that the MOU is the only written agreement between the parties, (*id*) however, the District Court wholly adopted Conway's conclusory and implausible allegations.

Conway's declaration is fundamentally misleading, and the District Court's reliance on it was clear error. The Amended Complaint clearly alleges that there are agreements other than the MOU pursuant to which Respondents merged their operations. For example, although the MOU contemplates Gray Line using Big Bus' intellectual property "solely to the extent necessary for the resale of tickets," it did not authorize Big Bus to use Gray Line's intellectual property. A. 47-48. However, as demonstrated in photographs contained in the Amended Complaint, the buses operated in Respondents' joint operation make use both the Grey

Line and Big Bus brand names. This clearly demonstrates an agreement that goes far beyond the text of the MOU. This is one of merely many concrete factual allegations in the Amended Complaint that the District Court ignored or discounted, impermissibly accepting Respondents' assertion that there was no merger and that the MOU is their only agreement. *See Anderson News, L.L.C.*, 680 F.3d at 185 (Reversing a dismissal of an antitrust claim because "The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion."); *Gelboim*, 823 F.3d at 776.

The MOU is also silent regarding Gray Line ceasing to operate buses, and Big Bus operating buses on behalf of both itself and Gray Line. A. 47-48. It also makes no reference to the sharing of bus stops between Big Bus and Gray Line. *Id.* By its terms, the MOU was only valid for a period of six months—but the merged operation has been running for over four years. *Id.* The MOU does not come close to explaining the facts on the ground, both as alleged by Go New York and photographic evidence included in the Amended Complaint. A. 297-300. Therefore, it was fundamentally improper for the District Court to accept Respondents' assertion at the pleading stage that there was no merger, and that the MOU was the only relevant agreement among Respondents. *See Davis*, 2024 WL 1434284, at *2 ("At the pleading stage, the court must accept the allegations in the complaint as true, unless they are conclusory and contradicted by extrinsic material incorporated into the complaint. Additionally, courts must resolve competing inferences in plaintiff's

favor at the pleading stage . . . " (internal citations omitted)).

The District Court was seemingly preoccupied with the MOU, when it should have focused on Go New York's allegations themselves. Indeed, it appears that the Court's error was partially based on the mistaken belief that "*Twombly* requires that a plaintiff identify the specific time, place, or person related to each conspiracy allegation. This is also incorrect." *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 325 (2d Cir. 2010). The Court rejected Go New York's claims that the Respondents had engaged in an anticompetitive merger because "The First Amended Complaint does not allege the terms of these agreements, the parties to them, when they were entered into, or even their subject matter." However, as this Court has stated: "conspiracies are rarely evidenced by explicit agreements, but nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators . . . " *Anderson News, L.L.C.* 680 F.3d at 183-84 (internal citations and quotations omitted). Indeed, this Court has recognized that it is unrealistic to require plaintiffs to supply details regarding the background of knowing tortious conduct prior to the pleading stage. *Id. See also Barnes v. City of New York*, 68 F.4th 123, 129 (2d Cir. 2023)("it is unclear what other facts Barnes could be expected to allege in order to show that Defendants' conduct was knowing, as opposed to mistaken . . . ")

IV. Go New York Stated a Claim for Monopolization and Attempted Monopolization

A claim under § 2 of the Sherman Act must allege: "(1) the possession of monopoly power in the relevant

market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *TechReserves Inc. v. Delta Controls Inc.*, No. 13 CIV. 752 GBD, 2014 WL 1325914, at *9 (S.D.N.Y. Mar. 31, 2014) (*quoting Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 73 (2d Cir. 1988)). Monopoly power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market." *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d Cir. 1998).

Go New York has clearly and plausibly alleged both conditions precedent to acquiring monopoly power. Go New York has adequately alleged that Respondents merged their New York hop-on, hop-off operations to fix prices and exclude Appellant from competing with them. As alleged by Go New York, prior to the merger, there were three companies operating in the New York Hop-on, Hop-off Market, Big Bus, Gray Line, and Go New York. A. 288. The Amended Complaint alleges that immediately prior to their merger, "Gray Line had been the largest hop-on, hop-off, sightseeing company operating in New York City, in terms of both sales revenue and the size of its bus fleet . . . " A. 289. Similarly, as alleged by Go New York, "Big Bus had owned and operated the second largest hop-on, hop-off sightseeing tour bus business in New York City." A. 290. Thus, Go New York trailed Big Bus and Gray Line. *Id.* When Respondents merged their operations, they acquired monopoly power in the New York hop-on, hop-off market. Given that, as alleged by Go New York, there were three players in the New York hop-

on, hop-off market, and that Gray Line and Big Bus were the first and second largest respectively, their merger must have resulted in a substantial, dominant market share. A. 288-291. Such a substantial market share is "strong evidence" of monopoly power. *See Tops Markets, Inc.* 142 F.3d T 99 ("We have held that a market share of over 70 percent is usually "strong evidence" of monopoly power").

But it is not only Respondents' respective market shares that cry out for an inference in favor of monopoly power. As this Court has stated " . . . there is little argument over the principle that existence of monopoly power, the power to control prices or exclude competition, is the primary requisite to a finding of monopolization." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979). Central to Go New York's allegation of monopolization is the fact that, as alleged by Go New York:

> Another major impact of this merger was to formalize and extend a pre-existing conspiracy among Respondents to deny Go New York access to critical trade partners within New York City, thereby (a) either shutting Go New York out of the Attraction Pass market or making it extremely difficult if not impossible for Go New York to compete in the Attraction Pass market, and (b) fixing the prices of Attraction Passes such that none of Big Bus, Gray Line or Leisure Pass would undercut each other on prices for comparable Attraction Passes.

A. 300. While Judge Kaplan initially dismissed Go New York's theory of monopolization as unviable

because "Section 2 does not permit a shared monopoly . . . " (A. 86), the fact that Big Bus and Gray Line have merged their operations fundamentally changes the calculus. Go New York's theory of monopolization is not based on the preexisting conspiracy—rather, it is based on the merger, and the preexisting conspiracy is merely further evidence that Respondents possess the power to control prices and exclude competitors—*e.g.*, monopoly power.

V. Go New York Has Adequately Alleged a Conspiracy to Monopolize Under § 2 of the Sherman Act

"A conspiracy to monopolize claim must allege: (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize.'" *TechReserves Inc.* 2014 WL 1325914, at *9 (*quoting Volvo N. Am. Corp.* 857 F.2d at 74). The standard for "concerted action" is the same for both § 1 and § 2 of the Sherman Act. *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010). Clearly, two competitors merging their operations is concerted action, and there can hardly be a stronger "overt act" than an actual MOU itself. As for the third element, "It need not be shown that monopoly power has been attained, nor that if the conspirators continued in their course unmolested they would have attained it, but only that obtaining such power is the purpose which motivates the conspiracy." *Fort Wayne Telsat v. Ent. & Sports Programming Network*, 753 F. Supp. 109, 113 (S.D.N.Y. 1990) (internal citations and quotations omitted). The Amended Complaint plausibly and adequately alleges each of these elements. Respondents have merged their operations into a single entity and formed a joint

venture with the intent to monopolize the relevant market. A. 297-300. At the pleading stage, Go New York's allegations are both credible and plausible.

VI. Go New York Plausibly Alleged a Conspiracy In Restraint of Trade

In the alternative, if this Court deems that Go New York has not adequately alleged a monopoly or attempted monopoly, at the very least Appellant has alleged a concerted restraint on trade in violation of § 1 of the Sherman Act and the Donnelly Act. Specifically, Go New York alleges that pursuant to their merger, Respondents have unreasonably conspired to restrain trade by fixing prices and entering into allegedly "exclusive" relationships with third-party attractions, which they then share amongst themselves, but refuse to allow to do business with Go New York. A. 300-301. As stated by this Court:

> A plaintiff's job at the pleading stage, in order to overcome a motion to dismiss, is to allege enough facts to support the inference that a conspiracy actually existed. As *Starr* suggests, there are two ways to do this. First, a plaintiff may, of course, assert direct evidence that the defendants entered into an agreement in violation of the antitrust laws . . . a complaint may, alternatively, present circumstantial facts supporting the inference that a conspiracy existed. . . . These plus 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, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013) (internal citations and quotations omitted).

A. Go New York Has Plausibly Alleged an Actual Agreement in Restraint of Trade

Go New York has alleged "direct evidence," of a horizontal agreement to share allegedly exclusive attractions and otherwise fix prices in the New York City hop-on, hop-off market, as the MOU and the other related agreements among Respondents alleged in the Amended Complaint are actual agreements in restraint of trade. A. 297-300. But Go New York alleges much more. As alleged by Go New York, Respondents merged their operations, licensing their intellectual property to the merged entity and agreeing to numerous other operating and marketing arrangements. *Id.* Therefore, because Go New York's allegations plausibly suggests agreements to unreasonably restrain trade, Appellant's § 1 Sherman Act claims must not be dismissed either.

B. Go New York has Plausibly Alleged Plus Factors to Infer a Restraint of Trade

At the very least, even if the MOU is not itself direct evidence of an anticompetitive conspiracy, when combined with the other new allegations in Go New York's Amended Complaint, they present "plus factors" sufficient to give rise to an inference of a conspiracy. To recap, the *new* critical allegations by Go New York are:

- The MOU and other agreements entered into among Respondents beginning in Summer of 2020, resulting in the merger of their operations in New York into a new entity. A. 297.
- Gray Line completely ceasing operation of buses in New York and relying solely on buses operated by Big Bus to service customers of the merged entity. A. 297-299.
- Gray Line's false assertions to DOT that it was still operating hop-on hop-off buses, thereby refusing to give up its assigned bus stops, while simultaneously permitting buses operated by Big Bus to service the merged entity to use Gray Line's previously assigned bus stops. *Id.*
- The cross-licensing and joint use of the famous trademarks and brand names of Big Bus and Gray Line. *Id.*
- Allegations of an explicit agreements among Respondents to share access to third-party attractions with each other, while agreeing to exclude Go New York. A. 300-301.

These plus factors are more than sufficient to plausibly allege a conspiracy in restraint of trade. *See Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) ("These plus factors may include: a common motive to conspire . . . evidence of shared economic interest and a high level of interfirm communications").

It would be hard to conceive of a stronger common motive to conspire than an agreement whereby alleged

competitors sell tickets for use by customers in a combined operation. Indeed, under the terms of the MOU as presented by Respondents, Big Bus clearly has a vested interest in continuing to benefit from the fame of Gray Line's branding and accompanying reputation. A. 48-49. And, because Gray Line is no longer operating hop-on, hop-off buses, it has a vested interest in making sure that it can send its customers to ride buses operated by Big Bus. Further, as previously alluded to, each of Respondents now has a vested interest in sharing allegedly "exclusive" third-party attractions, as well as excluding Go New York from access to such attractions. Thus, the Amended Complaint contains plausible and clear allegations of plus factors giving rise to an inference of a conspiracy to restrain trade in violation of § 1 of the Sherman Act.

CONCLUSION

For all the above reasons, the District Court's order granting Respondents' motion to dismiss should be reversed in its entirety.

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Dated: New York, New York
November 11, 2024

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6) (DECEMBER 13, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GO NEW YORK TOURS INC,

Plaintiff,

v.

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

Defendants.

Civil Action No. 1:23-cv-04256-ER

Defendants fundamentally mischaracterize Plaintiff Go New York Tours, Inc's ("Plaintiff" or "Go New York") Amended Verified Complaint (ECF No. 59, cited as "AVC") in this action, falsely asserting that its allegations are essentially identical to those previously alleged by Go New York in a prior antitrust litigation.

Not so. The claims in the present action are predicated primarily on an express, written agreement among Defendants that did not exist when the prior litigation was instituted and was not considered by the Court when adjudicating Go New York's prior claims. Whereas, Go New York's previous antitrust complaint focused exclusively on the sub-market for bundled attraction passes, (the "Attraction Pass Sub-Market"), Go New York's Amended Verified Complaint in this case alleges that Defendants effectively merged their New York City operations into a single operating entity, and in so doing, monopolized and attempted monopolization of the entire market for hop-on, hop-off sightseeing tour bus services in New York City (the "New York City Hop-on, Hop-off Market"). Moreover, because Defendants now have entered into written agreements effectively creating a single operating entity, Go New York alleges not only a combination and conspiracy in restraint of trade as it did in its previous antitrust litigation, but more importantly, actual monopolization as well as attempted monopolization. Indeed, the Defendants' merged operation has fundamentally changed the calculus and relevant market conditions since the prior litigation. The legal and factual issues here are distinct from those at issue in the prior litigation, and they were and could not have been adjudicated in the prior litigation.

FACTUAL BACKGROUND

Twin America and Gray Line

Defendant Twin America, LLC ("Twin America,") is the parent company of Defendants Gray Line New York Tours, Inc., and Sightseeing Pass LLC ("Sightseeing Pass" and collectively with Gray Line New

York Tours, Inc., "Gray Line"). See AVC at¶¶ 4-5. Twin America is in turn owned and operated by Coach USA, one of the largest transportation services providers in the United States. *Id.,* at ¶ 31. Gray Line first entered the New York City Hop-on, Hop-off Market in the 1990 and, pre-pandemic, had long been the largest hop on, hop off provider in New York City in terms of both revenue and fleet size. *Id*, at ¶ 30.

Anticompetitive agreements are not new to Gray Line. In fact, one of the Gray Line Defendants themselves, Twin America, was borne out of a similar anti-competitive agreement enacted in 2009 between Coach (Gray Line's previous corporate entity in the United States) and its then largest competitor in the New York City Hop-on, Hop-off Market, City Sights.[1] The United States Department of Justice ("DOJ") and the New York State Attorney General brought suit against Coach and City Sights for a similar merger which created Twin America. Ultimately, the DOJ entered into a settlement and consent judgment with Twin America, which required it to not only pay $7,500,000 in disgorgement, but for City Sights to divest its NYCDOT authorized bus stops.[2]

The Big Bus Defendants

Defendants Big Bus Tours Limited and Big Bus Tours Group Limited are organized and existing in the United Kingdom and are the parent companies of

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[1] *See United States et al. v. Twin America LLC, et al.,* S.D.N.Y. No. 12-CV-8989, "Competitive Impact Statement", available at https://www.justice.gov/d9/atr/case-documents/attachments/2015/03/16/312549.pdf

[2] *See Id.*

Defendant Open Top Sightseeing, USA, Inc., and Taxi Tours, Inc., the United States-based subsidiaries utilizing the Big Bus brand. AVC at ¶¶ 6-9. As alleged by Go New York, Big Bus Tours Limited, and Big Bus Tours Group Limited, are both controlled by a London based private equity firm, Exponent Private Equity LLP ("Exponent"). *Id.* Patrick Waterman, Taxi Tours' CEO, is also an officer and/or director of Big Bus Tours Group Holding Limited and Big Bus Tours Limited. *Id,* at ¶ 13. (Hereinafter, Big Bus Tours Group Holdings Limited, Big Bus Tours Group Limited, Big Bus Tours Limited, Open Top Sightseeing USA, Inc., and Taxi Tours are referred to herein collectively as "Big Bus"). In 2014, Big Bus entered the New York City Hop-on, Hop-off Market by purchasing an existing company, Taxi Tours LLC d/b/a Big Taxi Tours. *Id,* at ¶ 34. About a year later, Big Bus acquired another existing tour bus operator, Skyline Tours LLC, and in 2017, acquired yet another tour bus operator, Open Loop LLC. *Id.* Through its market acquisitions and market consolidation, as of 2019, Big Bus was the second largest hop-on, hop-off sightseeing tour company in New York City. *Id.*

Leisure Pass/Go City Defendants

Defendants Leisure Pass Group Holdings Limited, which recently changed its name to Go City Holdings Limited, and Leisure Pass Limited, which recently changed its name to Go City Limited, are UK based entities which, as alleged by Go New York, are controlled and principally owned by Exponent, which also owns and controls Big Bus. *Id.,* at 14-17. Defendant Leisure Pass Group, Inc., which recently changed its name to Go City Inc., is a company organized under the laws of the State of Delaware, registered to do

business in New York, and maintains a registered office in New York City. *Id.* As alleged by Go New York, Go City Inc., is owned and controlled directly and/or indirectly by Go City Holdings Limited, Go City Limited, and/or Big Bus Tours Group Holdings Limited, which in turn are ultimately controlled by Exponent. *Id.* (Hereinafter, Go City Holdings Limited, Go City Limited, and Go City, Inc. are referred to collectively as "Go City" and collectively with Twin America, Gray Line, and Big Bus as "Defendants") Go City offers "attraction passes" under the brand names "New York City Explorer Pass" and the "New York Pass," in which it offers access to about one hundred attractions and activities, but only one hop-on, hop-off tour bus company, Big Bus, with which it shares common ownership.

Hop-On, Hop-Off Tours and "Attraction Passes"

Go New York, Big Bus, and, until 2020, Gray Line, each offered hop-on, hop-off tour services. Hop-on, hop-off bus tours differ from conventional sight-seeing bus tours insofar as rather than customers staying on a single bus continuously for the length of the tour, op-on, hop-off tours operate numerous busses in "loops" with numerous stops and allow customers to "hop-on" or "hop-off" at any stop they like, to explore attractions near the stop. Therefore, customers have more control over their sightseeing experience than they would on a normal sightseeing tour. The New York City Hop-on, Hop-off Market is a discrete market within the larger New York City tourism industry.

A critical component for maintaining a competitive hop-on, hop-off business is to offer so-called "attraction passes," which combine passage on hop-on, hop-off bus

tours with admission to various tourist attractions and activities. *See* AVC, at ¶ 42. Thus, an attraction pass combines admissions to various New York City attractions and activities for a single price, which is substantially discounted from the total cost of the attractions and activities if they were purchased separately, thereby reducing the overall expense of and providing greater value to consumers who wish to sightsee in New York City. Go New York has been all but excluded from the Attraction Pass Sub-Market within the larger New York City Hop-on, Hop-off Market because of the monopolistic and anticompetitive conduct of Defendants. Sightseeing bus tours are the anchor product offered in attraction passes, which also offer tourists admissions to tourist attractions located within the route of the bus tours.

The 2020 Agreement

Gray Line and Big Bus have long had a tacit agreement to shut Go New York out of the Attraction Pass Sub-Market of the New York City Hop-on, Hop-off Market. However, in or about July 2020, that agreement expanded in an attempt to monopolize the entire New York City Hop-on, Hop-off Market, pursuant to a written agreement (and several subsequent operating agreements) between the two companies that merged together their hop-on, hop-off tour bus services operations into a single operating entity. *See* AVC at ¶ 55. Gray Line and Big Bus became partners in this new operating entity. *Id.* Specifically, Gray Line and Big Bus agreed that only Big Bus would operate a fleet of hop-on, hop-off tour buses in New York City, that Gray Line would cease operating sightseeing tour buses, and that both Gray Line and Big Bus would continue to sell tickets for

hop-on, hop-off bus tours and related attraction passes, using their famous brand names to drive business to their combined operation. Gray Line, thus, would direct customers to buses operated by Big Bus, and the two companies agreed not to undercut each other on prices. *Id.* This merger was memorialized in a Memorandum of Understanding signed in August of 2020 (*See* ECF No. 53-1, hereinafter referred to as the "MOU") which, for the purposes of the New York City Hop-on, Hop-off Market, effectively turned Gray Line and Big Bus into a single entity—an operating partnership between Gray Line and Big Bus. *Id,* at 55. However, agreements between Big Bus and Gray Line go far beyond the explicit terms contained in the MOU. For instance, crucially, each of the parties licensed their trademarks and brand names for use by the merged partnership entity. Although the MOU only explicitly contemplates *Gray Line* using *Big Bus*'s intellectual property "solely to the extent necessary for the resale of tickets," (MOU), the merged entity has resulted in the use of the famous brand names of both parties to drive sales. Indeed, for example, *Big Bus* has been putting *Gray Line*'s logo in prominent places on its buses, publicly holding out its operations as one joint integrated entity in the New York City Hop-on, Hop-off Market. *See* AVC, 1156-57. Both Big Bus and Gray Line have modified their respective websites and marketing materials to take advantage of the power of the combination of their famous brands. *See id,* at 159. Coordination of their joint operation so that it benefits from the fame of the pre-existing famous brands of both companies is a key component of Defendants' attempt to monopolize the market.

As alleged by Go New York, in addition to the foregoing, Gray Line permitted Big Bus to use bus stops previously assigned for exclusive use of Gray Line by the New York City Department of Transportation ("DOT"). *See* AVC, at 158. To confer this valuable benefit on the merged entity, Gray Line falsely represented to DOT that it intended to resume its hop-on, hop-off operations, when in fact, it had already merged its hop-on, hop-off bus operations with Big Bus. *See id.* Gray Line made these misrepresentations to DOT in order confer on the merged entity its exclusive rights to DOT-assigned bus stops. *See id.* Gray Line's misrepresentations to the DOT concerning its operating status were made for the purpose of conferring monopoly power on its merged entity with Big Bus.

Furthermore, the process of ticket selling itself involves allocating money through several channels. *See id,* at 160. Not only do Big Bus and Gray Line work together to allocate revenues among the stakeholders of the new joint partnership, they must also cooperate in the payment of commissions to sales representatives and others responsible for selling tickets for the benefit of the new joint enterprise. Thus, as alleged in the Amended Verified Complaint, Big Bus and Gray Line necessarily also integrated together accounting and management functions. *See id.*

In addition, each of Gray Line and Big Bus has adjusted its websites and other key marketing materials in order to facilitate their merged operations, cross-licensing to each other and to the merged entity their famous and powerful trademarks. *See id,* at 159.

Another major impact of this merged operation was to formalize and extend a pre-existing conspiracy among Big Bus, Gray Line and Go City to deny Go New York access to critical trade partners within New York City, thereby (a) either shutting Go New York out of the Attraction Pass Sub-Market or, at minimum, making it extremely difficult if not impossible for Go New York to compete effectively in the Attraction Pass Sub-Market, and (b) fixing the prices of Attraction Passes such that none of Big Bus, Gray Line or Leisure Pass/Go City would undercut each other on prices for comparable Attraction Passes. *See* AVC, at ¶ 61. As a result of this monopolistic conspiracy and price fixing, consumers have been forced to pay higher prices for Attraction Passes than would exist in the absence of this anti-competitive conduct. *Id.* An additional consequence has been that Go New York has been unable to effectively and fairly compete in the Attraction Pass Sub-Market.

As alleged by Go New York, numerous attractions which Go New York sought to partner with, such as Top of the Rock (the observatory on 30 Rockefeller Plaza), the 9/11 Memorial and Museum and the 9/11 Tribute Museum, have refused to work with Go New York while simultaneously executing trade partner agreements with Go New York's competitors, including Go City and Gray Line. *See* AVC at ¶¶ 65-76. Their refusal to work with Go New York has effectively shut Go New York out of the Attraction Pass Sub-Market. In fact, both the Empire State Building ("ESB") Observatory and One World Observatory cited their "exclusive" relationship with Gray Line as a reason for not partnering with Go New York, yet both Big Bus/Sightseeing Pass and Gray Line include both in

their respective branded attraction passes (which now serve to drive revenues to the new merged entity). *See id*, at ¶¶ 67-70. Go New York was able to temporarily forge partnerships with Broadway Inbound and the Intrepid Sea, Air, and Space Museum, but these partnerships were improperly terminated because Big Bus and Gray Line objected to Go New York's relationships with these attractions, while those attractions continued to work with Big Bus and Gray Line. *See id,* at ¶¶ 72-74, 79. An Intrepid representative expressly told Go New York it was terminating Go New York's agreement because otherwise its other trade partners (most likely Big Bus and Gray Line) would be unhappy. *See id,* at ¶ 73.

PROCEDURAL HISTORY

Go New York first asserted antitrust claims against Defendants in March 2019, in a previous action, *Go New York Tours, Inc. v. Gray Line New York Tours, Inc., et al.,* S.D.N.Y. Case No. 19-cv-02832-LAK. On May 23, 2019, Go New York filed a first amended complaint in that action[3] asserting claims under Sections 1 and 2 of the Sherman Act and the New York Donnelly Act, based almost exclusively on Big Bus and Gray Line's attempts to dominate the Attraction Pass Sub-Market of the New York City Hop-on, Hop-off Market by shutting Go New York out of arrangements with third-party attractions, However, unlike the present case, in the prior antitrust litigation Go New York did not allege the existence of a written agreement, nor did it allege that Defendants had merged their operations. The first amended complaint

[3] Defendants have filed this complaint as an exhibit to this motion, at ECF No. 54-1.

was dismissed by the Honorable Lewis Kaplan without prejudice, with leave for Go New York to replead. *See Go New York Tours, Inc. v. Gray Line New York Tours, Inc., et al.*, 2019 WL 8435369 (S.D.N.Y. Nov. 7, 2019), aff'd, 831 Fed. Appx. 485 (2020), cert. denied, 141 S. Ct. 2571 (2021).

Judge Kaplan's stated reasons for dismissing the Go New York's Sherman Act § 1 claim included that Go New York had not provided direct evidence of a horizontal agreement or alleged sufficient "plus factors" to give rise to an inference of a horizontal conspiracy to restrain trade. *Id.* Judge Kaplan specified that "'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.'" *Id.* (*quoting Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.,* 709 F.3d 129, 136 (2d Cir. 2013). Judge Kaplan dismissed Go New York's Sherman Act § 2 claim on the grounds that a monopoly requires a single monopolist and that "Section 2 does not permit a 'shared monopoly . . . " *Id.*

On December 5, 2019, Go New York filed a second amended complaint[4], which also focused on Defendants' exclusive arrangements with third party trade partners and shutting out Go New York from the Attraction Pass Sub-Market. *Id.* On March 4, 2020, Judge Kaplan dismissed the second amended complaint for many of the same reasons he dismissed the first,

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[4] Defendants have Go New York's second amended complaint in the prior action as an exhibit to this motion to dismiss, at ECF No. 54-3.

namely lack of direct evidence of a horizontal agreement or specific "plus factors" to infer a conspiracy to restrain trade.[5]

After learning that the Defendants entered into post-pandemic agreements merging their operations in an attempt to monopolize the market, Go New York brought the current action. Go New York's Amended Verified Complaint contains fundamentally different claims and allegations from those in the proceeding antitrust litigation. In the prior action, Go New York alleged primarily only a conspiracy and combination in restraint on trade of the Attraction Pass market, which is a distinct and separate sub-market of the New York City Hop-on, Hop-off Market. In sharp contrast, in the present action, Go New York alleges actual and attempted monopolization as well as a restraint on trade of the entire New York City Hop-on, Hop-off Market, not limited to the Attraction Pass Sub-Market. The present action is predicated upon Go New York's discovery of agreements pursuant to which Big Bus and Gray Line merged their New York

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[5] Judge Kaplan dismissed Go New York's Donnelly Act claims without prejudice. Go New York renewed those claims as counterclaims in New York State Court. *See Taxi Tours Inc. et al, v. Go New York Tours Inc. et al,* New York County Supreme Court Index No. 653012/2019. The New York Court of Appeals granted Go New York leave to appeal from the lower court's dismissal of Go New York's previous Donnelly Act claim, and oral argument is scheduled for February 15, 2024. *See Taxi Tours Inc. v. Go New York Tours, Inc.,* New York Court of Appeals Docket No 2023-00025. The issue on appeal to New York State's highest court is whether under the New York State pleading standard (as opposed to the Federal pleading standard), Go New York's Donnelly Act claims should have survived a motion to dismiss. *Id.*

operations. As alleged by Go New York, Big Bus and Gray Line now operate as a single, monopolistic entity in the New York City Hop-on, Hop-off Market, fixing prices and restraining competition in the New York City Hop-on, Hop-off Market, including not only the Attraction Pass Sub-Market, but the entire New York City Hop-on, Hop-off Market.

ARGUMENT

1. As a Threshold Matter, Defendants Arguments Rely Nearly Exclusively on Factual Determinations that Are Inappropriate for a Motion to Dismiss

Go New York has plausibly alleged, based on specifically identified documentary evidence, that Big Bus and Gray Line have effectively merged their New York hop-on, hop-off operations into a new fully integrated operating entity. Specifically, as alleged by Go New York, Big Bus and Gray Line share intellectual property, operational facilities such as bus stops, buses themselves, access to coveted third-party attractions, and accounting and managerial functions. *See* AVC at ¶¶ 58-62. Given that "In considering a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff's favor." *Williams v. Richardson*, 425 F. Supp. 3d 190, 200 (S.D.N.Y. 2019) (*citing Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007)), at this stage in the litigation, this Court must accept Go New York's well-pled allegation that Defendants are operating as a newly merged entity for the purpose of monopolizing the New York City Hop-on, Hop-off Market.

Defendants' arguments rely in large part on their assertion that the relationship between Big Bus and Gray Line is completely encapsulated by the MOU, specifically that "Contrary to Plaintiff's claims, the 2020 MOU is a simple reseller agreement pursuant to which Gray Line can sell Big Bus's hop-on, hop-off tickets," and that "The Amended Complaint's allegations that the 2020 MOU provides for something that it plainly does not are conclusory, contradicted by the plain terms of the agreement itself, and should be rejected." ECF No. 67, Defendants; Memorandum of Law in Support of their Joint MTD ("Def. Memo.") at 8, 18. However, Defendants themselves tacitly admit that as alleged by Go New York, the relationship between Big Bus and Gray Line goes far beyond that contemplated in the MOU. *See* Def. Memo. at 26 (Admitting to licensing of trademarks beyond what was encapsulated in the MOU). Even more fatally for Defendants, Go New York has recited detailed evidence in its pleadings sufficient to show that the relationship between Big Bus and Gray Line goes far beyond that of a "simple ticket reseller agreement." *See* AVC at ¶¶ 56-59 (presenting photographs of buses with both Big Bus' and Gray Line's logo on them as well as verified allegations that Gray Line permitted Big Bus to stop at its DOT assigned bus stops).

While Big Bus and Gray Line dispute these allegations, such disputed issues of fact cannot be properly adjudicated at this stage of this litigation. It is well-settled law that "a factual determination [is] not appropriate for a motion to dismiss." *Duran v. Henkel of Am., Inc.*, 450 F. Supp. 3d 337, 352 (S.D.N.Y. 2020). *See also Joseph v. Mobileye, N.V.*, 225 F. Supp. 3d 210, 220 (S.D.N.Y. 2016). Therefore, at this stage,

it would be inappropriate for this Court to accept Defendants' assertions that the relationship between Defendants is nothing more than a "ticket-reselling agreement," and at this stage the Court should accept as true Plaintiff's well-pled facts allegations.

2. Defendants' Arguments that the Present Action is Barred by Res Judicata are Misplaced

As Defendants admit, "Res Judicata bars a subsequent action when the party asserting it demonstrates that . . . 'the claims asserted in the subsequent action were, or could have been, raised in the prior action.'" Def. Memo., at 13 (*quoting Miller v. Austin*, No. 20-CV-1958, 2021 WL 1226770, at *5 (S.D.N.Y. Mar. 31, 2021)). Therefore, it has long been an axiom of American law:

> That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct—for example, an abatable nuisance—may frequently give rise to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the [previous] judgment. In addition, there are new antitrust violations alleged here—deliberately slow deliveries and tie-in sales, among others—not present in the former action . . . [the previous judgment] cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. In the interim, moreover, there was a substantial change in the scope of the defendants' alleged

> monopoly . . . Under these circumstances, whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the 1943 judgment does not constitute a bar to the instant suit . . .

Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 327-28, 75 S. Ct. 865, 868-69, 99 L. Ed. 1122 (1955). *See also Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1596, 206 L. Ed. 2d 893 (2020) ("Claim preclusion generally does not bar claims that are predicated on events that postdate the filing of the initial complaint." (internal quotations and citations omitted)).

The core of Go New York's claims in this action arises from the MOU, and subsequent related operating agreements, which postdated the prior action. Therefore, those claims were not considered when the prior action was adjudicated by Judge Kaplan. Go New York could not have made these factual allegations in the prior action because they "did not even then exist and [therefore] could not possibly have been sued upon in the prior case." *Lawlor*, 349 U.S. at 327.

Because the relevant time period for prior action predated the 2020 merger, Go New York's claims for monopolization and attempted monopolization cannot be barred by res judicata. As the Second Circuit has stated:

> With respect to the determination of whether a second suit is barred by res judicata, the fact that both suits involved essentially the same course of wrongful conduct is not decisive; nor is it dispositive that the two

> proceedings involved the same parties, similar or overlapping facts, and similar legal issues. A first judgment will generally have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first.
>
> If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion. For example, when a contract was to be performed over a period of time and one party has sued for a breach but has not repudiated the contract, res judicata will preclude the party's subsequent suit for any claim of breach that had occurred prior to the first breach-of-contract suit, but will not preclude a subsequent suit for a breach that had not occurred when the first suit was brought.

Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997) (*quoting Securities and Exch. Comm'n v. First Jersey Secs., Inc.,* 101 F.3d 1450, 1463 (2d Cir.1996)). *See also Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 384 (2d Cir. 2003) ("Slightly more problematic are those situations involving claims under statutes that regulate ongoing conduct. In those circumstances, prior actions may not have *res judicata* effect on subsequent actions where the subsequent actions address new factual predicates, even when the legal issues raised in both actions are closely related.").

Defendants may argue that even if Go New York's § 2 Sherman Act claims for monopolization of the entire New York City Hop-on, Hop-off Market are not barred by *res judicata*, Go New York's § 1 Sherman Act claims are barred by claim preclusion. However, in the prior antitrust action, Go New York did not allege the existence of a formal agreement between Big Bus and Gray Line pursuant to which the parties agreed to share trade partners with each other while excluding Go New York from access to such trade partners. Further, the merged operations that are the subject of the present litigation simply did not yet exist at the time of the prior litigation. Go New York now alleges that in operating the merged entity, Big Bus and Gray Line have explicitly agreed to exclude Go New York from access to third-party attractions shared by their merged operations.

It is well established that a "common motive to conspire [and] evidence of a high level of interfirm communications" are both plus factors which give rise to an inference a conspiracy to restrain trade *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). Go New York's Amended Complaint in this action adequately alleges these new "plus factors" and, therefore, Go New York's Sherman Act § 1 claim in the present action is not barred by res judicata or collateral estoppel. *See TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 501 (2d Cir. 2014) ("When a subsequent action involves a claim over "ongoing conduct" and it relies on facts that occurred both before and after the earlier action commenced, claim preclusion will not bar a suit, we have said, "based upon legally significant acts occurring after the filing of a prior suit that was itself based

upon earlier acts." (*quoting Waldman v. Village of Kiryas Joel,* 207 F.3d 105, 113 (2d Cir.2000)). *See also Poppington, LLC v. Brooks*, No. 20-CV-8616 (JSR), 2021 WL 3193023, at *5 (S.D.N.Y. July 27, 2021)(*Citing Technomarine SA*, 758 F.3d at 501 for the proposition that "The Court must therefore reject Brooks claim preclusion argument, since the copyright was not registered until after the prior judgment was rendered, and the registration was a "legally significant act" for the infringement claim. Therefore, Plaintiffs are not precluded from pursuing the instant infringement claim.").

3. Go New York's Allegations are Sufficient to Support a § 2 Sherman Act Claim

A. Go New York Has Adequately Alleged a Monopoly or Attempted Monopolization Claim

A claim under § 2 of the Sherman Act must allege: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *TechReserves Inc. v. Delta Controls Inc.*, No. 13 CIV. 752 GBD, 2014 WL 1325914, at *9 (S.D.N.Y. Mar. 31, 2014) (*quoting Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council,* 857 F.2d 55, 73 (2d Cir. 1988)). Monopoly power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market." *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d Cir. 1998).

Go New York has clearly and plausibly alleged both conditions precedent to acquiring monopoly power. Go New York has adequately alleged that Taxi Tours and Big Bus merged their New York hop-on, hop-off operations to fix prices and exclude Plaintiff from competing with them. As alleged by Go New York, prior to Big Bus and Gray Line's merger, there were three companies operating in the New York Hop-on, Hop-off Market, Big Bus, Gray Line, and Go New York. *See* AVC at ¶ 25. Plaintiff's Amended Complaint alleges that immediately prior to their merger, "Gray Line had been the largest hop-on, hop-off, sightseeing company operating in New York City, in terms of both sales revenue and the size of its bus fleet . . . " *Id,* at ¶ 30. Similarly, as alleged by Go New York, "Big Bus had owned and operated the second largest hop-on, hop-off sightseeing tour bus business in New York City." *Id,* at ¶ 33. Thus, Go New York trailed Big Bus and Gray Line. *Id.* When Big Bus and Gray Lined merged their operations, they acquired monopoly power in the New York Hop-On, Hop-Off Market. Given that, as alleged by Go New York, there were three players in the New York Hop-on, Hop-off Market, and that Gray Line and Big Bus were the first and second largest, their merger must have resulted in a substantial, dominant market share. *See id*, at ¶¶ 25, 30-34. Such a substantial market share is "strong evidence" of monopoly power. *See Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 99 (2d Cir. 1998)("We have held that a market share of over 70 percent is usually "strong evidence" of monopoly power").

Defendants fundamentally misstate Go New York's allegations, claiming that "Nor do[es] the appearance

of Defendants' logos on a Big Bus vehicle indicate that the companies have merged." Def. Memo. at 26. However, Go New York has not alleged that the companies have merged in their entirety, but rather, that only their New York City hop-on, hop-off operations have. Again, in order to effectively plead a monopoly claim, one must plead acquisition or possession of monopoly power in the relevant market. *See All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund*, 596 F. Supp. 2d 630, 641 (E.D.N.Y. 2009)("Critical to the determination of whether a plaintiff states a Section 2 claim of monopolization, or an attempt to monopolize, is whether there is a proper pleading of monopoly power and relevant market. Monopoly power is defined as 'the power to control prices or exclude competition.'" (*quoting United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956))(overturned on other grounds)). This begs the question however—what is a "relevant market?" The Second Circuit has rigorously defined the term:

> The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output. The relevant market is defined as all products "reasonably interchangeable by consumers for the same purposes," because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level. *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). Reasonable interchangeability

> sketches the boundaries of a market, but there may also be cognizable submarkets which themselves constitute the appropriate market for antitrust analysis . . . Defining a submarket requires a fact-intensive inquiry that includes consideration of such practical indicia as industry or public recognition of the submarket as a separate economic entity . . .

Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 496 (2d Cir. 2004). *See also PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) ("A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. Products will be considered to be reasonably interchangeable if consumers treat them as acceptable substitutes." (internal citations and quotations omitted)." It is therefore axiomatic that when claiming corporations that operate in many different discrete markets have monopolized or attempted monopolization of a single one, one must allege only monopolistic merger for the purposes of that market. *See e.g., Geneva Pharms. Tech. Corp.* 386 F.3d at 496 (holding that the district court erred in holding that brand-name and generic warfarin are the same market, when in fact "It may seem paradoxical to believe that Coumadin and generic warfarin—which have been certified by the FDA as therapeutically equivalent—are nevertheless in separate markets for antitrust analysis . . . ") *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 94 (2d Cir. 1998) (monopolization and attempted monopolization claim was properly pled when plaintiff alleged that defendants, one of

whom is a large national supermarket chain, had conspired to unlawfully block their reentry into the market for "predominantly food items together with general household merchandise" in "the southeastern portion of Chautauqua County, New York, extending approximately seven to ten miles in all directions from the city of Jamestown"); *All Star Carts & Vehicles, Inc.* 596 F. Supp. 2d, at 642 (sustaining a claim for monopolization and attempted monopolization of the "the market for small containerized waste hauling and disposal services in Long Island, New York" even though corporate parent defendant was " one of the largest business income trusts in the North American capital markets" and "one of the largest non-hazardous solid waste management companies in North America," operating in many markets.)

As made clear by the preceding cases, it is sufficient for Plaintiff to allege that Defendants have merged portions of their respective business operations to obtain a substantial market share and thereby monopolize the *New York Hop-on, Hop-off Market,* a discrete and clearly defined market.[6] Because

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[6] Defendants are incorrect in claiming that Go New York has not adequately stated a claim under § 7 of the Clayton Act. *See* Def. Memo., at 27. Because Go New York has pled that the corporations merged, with the new entity essentially acquiring the assets of the previous iteration, it is well settled that such a transaction falls squarely in the ambit of § 7 of the Clayton Act. *See United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 342, 83 S. Ct. 1715, 1730, 10 L. Ed. 2d 915 (1963)(" . . . Congress contemplated that the 1950 amendment would give s 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of s 7. Thus, the stock-acquisition and assets-acquisition provisions, read together, reach mergers, which fit neither

as alleged by Go New York, Defendants were the first and second largest entities in a three-entity market prior to their merger, (AVC at ¶¶ 30-34), Go New York has adequately alleged a merger resulting in a substantial, dominant market share which is, "strong evidence of monopoly power." *Tops Markets, Inc.,* 142 F.3d at 99.

Further, mergers can happen through many different mechanisms. While the prototypical merger involves one corporation acquiring another, appellate courts have routinely sustained claims of monopolization through merger when two separate companies formed a new entity to combine their respective branding power. *See, e.g. United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 332, 83 S. Ct. 1715, 1724, 10 L. Ed. 2d 915 (1963) (in which the Supreme Court held that a merger between two large banks which was effectuated by the creation of a new entity which would consolidate the two banks was prohibited by the Clayton Act); *United States v. Manufacturers Hanover Tr. Co.*, 240 F. Supp. 867, 875 (S.D.N.Y. 1965)(holding that "a merger of Manufacturers Trust Company and The Hanover Bank which resulted in the creation of defendant, Manufacturers Hanover Trust Company" violated the Clayton and Sherman Act").

Regarding attempted monopolization, an attempted monopolization claim "requires proof of three elements: (1) anti-competitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous probability that the attempt will succeed." *Volvo N.*

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category perfectly but lie somewhere between the two ends of the spectrum.").

Am. Corp. v. Men's Int'l Pro. Tennis Council, 857 F.2d 55, 73-74 (2d Cir. 1988). Further, "The willful acquisition or maintenance of monopoly power is to be distinguished from growth or development that is the result of superior product, business acumen or historical accident." *Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc.*, 386 F.3d 485, 495 (2d Cir. 2004). Thus, a merger where it is alleged the two merged entities possessed the majority of market share necessarily implies an attempted monopolization claim.

Lastly, "Proof of the first element of an attempted monopolization claim, anticompetitive or exclusionary conduct, may be used to infer the second element, specific intent to monopolize; and when coupled with proof of monopoly power, evidence of anticompetitive conduct may demonstrate a dangerous probability of success." *Id.* Because Go New York has adequately alleged an anticompetitive merger that is in the process of succeeding, Go New York has adequately alleged this claim as well.

Defendants claim that § 2 of the Sherman Act does not apply to duopoly, *i.e.* market domination by two competitors. However, "The idea that a monopoly is composed of a single economic entity . . . in no way precludes the possibility of a group of firms conspiring to monopolize, if the aim of the conspiracy is to form a single entity to possess the illegal market power." *Santana Prod., Inc. v. Sylvester & Assocs., Ltd.*, 121 F. Supp. 2d 729, 738 (E.D.N.Y. 1999) (*quoting Sun Dun, Inc. of Washington v. Coca–Cola Company,* 740 F.Supp. 381, 391-92 (D.Md.1990). *See also In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 382 (S.D.N.Y. 2016) (holding same). Although Defendants strenuously insist that Big Bus and Gray Line have not merged

together, the facts on the ground tell a different story. Go New York credibly and accurately alleges that Big Bus and Gray Line have merged into a single operating entity with respect to the New York Hop-on, Hop-Off Market. *See* AVC at ¶¶ 55-58. There is no duopoly here.

Furthermore, given that Go New York has alleged that Big Bus and Gray Line are engaged in a conspiracy to form a monopoly for the purposes of excluding it from the New York City Hop-on, Hop-off Market and its Attraction Pass Sub-Market, it may not even be necessary for Go New York to establish that they formed a single entity to sustain its Sherman Act § 2 claim. *See In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 DLC, 2014 WL 4379112, at *14 (S.D.N.Y. Sept. 4, 2014) ("The Supreme Court's decision in *American Tobacco Co. v. United States,* 328 U.S. 781 (1946), affirming the conviction of three major tobacco companies for a § 2 conspiracy, has given some courts pause about categorically rejecting the shared monopoly theory in the context of a conspiracy to monopolize claim. Some district courts, moreover, . . . have suggested that the theory may be viable in the context of a claim for conspiracy to monopolize if the aim of the conspiracy is to form a single entity to possess the illegal market power, or where two or more competitors seek to allocate a market and exclude competitors, even if they do not form a single corporate entity." *quoting Arista Records LLC v. Lime Grp. LLC,* 532 F.Supp.2d 556, 580 (S.D.N.Y.2007) (emphasis added)). *See also Santana Prod., Inc. v. Sylvester & Assocs., Ltd.*, 121 F. Supp. 2d 729, 740 (E.D.N.Y. 1999) ("Plaintiff also cites *Continental Ore Company v. Union Carbide & Carbon*

Corporation, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), and *United States v. Consolidated Laundries Corporation,* 291 F.2d 563, 573 (2d Cir.1961), in support of its claim that a group of competitors can conspire to monopolize. While that in itself may be a true statement of law . . . both *Continental Ore* and *Consolidated Laundries,* proof defendant conspirators were alleged to have allocated customers in their respective markets [was sufficient to convict the firms].”). Clearly, Defendants intended to create a single operating entity which takes advantage for marketing purposes of the separate value and fame of the respective brand name of the merging companies. *See* AVC at ¶¶ 56-57. Defendants' denial of the existence of a merged entity is not consistent with the facts on the ground as specified in detail in the Amended Verified Complaint.

B. Go New York Has Adequately Alleged a Conspiracy to Monopolize Under § 2 of the Sherman Act

“A conspiracy to monopolize claim must allege: (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize.’” *TechReserves Inc.* 2014 WL 1325914, at *9 (*quoting Volvo N. Am. Corp.* 857 F.2d at 74). The standard for “concerted action” is the same for both § 1 and § 2 of the Sherman Act. *See Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 190, 130 S. Ct. 2201, 2208, 176 L. Ed. 2d 947 (2010). Clearly, two competitors merging their operations is concerted action, and there can hardly be a stronger “overt act” than an actual agreement itself. As for the third element, ‘It need not be shown that monopoly power has been attained, nor that if the conspirators continued in

their course unmolested they would have attained it, but only that obtaining such power is the purpose which motivates the conspiracy.'" *Fort Wayne Telsat v. Ent. & Sports Programming Network*, 753 F. Supp. 109, 113 (S.D.N.Y. 1990). The AVC plausibly and adequately alleges each of these elements. Defendants have merged their operations into a single entity and formed a joint venture with the intent to monopolize the relevant market. *See* AVC at ¶¶ 55-58. At the pleading stage, Go New York's allegations are both credible and plausible.

4. Go New York Plausibly Alleges a Conspiracy in Restraint of Trade

In the alternative, if this Court deems that Go New York has not adequately alleged a monopoly or attempted monopoly, at the very least Plaintiff has alleged a concerted restraint on trade in violation of § 1 of the Sherman Act and the Donnelly Act. Specifically, Go New York alleges that pursuant to Big Bus and Gray Lines' merger, they have unreasonably conspired to restrain trade by fixing prices and entering into allegedly "exclusive" relationships with third-party attractions, which they then share amongst themselves, but refuse to allow to do business with Go New York. As stated by the Second Circuit:

> A plaintiff's job at the pleading stage, in order to overcome a motion to dismiss, is to allege enough facts to support the inference that a conspiracy actually existed. As *Starr* suggests, there are two ways to do this. First, a plaintiff may, of course, assert direct evidence that the defendants entered into an

> agreement in violation of the antitrust laws . . . a complaint may, alternatively, present circumstantial facts supporting the inference that a conspiracy existed. . . . These plus 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, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013) (internal citations and quotations omitted).

A. Go New York Has Plausibly Alleged an Actual Agreement in Restraint of Trade

Go New York has alleged "direct evidence," of a horizontal agreement to share allegedly exclusive attractions and otherwise fix prices in the New York City Hop-on, Hop-off market, as the MOU is an actual written agreement in restraint of trade. But the Go New York alleges much more. To implement the MOU, Defendants found it necessary to merge their operations, licensing their intellectual property to the merged entity and agreeing to numerous other operating and marketing arrangements. *See* AVC at ¶¶ 56-59. Tellingly, Defendants do not deny that there may be additional written agreements concerning the merger of their operations that they have yet to disclose. The fact remains that the reality on the ground implies and necessitates much closer cooperation than the terms of the MOU themselves provide. Indeed, a credibility determination that the MOU is the "entire" agreement is not appropriate at this early stage of the

litigation. Therefore, because Go New York's allegations plausibly suggests an actual agreement to unreasonably restrain trade, Plaintiff's § 1 Sherman Act claims must not be dismissed either.

B. Go New York has Plausibly Alleged Plus Factors to Infer a Restraint of Trade

At the very least, even if the MOU is not itself direct evidence of an anticompetitive conspiracy, when combined with the other new allegations in Go New York's Amended Verified Complaint, they present "plus factors" sufficient to give rise to an inference of a conspiracy. To recap, the *new* critical allegations by Go New York are:

- The MOU and other agreements entered into by Big Bus and Gray Line beginning in Summer of 2020, resulting in the merger of their operations in New York into a new entity. *See* AVC at ¶ 55.
- Gray Line completely ceasing operation of buses in New York and relying solely on buses operated by Big Bus. *See id,* at ¶¶ 55, 58.
- Gray Line's false assertions to the DOT that it was still operating hop-on hop-off buses, thereby refusing to give up its assigned bus stops, while simultaneously permitting Big Bus to stop at them. *See id.*
- The cross-licensing and joint use of the famous trademarks and brand names of Big Bus and Gray Line. *See id,* at ¶¶ 56-57.

- A new, explicit agreement among Defendants to share access to third-party attractions with each other, while agreeing to exclude Go New York. *See id,* at ¶ 61.

These plus factors are more than sufficient to plausibly allege a conspiracy in restraint of trade. *See Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) ("These plus factors may include: a common motive to conspire . . . evidence of shared economic interest and a high level of interfirm communications").

It would be hard to conceive of a stronger common motive to conspire than an agreement whereby alleged competitors sell tickets for use by customers in a combined operation. Indeed, under the terms of the MOU as presented by Defendants, Big Bus clearly has a vested interest in continuing to benefit from the fame of Gray Line's branding and accompanying reputation. And, because Gray Line is no longer operating hop-on, hop-off buses, it has a vested interest in making sure that it can send its customers to ride buses operated by Big Bus. Further, as previously alluded to, Big Bus and Gray Line now have a vested interest in sharing allegedly "exclusive" third-party attractions, as well as excluding Go New York from access to such attractions. Thus, the Amended Verified Complaint contains plausible and clear allegations of plus factors giving rise to an inference of a conspiracy to restrain trade in violation of § 1 of the Sherman Act

5. Go New York Has Stated a Claim for Unfair Competition

Plaintiff has adequately stated a claim for unfair competition, as Defendants have caused consumer confusion by holding themselves as separate entities, when in fact they have been operating as one merged entity. Unfair competition under "New York common law requires plaintiff to show (1) actual confusion or a likelihood of confusion; and (2) the defendant's bad faith." *RVC Floor Decor, Ltd. v. Floor & Decor Outlets of Am., Inc.*, 527 F. Supp. 3d 305, 322 (E.D.N.Y. 2021) (internal citations and quotations omitted). Because Defendants have caused consumer confusion and demonstrated bad faith by continuing to pretend to be competitors when they are in fact one entity, Plaintiff's claim should not be dismissed.

CONCLUSION

For all the above reasons, Defendants' Motion to Dismiss Pursuant to Fed R. Civ. Pro 12(b)(6) should be denied in its entirety.

BARTON LLP

By: /s/ Maurice N. Ross

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Attorneys for Appellant
Go New York Tours, Inc.

Dated: New York, New York
December 13, 2023

DECLARATION OF JULIA CONWAY (NOVEMBER 13, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GO NEW YORK TOURS INC,

Plaintiff,

v.

GRAY LINE NEW YORK TOURS, INC., ET AL.,

Defendants.

Civil Action No. 1:23-cv-04256-ER

Before: Edgardo RAMOS, U.S.D.J.

I, JULIA CONWAY, declare the following:

1. I am Executive Vice President of North America for Taxi Tours, Inc., the New York operating subsidiary of Big Bus Tours, Ltd. I have personal knowledge of the matters described herein and submit this declaration in support of Defendants' motion to dismiss the Amended Verified Complaint in this action.

2. I have attached a true copy of the Memorandum of Understanding between Big Bus Tours, Ltd. and Twin America, LLC, Gray Line New York Tours, Inc., and affiliates, dated August 27, 2020, to my declaration

as Exhibit A. This is the "written agreement" referenced—although mischaracterized—in Paragraph 44 and 55 of the Amended Verified Complaint.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/ Julia Conway

Dated: November 13, 2023

EXHIBIT A

Confidential Memo

To: Twin America, LLC, Gray Line New York Tours, Inc. and affiliates ("TA")

From: Big Bus Tours, Ltd. ("BB")

Date: August 27, 2020

Re: Memorandum of Understanding

This Memorandum of Understanding sets forth the terms for a re-selling arrangement between Twin America, LLC, Gray Line New York Tours, Inc. and affiliates ("TA") and Big Bus Tours, Ltd. ("BB"). This MO U's summary of terms is mutually agreed for this arrangement between the parties and is not intended to be legally binding, except that by signing below each party expressly agrees that neither party will have any liability or obligation with respect to or in connection with this MOU or the arrangement contemplated hereby (whether by virtue of this MOU, any other communications, any subsequent course of dealing or usage of trade, or otherwise) except as and to the extent may be expressly set forth in a subsequent definitive written agreement signed by the parties.

Summary	TA and BB propose to enter into an arrangement pursuant to which TA will sell sightseeing tour bus tickets and private *hire* services. The sightseeing tours will be on BB's route network, operated solely by BB. Private hires will be operated on BB's fleet of open top, double decker buses. BB shall continue to sell its

	products through its current distribution channels and at prices determined solely by BB, as will TA.
Term	Term: 6 months, expiring automatically if both parties do not agree to extend prior to the end of the term. Either party may terminate at any time with 90-days' notice provided in writing.
Rates	In the New York City market, BB's Classic ticket is provided to TA at a XX% discount off of headline, full-price retail. In the New York City market where operated, BB's Night Tour ticket at a XX% discount off of headline, full-price retail. In the New York City market where BB offers a promotional special (e.g., "kids ride free"), BB will match said promotion in its offer to TA. This does not apply to online purchase discounts or other general percentage discounts, which have already been taken into account in setting the percentage discount above. As additional core BB products (excluding third-party attractions)

	are added to BB's line-up in the New York City market, they will be made available for re-sale to TA at a XX% discount of headline, full-price retail. In all BB markets, private hires are $350 per hour with a three-hour minimum. Private hires must be vetted by BB for route and passenger safety protocols.
Sales Channels and Marketing	In each market, TA can re-sell in all sales channels, provided (a) it is consistent with the policies set forth in the *RESELLER TICKET AGREEMENT* entered into by the parties' affiliates on December 31, 2017 in Washington DC (to the extent such policies are applicable) and (b) with respect to in-market and on-street sales and other channels that are not permitted under such Reseller Ticket Agreement (but are permitted under this arrangement), re-sales are made under the applicable TA brand (not BB brand) consistent with TA's past practice and subject to reasonable policies and procedures to be agreed by the

	parties. Without limiting the foregoing sentence, BB products will be made available to TA to rename and bundle for resale.
Operational Network	BB will maintain its operational network, and reserves the right to alter it at any time with proper notification to TA.
Capacity	Due to government-mandated restriction as a result of COVID-19, capacity is reduced to top-deck only at 50%. ADA passengers/parties are, of course, permitted on the lower deck. Capacity will augment as regulations allow.
Confidentiality	Both parties agree to keep confidential all information about the companies and the terms and conditions of the transaction.
Technology	TA will cooperate with BB to integrate *via* API to facilitate passengers to board with digital tickets on BB's redemption technology.
Intellectual Property	BB grants to TA the non-exclusive, royalty-free, worldwide, revocable license to use its Intellectual Property solely to the extent necessary for the resale of tickets to the same

	extent as provided in Section 7 of the RESELLER TICKET AGREEMENT referred to above (substituting the applicable market's TA brand in lieu of CitySights DC).

/s/ Mark Marmurstein
Mark Marmurstein for Twin America, LLC and Gray Line New York Tours, Inc.

/s/ Pat Waterman
Pat Waterman for Big Bus Tours, Ltd.

AMENDED VERIFIED COMPLAINT
(OCTOBER 10, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GO NEW YORK TOURS INC,

Plaintiff,

v.

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

Defendants.

Civil Action No. 1:23-cv-04256-ER

Jury Trial Demand

Plaintiff Go New York Tours, Inc. ("Go New York"), by its undersigned counsel, hereby alleges, as against defendants Gray Line New York Tours, Inc., Twin America, LLC, Sightseeing Pass LLC, Big Bus Tours Group Limited, Big Bus Tours Limited, Open Top

Sightseeing USA, Inc., Taxi Tours, Inc., Go City Holdings Limited, Go City Limited, and Go City, Inc., as follows:

NATURE OF ACTION

1. This is an action for anticompetitive antitrust violations by the two dominant companies in the New York City hop-on, hop-off sightseeing tour bus market targeted against the third and only other company currently operating in that market, Plaintiff Go New York.[1] As alleged below, the two dominant companies and their affiliates have formed a single operating entity and in so doing, have monopolized and/or attempted to monopolize the New York City hop-on, hop-off sightseeing tour bus market (the "New York City Hop-On, Hop-Off Market") and its sub-market, the "Attraction Pass Market". In pursuit of this illegal monopolistic scheme, the two dominant companies and their affiliates have expressly conspired with each other pursuant to an agreement formalized in late July, 2020 to exclude plaintiff Go New York and its affiliates from those markets, and in so doing, fix the prices at which tickets to hop-on, hop-off bus services as well as Attraction Passes are sold in the relevant market. Defendants' anticompetitive conduct has minimized competition in the New York City Hop-On, Hop-Off

[1] Beginning in or about July 2022, Aurora Tourism Services LLC, operating under the brand name "Iconic", began to operate a small number of double-decker tour buses in the New York City market. However, because Iconic has operated only a small number of buses, it cannot offer "hop on hop off" sightseeing tours and is not currently considered a competitor in the relevant market.

Market at the expense of consumers—meaning customers are being forced to pay higher prices than they would absent the anticompetitive behavior. The anticompetitive behavior also directly damages Go New York because (a) it has been unable to effectively compete in the New York City Hop-On, Hop-Off Market, as well as in one of that markets' subsets, the Attraction Pass market, (b) it has become less competitive in both those markets, (c) it has lost sales of (i) its hop-on, hop-off tourist bus services, (ii) its bike rental services (which are facilitated through Go New York's commonly owned affiliate, ASK Standard Transit Corp d/b/a Bike Rental Central Park ("ASK Transit"), (iii) its boat tour services (which are provided by Go New York's commonly owned affiliate, New York Water Tours Inc, d/b/a Liberty Cruise and d/b/a Event Cruises New York City), and (iv) its "Attraction Pass" multi-attraction package offerings, and (d) has lost market share, customers, and revenues. Defendants' anti-competitive conduct violates federal and New York state antitrust statutes and New York state common law. Plaintiff Go New York asserts herein claims against defendants for violations of Sections 1 and 2 of the Sherman Act and Sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, 15, and 18 and for violations of the Donnelly Act, New York General Business Law § 340, and for unfair competition under New York common law. Plaintiff Go New York seeks damages from all defendants, including treble damages, costs and attorneys' fees under the Sherman, Clayton and Donnelly Acts.

PARTIES

Go New York

2. Plaintiff Go New York is a New York corporation with its main offices located at 2 East 42nd Street, New York, New York.

Gray Line

3. Defendant Gray Line New York Tours, Inc. is a New York corporation with its executive office address, as indicated in the New York State Secretary of States's records, at 1430 Broadway, New York, New York., although upon information and belief it no longer maintains offices at that address.

4. Defendant Twin America, LLC ("Twin America") is a Delaware limited liability company registered with the New York State Department of State to do business in New York State. Upon information and belief, Twin America operates and controls Gray Line New York Tours, Inc. (Hereinafter, Gray Line New York Tours, Inc. and Twin America are referred to herein collectively as "Gray Line".)

5. Defendant Sightseeing Pass LLC ("Sightseeing Pass") is a Delaware limited liability company registered with the New York State Department of State to do business in New York State. Upon information and belief, Sightseeing Pass shares common ownership and control with Gray Line, and/or is owned and/or controlled by Gray Line.

Big Bus

6. Non-party Big Bus Tours Group Holdings Limited is a company organized and existing under

the laws of the United Kingdom with its main offices located at 110 Buckingham Palace Road, London, United Kingdom.

7. Upon information and belief, non-party Exponent Private Equity LLP ("Exponent"), a London-based private equity firm organized and existing under the laws of the United Kingdom, owns, directly and/or indirectly, approximately 85 percent of and controls Big Bus Tours Group Holdings Limited.

8. Upon further information and belief, non-party Merlin Entertainments plc ("Merlin"), a company organized and existing under the laws of the United Kingdom with its main offices located in Dorset, United Kingdom, owns, directly and/or indirectly, approximately 15 percent of and as such exerts control over Big Bus Tours Group Holdings Limited. Upon further information and belief, Merlin owns and controls, directly and/or indirectly, various companies which own and operate "Madame Tussauds" wax museum tourist attractions located around the world, including the Madame Tussauds wax museum attraction located on West 42nd Street in the Times Square area of New York City.

9. Defendant Big Bus Tours Group Limited is a company organized and existing under the laws of the United Kingdom with its main offices located at 110 Buckingham Palace Road, London, United Kingdom. Upon information and belief, Big Bus Tours Group Limited is owned and controlled, directly and/or indirectly, by Big Bus Tours Group Holdings Limited, and ultimately by Exponent and Merlin.

10. Defendant Big Bus Tours Limited is a company organized and existing under the laws of the

United Kingdom with its main offices located at 110 Buckingham Palace Road, London, United Kingdom. Upon information and belief, Big Bus Tours Limited is owned and controlled, directly and/or indirectly, by Big Bus Tours Group Holdings Limited and/or Big Bus Tours Group Limited, and ultimately by Exponent and Merlin.

11. Defendant Big Bus Tours Limited is the owner of United States Trademark Serial No. 86695035, a word mark for "Big Bus" (the "Big Bus Trademark"). Defendant Big Bus Tours Limited licenses the Big Bus Trademark to Defendant Taxi Tours, Inc., as well as Gray Line pursuant to their merger agreement.

12. Defendant Open Top Sightseeing USA, Inc., is a Delaware corporation which is registered with the New York State Department of State to do business in New York State, and with its main office address at 723 Seventh Avenue, New York, New York. Upon information and belief, Open Top Sightseeing USA, Inc. is owned and controlled, directly and/or indirectly, by Big Bus Tours Group Holdings Limited, Big Bus Tours Group Limited, and Big Bus Tours Limited, and ultimately by Exponent and Merlin.

13. Defendant Taxi Tours, Inc. ("Taxi Tours") is a New York corporation with its main office address at 723 Seventh Avenue, New York, New York. Taxi Tours' CEO, Patrick Waterman, is also an officer and/or director of Big Bus Tours Group Holdings Limited, Big Bus Tours Group Limited, and Big Bus Tours Limited, and resides in the United Kingdom. Upon further information and belief, Taxi Tours, Inc. is owned and controlled, directly and/or indirectly, by Big Bus Tours Group Holdings Limited, Big Bus Tours Group Limited, Big Bus Tours Limited, and/or

Open Top Sightseeing USA, Inc., and, ultimately, by Exponent and Merlin. (Hereinafter, Big Bus Tours Group Holdings Limited, Big Bus Tours Group Limited, Big Bus Tours Limited, Open Top Sightseeing USA, Inc., and Taxi Tours are referred to herein collectively as "Big Bus".) Indeed, Julia Conway is the Treasurer and Director of both Taxi Tours and Open Top Sightseeing USA, Inc. Conway was actively involved in the negotiating, drafting, and reviewing the Conduct Agreement. She also signed the Conduct Agreement, at the direction of Big Bus's attorneys, in the small space provided for that purpose underneath "BIG BUS TOURS, LTD." printed in all caps on the agreement's signature page. On November 17, 2022, Conway was deposed in a state-court matter between the parties currently pending in New York Supreme Court, New York County, on November 17, 2022. Taxi Tours, Inc. v. Go New York Tours, Inc., Index No. 653012/2019 (Sup. Ct. N.Y. Cty.). During that deposition, she testified that she had not been "careful enough," in affixing her signature on behalf of Big Bus Tours, Ltd., but nonetheless she admitted that she conferred with Big Bus' attorneys in advance of signing the document.

Leisure Pass/Go City

14. Defendant Leisure Pass Group Holdings Limited a/k/a Go City Holdings Limited is a company organized and existing under the laws of the United Kingdom with its main offices located at 25 Soho Square, London, England, W1D 3QR.

15. Upon information and belief, Go City Holdings Limited is controlled and principally owned directly and/or indirectly by Exponent, which, as alleged

above, is also the principal owner and controller, directly or indirectly of Big Bus. Upon further information and belief, Big Bus Tours Group Holdings Limited owns a significant minority stake in, and as such exerts control over, Go City Holdings Limited.

16. Defendant the Leisure Pass Group Limited a/k/a Go City Limited is a company organized and existing under the laws of the United Kingdom with its main offices located at 25 Soho Square, London, England, W1D 3QR. Upon information and belief, Go City Limited is owned and controlled, directly or indirectly, Go City Holdings Limited, Exponent, and Big Bus Tours Group Holdings Limited, and, ultimately, by Exponent.

17. Defendant Leisure Pass Group, Inc. a/k/a Go City, Inc. is a company organized and existing under the laws of the State of Delaware, is registered with the New York State Department of State to do business in New York State, and maintains a registered office in New York City. Upon information and belief, Go City Inc. is owned and controlled directly and/or indirectly by Go City Holdings Limited, Go City Limited, and Big Bus Tours Group Holdings Limited, and, ultimately, by Exponent. (Hereinafter, Go City Holdings Limited, Go City Limited, and Go City, Inc. are referred to collectively as "Go City".)

JURISDICTION AND VENUE

18. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 15 U.S.C. § 15 (action arising under Sherman and Clayton Acts), and 28 U.S.C. § 1337 (supplemental jurisdiction).

19. Jurisdiction is proper over defendant Gray Line New York, Inc. because it is a New York corporation and maintains its principal offices in New York, New York. Jurisdiction is proper over defendant Twin America, LLC because it is registered with the New York State Department of State to do business in New York State and maintains its principal offices in New York, New York, and each of them regularly transacts business in New York State. Gray Line New York, Inc. and Twin America, LLC both operate using the brand names "Gray Line" and "City Sightseeing".

20. Jurisdiction is proper over defendants Big Bus Tours Group Limited, and Big Bus Tours Limited because they regularly transact business in New York State and have engaged in conduct directed toward New York State which has caused and is causing injury in New York State. Indeed, Big Bus Tours Limited owns and licenses the

21. Jurisdiction is proper over defendant Open Top Sightseeing USA, Inc. because it is registered to do business in New York State, maintains its offices in New York, New York, regularly transacts business in New York State, and has engaged in conduct directed toward New York State which has caused and is causing injury in New York State. Jurisdiction is proper over defendant Taxi Tours, Inc. because it is a New York corporation, maintains in New York, New York, regularly transacts business in New York State, and has engaged in conduct directed toward New York State which has caused and is causing injury in New York State.

22. Jurisdiction is proper over defendant Go City, Inc. because it is authorized to do business and regularly transacts business in New York State.

Jurisdiction is proper over defendants Go City Holdings Limited and Go City Limited because they regularly transact business in New York State and have engaged in conduct directed toward New York State which has caused and is causing injury in New York State.

23. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391 (b)(1)-(2) and (c)(2) because each of defendants either has its offices and/or regularly transacts business in this district and is subject to personal jurisdiction in this district, and a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this district.

BACKGROUND

24. Go New York owns and operates a fleet of double-decker, "hop-on, hop-off" sightseeing tour buses in New York City under the brand name "TopView." Hop-on, hop-off bus tours allow tourists and other customers to "hop off" a tour bus at attractions that interest them (such as Madame Tussaud's, for example) and then "hop on" another bus operated by the same company when they are ready to resume their tour. Go New York also provides bike rentals through its commonly owned affiliate, ASK Standard Transit, Inc. and boat tours through its commonly owned affiliate, New York Water Tours Inc.

25. Go New York is one of two major "hop-on, hop-off" sightseeing tour bus businesses presently operating in the New York City market, together with the joint venture between Big Bus and Gray Line. Prior to the Covid-19 pandemic which arose in or about March 2020, Go New York historically had been

the smallest of the three businesses, in terms of both revenues and the number of buses in its fleet.

26. Unlike Gray Line and Big Bus, which are affiliated with large, multi-national business operations, Go New York only has one affiliate in another location, which began doing business in September of 2023.

27. Go New York began its operations in New York City in 2012, doing business under the name "Go New York Tours" with four double decker sightseeing tour buses, and has since increased its fleet to more than 80 buses and expanded its tourist offerings to include boat tours, bicycle rentals, attraction passes and other tourist-oriented services.

28. Go New York is a member of New York City & Company, the official destination marketing organization for New York City, as are Gray Line, Big Bus, and Go City.

29. Go New York, Gray Line, and Big Bus are direct competitors of each other, offering similar types of tourist-oriented services in addition to their hop-on, hop-off sightseeing bus tours. Although other companies may also operate sightseeing bus tours in New York City, they tend to focus on specialized markets and do not presently offer the same hop-on, hop-off services as Go New York and the joint venture between Gray Line and Big Bus.

Gray Line's Pre-Pandemic Dominance in the New York City Sightseeing Tour Bus Market

30. Prior to March 2020, when the pandemic disrupted markets worldwide, Gray Line had been the largest hop-on, hop-off sightseeing company operating

in New York City, in terms of both sales revenues and the size of its bus fleet, and had been operating in New York City since the 1990s. The relevant market includes the New York City market for hop-on, hop-off sightseeing buses and a relevant sub-market for so-called "attraction passes" wherein as described in more detail below, tickets for hop-on, hop-off tour buses are combined in a single package with admission to various New York City tourist attractions.

31. Gray Line is a licensee and/or franchisee of Gray Line Worldwide, which has promoted itself as "the largest provider of sightseeing tours on the planet", offering "thousands of tours and experiences in more than 700 locations, spanning six continents".[2]

32. Gray Line had maintained its dominance in the New York City Hop-on, Hop-Off market in large part through acquisition and market consolidation. In 2009, Gray Line joined forces with its then-largest competitor, CitySights, combining their assets and operations to form Twin America. Gray Line is no stranger to anti-competitive activities. In 2012, the United States Department of Justice and the New York State Attorney General jointly sued Twin America and related companies in the United States District Court for the Southern District of New York for various antitrust violations.[3] The lawsuit resulted in a consent judgment issued on November 17, 2015, pursuant to which, among other things, Twin America was required to forfeit 47 sightseeing bus stops in

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[2] *See* https://www.grayline.com/about-us (last viewed pre-pandemic on March 7, 2019).

[3] *See United States of America, et al., v. Twin America, LLC, et al.*, S.D.N.Y., 12-CV-8989.

Manhattan which the New York City Department of Transportation had previously assigned to CitySights, and to disgorge profits in the amount of $7.5 million.

Big Bus's Pre-Pandemic Participation in the New York City Sightseeing Tour Bus Market

33. Prior to the pandemic which disrupted markets world-wide as of March 2020, Big Bus had owned and operated the second largest hop-on, hop-off sightseeing tour bus business in New York City. Big Bus is based in the United Kingdom and bills itself as "the largest operator of open-top sightseeing bus tours in the whole wide world. Inspiring the spirit of adventure in over 25 cities, across four continents. Beginning with a fleet of three, today hundreds of buses and guides are helping over four million tourists explore each year."[4]

34. Like Gray Line, Big Bus secured its pre-pandemic position in the New York City sightseeing tour bus market largely through acquisition and market consolidation. In or about January 2014, Big Bus (via its predecessor) entered the New York City market by purchasing an existing company, Taxi Tours LLC d/b/a Big Taxi Tours. About one year later, in March 2015, Big Bus acquired an existing tour bus operator, Skyline Tours LLC. In 2017, Big Bus acquired Open Loop New York ("Open Loop"), making it the second largest of only three companies then offering "hop-on, hop-off" sightseeing tour bus services in New York City.

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4 *See* https://www.bigbustours.com/about-big-bus-tours (last visited on October 11, 2023).

Relevant Markets within the New York City Sightseeing Tour Industry

35. "Hop-on, hop-off" tour bus services offer a convenient way for sightseers to visit numerous attractions while charting their own journey. Hop-on, hop-off tours operators differ from conventional sightseeing tour bus operators insofar that rather than staying on a single bus continuously for the length of the tour, hop-on, hop-off tours operate numerous busses in "loops" with numerous stops and allow customers to "hop-on" at any stop they like and "hop-off" at any stop they like, to explore attractions near the stop. Therefore, customers have more control over their sightseeing experience than they would on a conventional sightseeing bus tour. There is a separate, distinct and relevant market for the sale of hop-on, hop-off tour bus services within New York City

36. Go New York attempts to compete against Gray Line and Big Bus for the same consumers, offering the same types of hop-on, hop-off sightseeing bus tours and tourist "attraction passes" in New York City. The market for "hop-on, hop-off" sightseeing bus tours is separate from the market for tourist "attraction passes" although they are interrelated insofar as "hop-on, hop-off" sightseeing bus tours are one of the "attractions" offered in tourist "attraction passes".

37. One substantial means employed by Go New York, Gray Line, and Big Bus to market and sell their services and products within New York City is through individual, uniformed sales representatives located near popular tourist attractions throughout Manhattan. Sales representatives from each of the three companies often work side by side with representatives of the other companies on the streets of

Manhattan, each promoting his or her company's services and products and trying to persuade tourists to choose to purchase the services and products of his or her company over those of the other two companies.

38. Each of the three companies also markets and sells its services and products available in New York City online through their respective web sites, through which a consumer located virtually anywhere within or outside the United States can purchase a company's services and products to be enjoyed when the consumer visits New York City.

39. In addition, each of the three companies sells its services and products to consumers at their respective offices and/or visitor centers in Manhattan.

40. Another significant means of marketing and selling the companies' services and products is through the concierge services and guest service desks in hotels, which promote and arrange for the purchase of sightseeing and activities for hotel guests. Both Gray Line and Big Bus have arrangements with hotels and/or concierge and guest service providers to market and sell their tourist-oriented services and products to hotel guests.

41. Go New York has been largely shut out of such arrangements and improperly prevented from having its services and products marketed and sold through hotels and/or concierge and guest service providers.

The New York City Attraction Pass Sub-Market

42. The hop-on hop-off tour bus companies (through affiliates) sell their services, in part, via bundled attraction sightseeing passes (referred to

generally hereinafter as the "Attraction Pass"). Attraction Passes constitute a sub-market within the New York City Hop-on, Hop-Off Tour market. An Attraction Pass combines admissions to various New York City attractions and activities for a single price which is substantially discounted from the total cost of the attractions and activities if they were purchased separately, thereby reducing the overall expenses of and providing greater value to consumers who wish to sightsee in New York City.

43. Prior to the pandemic, Go New York, Gray Line, and Big Bus each attempted to offer Attraction Passes which combine various New York City attractions with their own respective hop-on, hop-off sightseeing bus tours and other services for a single price. Other companies that do not own attractions or operate their own tourist services, including Go City and Sightseeing Pass, also offer Attraction Passes which may (but do not necessarily) include sightseeing bus tours.

44. However, in or about July 2020, Gray Line and Big Bus formed a single operating entity pursuant to a formal written agreement, the effect of which was to monopolize and fix prices within the market for New York City Hop-on, Hop-off tour bus services, and to effectively shut Go New York out of the Attraction Pass sub-market, making it difficult if not impossible for Go New York to offer and sell competitive attraction passes. Go New York has attempted to offer its own version of attraction passes that combine together its "hop on hop off" bus services with the bike rental and boat tour services of its commonly owned affiliates (ASK Transit and Liberty Cruise New York City), and certain other tourist attractions within New York

City, but the conspiracy between Gray Line and Big Bus described herein has made it extremely difficult, if not impossible, for Go New York to compete effectively in the "Attraction Pass" market, and therefore, the larger Hop-On, Hop-off market

45. In general, companies that offer Attraction Passes must enter into "trade partner" agreements with the owners of attractions and activities that are bundled into the Attraction Passes. Generally, trade partners agree to make admission to their attractions or their services available at a discounted "net rate" when bundled into a partner's Attraction Pass, with the seller of the Attraction Pass paying its partner at the agreed net rate for each pass used at that attraction or to use its services. The net rate accounts for a commission-type fee retained by the seller of the Attraction Pass for each such use. The trade partner that owns the attraction or operates the service being used benefits by gaining additional customers, while the partner selling the Attraction Pass earns commissions.

46. The Attraction Pass sub-market is a natural fit for hop-on, hop-off sightseeing tour bus companies, whose very business model involves transporting tourists comfortably and efficiently between tourist attractions. The sightseeing tour bus companies benefit not just from commissions from passes used at tourist attractions, but also from selling their own sightseeing tours and other services as a component of Attraction Passes. The Attraction Pass has become a primary and essential facility for Go New York, Gray Line, and Big Bus to offer and sell their services and to compete in the New York City Hop-on, Hop-off market. Further, the market for Attraction Passes has become a

separate and distinct market within the New York City tourism industry.

47. Go New York has attempted to offer Attraction Passes under various names, which allows the consumer to choose among various tourist attractions and activities offered with the pass, while traveling and sightseeing on Go New York's hop-on, hop-off tour buses during a determined period of time ranging from one to several days, at a price substantially less than it would cost the consumer to purchase them separately. Go New York has also bundled its affiliated bike rental and tour boat services with attempted Attraction Pass offerings. However, once Gray Line and Big Bus formed their operating entity, it became apparent that Gray Line and Big Bus had expressly agreed to monopolize (or at least attempt to monopolize) the New York City Hop-on, Hop-off market by conspiring together to shut out Go New York from access to many of the most popular and valuable trade partners offering tourist attractions within New York City.

48. Big Bus offers its "Big Pass", which allows the consumer to choose among various tourist attractions and activities while traveling and sightseeing on Big Bus's hop-on, hop-off tour buses during a determined period of time ranging from one to several days.

49. Gray Line offers similar Attraction Passes that combine admissions to various New York City tourist attractions with Gray Line's tour bus (prior to the merger) and Big Bus's tour bus (after the merger) and other services during specific time periods, under various brand names, including "Freestyle", "Flexpass", "Citysightseeing", and "Sightseeingpass".

50. Go City offers Attraction Passes in cities around the world. In the New York City market, Go City offers Attraction Passes under the brand names "New York City Explorer Pass" and the "New York Pass", which allow the consumer to pick and choose among various attractions and services to bundle and pay for in a single pass. Although Go City offers around 100 various attractions and activities to include in its passes, it offers the services of only one hop-on, hop-off sightseeing tour bus company, Big Bus, which shares common ownership and control with Go City.

51. Sightseeing Pass offers Attraction Passes in various cities throughout the United States. In the New York City market, Sightseeing Pass offers Attraction Passes under the same brand names used by Gray Line, with which it shares common ownership and control. Sightseeing Pass offers around 100 various attractions and activities included in its various passes, but offers the services of only one hop-on, hop-off sightseeing tour bus company, Gray Line, prior to the formation of the single entity, and Big Bus, after the merger.

52. Attraction Passes are a popular, convenient, and economical means for consumers to plan their sightseeing and tourist activities in New York City and have become an essential facility for the hop-on, hop-off sightseeing tour bus companies in the New York City market to market and sell their services and products.

53. Therefore, the ability of each of Go New York, Gray Line, and Big Bus to compete with each other in New York City, as well as with the multitude of other tourist attractions and activities from which tourists may choose when visiting New York City, depends in

substantial part on each company's ability to establish trade partner relationships with other attractions so as be able to offer many popular attractions with their respective Attraction Passes at the best price, and to access the main distribution channels from which consumers learn about and purchase the passes.

Defendants' Anti-Competitive Conduct

54. For a relatively short period of time of approximately five months from March 2020 through July 2020, the Covid-19 pandemic effectively shut down the markets for Hop-On Hop-Off tour buses and Attraction Passes in New York City.

55. In or about July 2020, while the tourism industry was shut down, Gray Line and Big Bus recognized an opportunity to form a profitable, monopolistic operating entity that would permit them to fix prices and prevent competition in the markets for Hop-on Hop-Off tour buses and Attraction Passes. Accordingly, they merged their operations the effect of which was to form a single operating entity. Pursuant to a written agreement entered into in late July 2020, Gray Line and Big Bus agreed that (a) Big Bus would operate its hop-on, hop-off tour buses within New York City, (b) Gray Line would cease operating its fleet of hop-on, hop-off tour buses within New York City, except that on information and belief, certain buses owned by Gray Line would be operated by Big Bus, (c) Gray Line would continue to sell tickets on its website and otherwise under its "Gray Line" and "City Sightseeing" brand names for hop-on, hop-off tour buses, with Gray Line's ticket holders being directed to use their tickets to ride only buses operated by Big

Bus, (d) Big Bus would continue to sell tickets to consumers for its hop-on, hop-off tour buses, (e) Gray Line, Big Bus and Go City would continue to sell their respective Attraction Passes and in so doing, would cooperate with each other in providing access to trade partner attractions, while excluding Go New York from access to such attractions, and (f) Gray Line, Big Bus and Go City would not undercut each other on prices for hop-on hop-off tour buses and Attraction Passes, essentially conspiring to fix the prices of such services. This merger was memorialized in a Summer 2020 Memorandum of Understanding (the "MOU"), which, for the purposes of the New York City Hop-on, Hop-off market, effectively turned Gray Line and Big Bus into a single entity.

56. In order to implement the MOU, there have been several other agreements between Big Bus and Grey Line, both formal and informal. For instance, because Big Bus' UK based parent company, Big Bus Tours Limited, owns the Big Bus Trademark, it cross-licensed the Big Bus Trademark for use by Big Bus and Grey Line in connection with the merged entity. Likewise, Grey Line cross-licensed its trademark rights for use by the merged entity and Big Bus. Indeed, although the MOU contemplates Gray Line using Big Bus' intellectual property "solely to the extent necessary for the resale of tickets," the opposite has happened. Indeed, Big Bus has been putting Gray Line's logo in prominent places on its buses, publicly holding themselves out as one entity, or at the very least, a joint venture in the New York City Hop-on, Hop-off market:


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BIGBUSTOURS.COM

57. The above pictures clearly demonstrate that Big Bus is running buses in the name of both companies pursuant to cross-license agreements.

58. Further, prior to the pandemic, the New York City Department of Transportation ("DOT") had assigned each of Gray Line, Big Bus and Go New York exclusive access to designated Bus Stops where the companies can pick up and discharge passengers. Access to these bus stops is extremely valuable. When Big Bus and Gray Line combined operations, Gray Line permitted Big Bus to use its designated bus stops. In so doing, Gray Line ceased operating its buses, but falsely asserted to the Department of Transportation that it should not reassign access to bus stops that had been designated to Gray Line. Had Gray Line informed DOT that pursuant to its agreement with Big Bus, it had ceased operating buses, DOT would have fairly reassigned and apportioned designated bus stops among operating entities within New York City. Instead, Gray Line misrepresented its status for months, depriving Go New York and its affiliates from access to additional designated bus stops, and instead, allowing the newly merged entity to take advantage of both the bus stops

previously assigned to Big Bus and those previously assigned to Gray Line.

59. In addition, each of Gray Line and Big Bus has adjusted its websites and other key marketing material in order to facilitate the merger. Indeed, it was necessary for Big Bus and Gray Line to make these changes to their marketing materials, as consumers might be confused as to why Gray Line customers were on a Big Bus.

60. Furthermore, the process of ticket selling itself involves allocating money through several channels. Not only do Big Bus and Gray Line nwork together to fairly allocate revenue, but critically, as alluded to above one of the key sales channels for hop-on, hop-off tours and Attraction Passes are sales representatives who work on commission. Because the sales representatives' commissions are based on the amount of sales they make, Big Bus and Gray Line must work together in the merged entity in order to fairly allocate commissions to their uniformed salespeople.

61. Another major impact of this merger was to formalize and extend a pre-existing conspiracy among Big Bus, Gray Line and Go City to deny Go New York access to critical trade partners within New York City, thereby (a) either shutting Go New York out of the Attraction Pass market or making it extremely difficult if not impossible for Go New York to compete in the Attraction Pass market, and (b) fixing the prices of Attraction Passes such that none of Big Bus, Gray Line or Leisure Pass would undercut each other on prices for comparable Attraction Passes. As a result of this monopolistic conspiracy and price fixing, consumers have been forced to pay higher prices for Attraction Passes than would exist in the absence of this anti-

competitive conduct and Go New York has been unable to effectively and fairly compete in the Attraction Pass market.

62. Pursuant to this conspiracy, Big Bus, Gray Line and Go City have expressly agreed to provide each other access to critical trade partners, while conspiring together to exclude Go New York from access to such trade partners.

63. Thus, Gray Line and Big Bus, with the help of their respective affiliates Sightseeing Pass and Go City, have conspired to leverage their substantial market power to require and/or to persuade major New York City attractions to refuse to enter into trade partner agreements with Go New York, and have regularly falsely disparaged TopView "inferior, low cost, low quality" service such that the attractions would risk harming their own reputations by entering into trade partner agreements with Go New York. In addition, Go City and Sightseeing Pass each present themselves to the consuming public as separate and apart from their affiliated sightseeing tour bus company, but offer the hop-on, hop-off sightseeing tour bus services of only Big Bus and exclude Go New York.

64. Gray Line and Big Bus, with the help of their respective affiliates, Sightseeing Pass and Go City, have been and are engaging in their aforesaid conduct with the intent to destroy the value and competitiveness of Go New York's Attraction Passes and to prevent Go New York from meaningfully competing in the market for Attraction Passes. Defendants have thereby harmed competition in the New York City market, to the detriment of consumers.

65. For example, while both Gray Line and Big Bus include admission to "Top of the Rock", the observatory and tourist facility at Rockefeller Center in midtown Manhattan, in their respective bundled sightseeing passes, the operator of Top of the Rock has rebuffed repeated attempts by Go New York to establish a relationship with it. Top of the Rock rejected Go New York notwithstanding Go New York's proposal that that it would not take any commission or fee for admission of Go New York's customers, passing the entire discounted rate on to Top of the Rock's customers and allowing Top of the Rock to charge a higher net rate.

66. Top of the Rock has consistently rejected Go New York as a trade partner, because of deliberate pressure by Gray Line and Big Bus to exclude Go New York. There is no rational business reason for Top of the Rock to reject Go New York as a trade partner, other than that Gray Line and Big Bus conspired together to demand that it not do business with Go New York. Mark Marmurstein, Gray Line's chief executive officer, expressly conspired with Big Bus executives Julia Conway and Charles Nolan to share access to Top of the Rock, while jointly pressuring Top of the Rock to exclude Go New York.

67. Go New York has also been shut out of the Empire State Building Observatory (the "ESB Observatory"), notwithstanding Go New York's proposal that it would not take any commission or fee for admission of Go New York's customers to the ESB Observatory, passing the entire discounted rate on to its customers and allowing ESB Observatory to charge a higher net rate. Yet Big Bus and Gray Line now share access to the ESB Observatory in their respective Attraction

Passes, even though the operator of the ESB Observatory previously refused to conduct business with Go New York on the ground that it had an exclusive relationship with Go City's "New York Pass", and Go City shares common ownership with Big Bus, which is a trade partner of the ESB Observatory. Gray Line executive Mark Marmurstein and Big Bus executives Julia Conway and Charles Nolan have agreed to share access to the ESB Observatory in their respective Attraction Passes, but have also agreed with the operator of the ESB Observatory to exclude Go New York.

68. There is no apparent rational business reason for ESB Observatory to reject Go New York as a trade partner, other than Big Bus, Go City and Gray Line demanded that it not do business with Go New York. This is especially true because ESB Observatory advised Go New York it had an exclusive relationship with Big Bus, yet it agreed with Big Bus to allow Gray Line (a competitor of Big Bus) to participate in a purportedly exclusive arrangement while also agreeing with Big Bus and Gray Line to exclude Go New York.

69. Go New York has also been shut out of the One World Observatory at the World Trade Center in lower Manhattan because of pressure and demands by Big Bus and Gray Line executives Julia Conway, Charles Nolan and Mark Marmurstein, who have agreed with each other that Big Bus and Gray line can include One World Observatory in their respective Attraction Passes, and that One World Observatory should continue to exclude Go New York access to One World Observatory.

70. Representatives of the One World Observatory have told Go New York that it has an exclusive relationship with Mark Marmurstein, the president of Gray Line, and, indeed, Gray Line advertises the One World Observatory as one of several attractions offered "exclusively" with Gray Line's Multi-Attraction Passes. Nevertheless, Big Bus also advertises and sells One World Observatory admission as part its own Big Pass, indicating that proffered explanation for excluding Go New York is pretextual. In fact, Mark Marmurstein has agreed with Big Bus executives Julia Conway and Charles Nolan that Gray Line and Big bus can share access to One World Observatory so long as Go New York continues to be excluded.

71. Thus, the above-mentioned Gray Line and Big Bus executives have conspired to pressure and demand that One World Observatory, a major attraction which would be at the top of the list of places to visit for most tourists visiting New York City, exclude Go New York. By doing so, Gray Line and Big Bus have rendered Go New York's Attraction Passes less attractive to tourists and less competitive in the New York City market, thereby harming competition in the New York City market and preventing Go New York from being able to compete fairly in that market.

72. As another example, Go New York previously executed a trade partner agreement with the Intrepid Sea, Air, and Space Museum (the "Intrepid"), a major tourist attraction located at the west side piers in midtown Manhattan. Both Gray Line and Big Bus were already trade partners of the Intrepid, and would necessarily have known of the new agreement with Go New York.

73. The Intrepid unilaterally terminated the agreement just as Go New York began sending its customers there, and in breach of the agreement between Go New York and the Intrepid, The Intrepid refused to honor the passes held by Go New York's customers. An Intrepid representative told Go New York that the Intrepid did not want to make its other trade partners unhappy by dealing with Go New York. In fact, Gray Line executive Mark Marmurstein and Big Bus executives Julia Conway and Charles Nolan have expressly agreed with each other to continue to share access to the Intrepid, while continuing to demand that the Intrepid exclude Go New York.

74. Gray Line and Big Bus, thus, conspired with each other and the Intrepid to cause the Intrepid to terminate and to breach its trade partner agreement with Go New York, for the purpose of rendering Go New York's Attraction Passes less attractive to tourists and less competitive in the New York City market, thereby harming competition in the New York City market and preventing Go New York from being able to compete fairly in that market.

75. Other museums that have refused to work with Go New York include the 9/11 Memorial and Museum and the 9/11 Tribute Museum in lower Manhattan, and the Museum of Modern Art in midtown.

76. Big Bus and Gray Line are trade partners of the 9/11 Memorial and Museum and the 9/11 Tribute Museum, and Big Bus is also a trade partner of the Museum of Modern Art. Gray Line and Big Bus executives Mark Marmurstein, Julia Conway and Charles Nolan have agreed to share access to these museums with each other, while expressly conspiring

together and with these museums and to exclude Go New York, for the purpose of rendering Go New York's Attraction Passes less attractive to tourists and less competitive in the New York City market, thereby harming competition in the New York City market and preventing Go New York from being able to compete fairly in that market.

77. Go New York previously worked with Madame Tussauds, the wax museum attraction located in the Times Square area of Manhattan prior to 2015, before rebranding its hop-on, hop-off tour buses services as "TopView". Big Bus, a trade partner of Madame Tussauds, offering the attraction with its Big Pass, and Madame Tussauds promotes and sells Big Bus tickets at its own facility and web site. Gray Line is also a trade partner of Madame Tussauds.

78. In 2018, Go New York met with representatives of Madame Tussauds to try to forge a trade partner relationship with Madame Tussauds, but was eventually told that Madame Tussauds was not onboarding additional trade partners. Big Bus and Gray Line executives Mark Marmurstein, Julia Conway and Charles Nolan, upon information and belief, conspired with Madame Tussauds and each other to exclude Go New York, for the purpose of rendering Go New York's Attraction Passes less attractive to tourists and less competitive in the New York City market, thereby harming competition in the New York City market and preventing Go New York from being able to compete fairly in that market.

79. Go New York has also been excluded from Broadway Inbound, an online platform for travel service providers and groups to sell tickets to Broadway shows. In January 2019, Broadway Inbound opened

an account for Go New York. But a few days later, Broadway Inbound suddenly closed the account, stating that it needed "further time to review" Go New York's account and might reconsider Go New York in six months' time "once we better understand the local market landscape." Broadway Inbound has long-established business relationships with both Gray Line and Big Bus, neither of whose accounts have been closed for further review. In fact, Gray Line executive Mark Marmurstein and Big Bus executives Julia Conway and Charles Nolan have agreed to share access to Broadway Inbound, while working together to exclude Go New York from Broadway Inbound.

80. Gray Line and Big Bus conspired with Broadway Inbound and each other to exclude Go New York, for the purpose of rendering Go New York's Attraction Passes less attractive to tourists and less competitive in the New York City market, thereby harming competition in the New York City market and preventing Go New York from being able to compete fairly in that market.

81. In January 2019, Go New York contacted the companies Coach USA and Short Line (referred to hereinafter as "Coach/Short Line"), which operate a shuttle bus service between New York City and the Woodbury Common Premium Outlet shopping center ("Woodbury Common"), to discuss including their shuttle bus service in Go New York's Attraction Passes. Coach/Short Line initially expressed interest and began negotiating a trade partner relationship. But then, Coach/Short Line ceased negotiations and refused to work with Go New York, telling Go New York that "we aren't able to work with you due to other sightseeing company relationships." In fact,

Gray Line executive Mark Marmurstein has agreed with Big Bus executives Julia Conway and Charles Nolan to share access to Woodbury Commons with each other, while working with Coach/Short line to exclude Go New York.

82. Big Bus, Go City, Gray Line, and Sightseeing Pass all have trade partner relationships with Coach/Short Line and offer trips to Woodbury Common with their respective Attraction Passes (directly and/or through their respective affiliates). Big Bus, Go City, Gray Line, and Sightseeing Pass, have conspired with Coach/Short Line and each other to exclude Go New York, for the purpose of rendering Go New York's Attraction Passes less attractive to tourists and less competitive in the New York City market, thereby harming competition in the New York City market and preventing Go New York from being able to compete fairly in that market.

83. The cumulative impact on Go New York from the aforesaid monopolistic conspiracy by executives of Gray Line and Big Bus, which was formalized and implemented pursuant to their July 2020 agreement, has been to effectively shut out Go New York from effectively competing in the Attraction Pass market and the larger New York City Hop-on, Hop-off Market.

84. In this regard, Gray Line and Big Bus are able to fix prices for their respective Attraction Passes and those of their affiliates at levels substantially higher than would have existed had Go New York not been effectively shut out of the Attraction Pass market. While Go New York continues to attempt to offer Attraction Passes, it cannot effectively compete because it has been shut of access to numerous critical trade

partner relationships. But for the monopolistic conspiracy among Gray Line, Big Bus and their affiliates, which was formalized pursuant to their July 2020 joint venture, Go New York could have offered competitive Attraction Passes at lower prices than those offered by Gray Line, Big Bus and their affiliates. The merger between Gray Line and Big Bus has effectively eliminated and destroyed meaningful competition in the Attraction Pass market and thereby severely curtailed competition in the New York City Hop-on, Hop-off market at large.

85. By excluding Go New York from major tourist attractions, defendants have substantially inhibited or prevented Go New York's ability to offer and sell bundled sightseeing passes that are attractive to customers, and substantially inhibited or prevented Go New York's access to essential distribution channels.

FIRST CLAIM FOR RELIEF
(Against All Defendants, for Monopolization Under of Section 2 of the Sherman Act and Section 4 of the Clayton Act, 15 U.S.C. §§ 1, 15)

86. Plaintiff repeats, realleges and reincorporates the allegations of paragraphs 1 through 80 as if set forth in their entirety herein.

87. As alleged above, defendants have engaged in a merger to monopolize the New York City Hop-on, Hop-off Market and its submarket, the Attraction Pass Market, to fix prices within the New York City Hop-on, Hop-off market, and to prevent or impede Go New York's ability to compete in the New York City Hop-on, Hop-off market.

88. Big Bus and Go City have unlawfully conspired with Gray Line and Sightseeing Pass, and all of them have conspired with the operators of New York City tourist attractions, whether directly or through their respective affiliates, to monopolize the Attraction Pass market and the larger New York City, Hop-on, Hop-off market by excluding Go New York and its affiliates from trade partner relationships with New York City tourist attractions, from the Attraction Passes offered by Go City and Sightseeing Pass in the New York City market, from hotel concierges and guest services, and from other tourist services.

89. Defendants' aforesaid improper conduct has already had and/or is likely to have the effect of substantially reducing or eliminating competition from Go New York and its affiliates in the New York City Hop-on, Hop-off market to maintain artificially high prices for consumers, and defendants have engaged in their aforesaid improper conduct knowingly and purposefully, with the intent to harm competition in said market and to cause Go New York and its affiliates to lose market share, customers, and revenues.

90. Defendants by their aforesaid unlawful conduct have caused actual injury to Go New York by causing Go New York and its affiliates to lose market share, customers, and revenues, including but not limited to sales of the Attraction Pass product, its hop-on hop off tour bus services, the bike rental services of its affiliate, ASK Transit, and the boat tour services of its affiliate, Liberty Cruise.

91. Defendants have thereby engaged in monopolization in violation of section 2 of the Sherman Act, 15 U.S.C. 2 and section 4 of the Clayton Act, 15 U.S.C. § 15.

92. Based on the foregoing,, Go New York is entitled to recover its damages from defendants including treble damages, costs of suit including reasonable attorney fees, and interest, to the fullest extent permitted by law.

SECOND CLAIM FOR RELIEF
(Against All Defendants, for Attempted Monopolization Under Section 2 of the Sherman Act and Section 4 of the Clayton Act, 15 U.S.C. §§ 2, 15)

93. Plaintiff repeats, realleges and reincorporates the allegations of paragraph 1 through 93 as if set forth in their entirety herein.

94. As alleged above, defendants have engaged in a merger to attempt to monopolize the New York City Hop-on, Hop-off market and its submarket, the Attraction Pass market.

95. Defendants have entered into an actual anticompetitive agreement with a specific intent to monopolize.

96. Defendants have thereby engaged in attempted monopolization in violation of section 2 of the Sherman Act, 15 U.S.C. § 2 and section 4 of the Clayton Act, 15 U.S.C. § 15.

97. Therefore, Go New York is entitled to recover its damages from defendants including treble damages, costs of suit including reasonable attorney fees, and interest, to the fullest extent permitted by law.

THIRD CLAIM FOR RELIEF
(Against All Defendants, for Conspiracy to Monopolize Under Section 2 of the Sherman Act and Section 4 of the Clayton Act, 15 U.S.C. §§ 2, 15)

98. Plaintiff repeats, realleges and reincorporates the allegations of paragraph 1 through 97 as if set forth in their entirety herein.

99. As alleged above, defendants have engaged in a conspiracy to monopolize the New York City Hop-on, Hop-off market and its submarket, the Attraction Pass market.

100. Big Bus and Go City have unlawfully conspired with Gray Line and Sightseeing Pass, and all of them have conspired with the operators of New York City tourist attractions, whether directly or through their respective affiliates, to monopolize the Attraction Pass market and the larger New York City, Hop-on, Hop-off market by excluding Go New York and its affiliates from trade partner relationships with New York City tourist attractions, from the Attraction Passes offered by Go City and Sightseeing Pass in the New York City market, from hotel concierges and guest services, and from other tourist services.

101. Defendants' aforesaid improper conduct has already had and/or is likely to have the effect of substantially reducing or eliminating competition from Go New York and its affiliates in the New York City Hop-on, Hop-off market to maintain artificially high prices for consumers, and defendants have engaged in their aforesaid improper conduct knowingly and purposefully, with the intent to harm competition

in said market and to cause Go New York and its affiliates to lose market share, customers, and revenues.

102. Defendants by their aforesaid unlawful conduct have caused actual injury to Go New York by causing Go New York and its affiliates to lose market share, customers, and revenues, including but not limited to sales of the Attraction Pass product, its hop-on hop off tour bus services, the bike rental services of its affiliate, ASK Transit, and the boat tour services of its affiliate, Liberty Cruise.

103. Defendants have thereby engaged in conspiracy to monopolize in violation of section 2 of the Sherman Act, 15 U.S.C. 1 and section 4 of the Clayton Act, 15 U.S.C. § 15.

104. Therefore, Go New York is entitled to recover its damages from defendants including treble damages, costs of suit including reasonable attorney fees, and interest, to the fullest extent permitted by law.

FOURTH CLAIM FOR RELIEF
(Against All Defendants, for Unreasonable Restraint of Trade Under Section 1 of the Sherman Act and Section 4 of the Clayton Act, 15 U.S.C. §§ 1, 15)

105. Plaintiff repeats, realleges and reincorporates the allegations of paragraph 1 through 104 as if set forth in their entirety herein.

106. As alleged above, defendants have engaged in a conspiracy to unreasonably restrain trade in the New York City Hop-on, Hop-off market and its submarket, the Attraction Pass market.

107. Big Bus and Go City have unlawfully conspired with Gray Line and Sightseeing Pass, and all of them have conspired with the operators of New York City tourist attractions, whether directly or through their respective affiliates, to monopolize the Attraction Pass market and the larger New York City, Hop-on, Hop-off market by excluding Go New York and its affiliates from trade partner relationships with New York City tourist attractions, from the Attraction Passes offered by Go City and Sightseeing Pass in the New York City market, from hotel concierges and guest services, and from other tourist services.

108. Defendants' aforesaid improper concerted action has already had and/or is likely to have the effect of substantially reducing or eliminating competition from Go New York and its affiliates in the New York City Hop-on, Hop-off market to maintain artificially high prices for consumers, and defendants have engaged in their aforesaid improper conduct knowingly and purposefully, with the intent to harm competition in said market and to cause Go New York and its affiliates to lose market share, customers, and revenues.

109. Defendants by their aforesaid unlawful conduct have caused actual injury to Go New York by causing Go New York and its affiliates to lose market share, customers, and revenues, including but not limited to sales of the Attraction Pass product, its hop-on hop off tour bus services, the bike rental services of its affiliate, ASK Transit, and the boat tour services of its affiliate, Liberty Cruise.

110. Defendants have thereby engaged in conspiracy to monopolize in violation of section 2 of the

Sherman Act, 15 U.S.C. § 2 and section 4 of the Clayton Act, 15 U.S.C. § 15.

111. Therefore, Go New York is entitled to recover its damages from defendants including treble damages, costs of suit including reasonable attorney fees, and interest, to the fullest extent permitted by law.

FIFTH CLAIM FOR RELIEF
(Against All Defendants, for Violations of the Clayton Act, Sections 7 and 4, 15 U.S.C. §§ 15 and 18)

112. Plaintiff repeats, realleges, and reincorporates the allegations of paragraph1 through 111 as if fully set forth in their entirety herein.

113. Defendants Big Bus and Gray Line have formed a jointly-owned entity for the purposes of creating a monopoly.

114. Defendants have thereby engaged in an anticompetitive merger under Sections 7 and 4 of the Clayton Act, 15 U.S.C. §§ 15 & 18.

115. Therefore, Go New York is entitled to recover its damages from defendants including treble damages, costs of suit including reasonable attorney fees, and interest, to the fullest extent permitted by law.

SIXTH CLAIM FOR RELIEF
(Against All Defendants, for Violations of the Donnelly Act, New York Gen. Bus. L. § 340, et seq.)

116. Plaintiff repeats, realleges and reincorporates the allegations of paragraphs 1 through 87 as if set forth in their entirety herein.

117. As alleged above, each of defendants has conspired to monopolize the market for Hop-On, Hop-Off Buses and the sub-market for Attraction Passes within New York City, have attempted to monopolize such markets, and have excluded, and/or entered into contracts for the purpose of excluding, Go New York and its affiliates from such markets..

118. Defendants' aforesaid improper conduct has already had and/or is likely to have the effect of substantially reducing or eliminating competition from Go New York and its affiliates in the New York City Hop-on, Hop-off market and the Attraction Pass sub-market, and to maintain artificially high prices for consumers, and defendants have engaged in their aforesaid improper conduct knowingly and purposefully, with the intent to harm competition in said market and to cause Go New York and its affiliates to lose market share, customers, and revenues

119. Defendants have each engaged in their aforesaid improper conduct knowingly and purposefully, with the intent to harm competition in said market and to cause Go New York and its affiliates to lose market share, customers, and revenues, and have caused such actual injury to Go New York and its affiliates.

120. For the foregoing reasons, defendants have engaged in unreasonable restraint of trade in violation of the Donnelly Act, New York Gen. Bus. L. § 340.

121. Therefore, Go New York is entitled to recover its damages from defendants including treble damages, and its costs of suit including reasonable attorney's fees, to the fullest extent permitted by law.

SEVENTH CLAIM FOR RELIEF
(Against All Defendants, for Common Law Unfair Competition)

122. Plaintiff repeats, realleges and reincorporates the allegations of paragraphs 1 through 93 as if set forth in their entirety herein.

123. As alleged above, defendants have confused consumers as to the extent of their affiliation, thereby increasing their own market share at the expense of Go New York and preventing Go New York from offering and selling its services and products.

124. By reason of the foregoing, defendants have wrongfully diverted business from Go New York and its affiliates to themselves, thereby damaging Go New York in an amount to be determined at trial, which Go New York is entitled to recover from defendants.

WHEREFORE, plaintiff Go New York Tours, Inc. demands Judgment in its favor and against defendants Gray Line New York Tours, Inc., Twin America, LLC, Sightseeing Pass LLC, Big Bus Tours Group Limited, Big Bus Tours Limited, Open Top Sightseeing USA, Inc., Taxi Tours, Inc., Go City Holdings Limited, Go City Limited, and Go City, Inc., as follows:

A. Awarding plaintiff Go New York its actual damages and treble damages for violations of the Sherman and Clayton Acts, and of the Donnelly Act;

B. Awarding plaintiff Go New York its costs of suit, including reasonable attorneys' fees, under the Clayton Act and the Donnelly Act, and as may otherwise be permitted by law;

C. Awarding plaintiff Go New York interest under the Clayton Act, and as may otherwise be permitted by law;

D. Awarding plaintiff Go New York its damages, costs of suit, and interest for unfair competition under New York common law, and its interests and costs as may be permitted by law; and

E. Such other and further relief as the Court may deem just and proper.

Plaintiff hereby demands a trial by jury of all claims and issues herein.

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