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COURT OF APPEALS  
STATE OF NEW YORK

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TAXI TOURS,

Respondent,

-against-

NO. 27

GO NEW YORK TOURS,

Appellant.

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20 Eagle Street  
Albany, New York  
February 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Christian C. Amis  
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1 CHIEF JUDGE WILSON: Next matter on the calendar  
2 is Taxi Tours v. Go New York Tours.

3 MR. ROSS: Good afternoon, Your Honors. May it  
4 please the court. I am Maurice Ross from Barton LLP. May  
5 I please reserve three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes, sir.

7 MR. ROSS: Your Honors, in the modern world, in  
8 every industry we see emerging duopolies and monopolies.  
9 This case is all about an attempt by the respondents to  
10 create a duopoly in the New York market.

11 JUDGE RIVERA: Well, Counsel, in the complaint,  
12 are you asserting that that complaint, liberally construed  
13 as is required under our law, sets out allegations of a  
14 conspiracy, an agreement, an arrangement, all of the above?  
15 What - - - what's your position on that?

16 MR. ROSS: It alleges an arrangement under the  
17 Donnelly Act. It alleges a conspiracy. But we think the  
18 allegations are more than sufficient to draw an inference  
19 of an arrangement.

20 JUDGE SINGAS: How specifically? What specific  
21 allegations?

22 MR. ROSS: Your Honor - - - okay. We - - - first  
23 of all, the complaint identifies a large number of  
24 attractions in the multi-attraction market from which Go  
25 New York has been shut out, number one. We identify them

1 by name with specificity. And obviously, we identify the  
2 time period over which this has occurred.

3 Second of all - - -

4 JUDGE SINGAS: I'm concerned about the concerted  
5 action. Which allegations specifically speak to that?

6 MR. ROSS: Yes. Well, for example, Your Honor,  
7 we actually allege that this case involves not merely  
8 parallel action but horizontal concerted action. For  
9 example, with regard to the One World Observatory - - -

10 CHIEF JUDGE WILSON: The horizontal - - - the  
11 horizontal is generally thought of as less suspicious than  
12 the - - - the - - - sorry. The vertical is thought of as  
13 less suspicious than the horizontal.

14 MR. ROSS: Correct. And we allege horizontal.

15 CHIEF JUDGE WILSON: Right. I got it backwards.  
16 I'm sorry.

17 MR. ROSS: And here's - - - here's - - - here's  
18 how this would - - -

19 CHIEF JUDGE WILSON: The horizontal - - - the  
20 horizontal - - - the horizontal is not as disfavored as the  
21 - - - do I have them - - - no.

22 JUDGE RIVERA: Vertical.

23 MR. ROSS: As vertical.

24 CHIEF JUDGE WILSON: Sorry, as - - -

25 MR. ROSS: I think the word, Your Honor Judge

1 Wilson, I think is vertical.

2 CHIEF JUDGE WILSON: Vertical is - - - vertical  
3 is easier - - - vertical restraints are not viewed as  
4 unfavorably as horizontal ones.

5 MR. ROSS: That's true, Your Honor. Although,  
6 both tend to be evaluated under the rule of reason.

7 CHIEF JUDGE WILSON: Yes.

8 MR. ROSS: But it is correct. And the issue  
9 here, and what I think the lower courts ignored, is that  
10 this complaint alleges horizontal with specificity. And  
11 here's how it works. In paragraph 37, we talked about the  
12 One World Observatory. Paragraph 37 of the complaint.  
13 It's at the record, page 69. We talked about the fact that  
14 Gray Line and Big Bus share this particular attraction, and  
15 Gray Line has exclusive rights to it. Even though Gray  
16 Line has exclusive rights, it shares that attraction with  
17 Big Bus. But Go New York is shut out. So here we have a  
18 waiver of exclusivity; that is horizontal conduct.

19 JUDGE RIVERA: Okay. Shut out. And the  
20 allegations of that shut out are what?

21 MR. ROSS: The allegations are that when Go New  
22 York applied to each of these attractions, including that  
23 one, they were told that - - - the attraction people were  
24 told, if you do business with Go New York, we will stop  
25 doing business with Big Bus and Gray Line.

1 JUDGE RIVERA: Uh-huh.

2 MR. ROSS: And this - - - and the complaint  
3 alleges with specificity that this happened time after time  
4 with attraction after attraction throughout the industry.  
5 And so we believe, Your Honor, that - - - that the data at  
6 least supports an inference - - -

7 JUDGE RIVERA: So the complaint is sufficient  
8 because of that. Because you allege that you were told by  
9 some representative, right - - - some representative of  
10 those attractions that they - - - if they do business with  
11 you, they will not be able to do business with these other  
12 companies?

13 MR. ROSS: That's right. And also - - -

14 JUDGE RIVERA: That's - - - that's the heart of  
15 the complaint, yes?

16 MR. ROSS: It is - - - well, the heart of the  
17 complaint is also that there's a pattern. This doesn't  
18 just happen one time. This happens everywhere throughout  
19 the industry. Go New York is shut out of the attraction  
20 pass market because of this conduct.

21 I believe - - - I respectfully submit - - -

22 JUDGE RIVERA: Well, how many attractions do you  
23 refer to in the complaint?

24 MR. ROSS: Well, we refer to - - - I don't know  
25 the exact number, but - - - but - - - but eight or nine or



1 ten. I mean, it's - - -

2 JUDGE RIVERA: Uh-huh.

3 MR. ROSS: - - - we have Top of the Rock, One  
4 World Observatory, Madame Tussauds, the Intrepid Museum,  
5 Broadway Inbound, courts - - - Coach Shortline. We  
6 identify each of these, and the same thing happens every  
7 time.

8 Now, I submit, Your Honors - - -

9 JUDGE RIVERA: So then you're saying it's these  
10 allegations in the complaint that a representative from  
11 certain attractions has said, if we do business with you,  
12 we will not be able to do business with them.

13 MR. ROSS: That's correct.

14 JUDGE RIVERA: And that - - - and they have said  
15 that's the reason why they will not do business with you?

16 MR. ROSS: Correct.

17 JUDGE RIVERA: Okay.

18 MR. ROSS: And - - -

19 JUDGE RIVERA: Those are - - - I'm sorry - - -  
20 those are those allegations. And then you're saying you  
21 have additional allegations that it is a - - - a broad - -  
22 - right? This is broadly the experience of your company - -  
23 - of your client, excuse me.

24 MR. ROSS: Right. And it even involves  
25 attractions where one of the other - - -



1 JUDGE RIVERA: So the - - - the attractions are  
2 examples.

3 MR. ROSS: That's correct.

4 JUDGE RIVERA: Okay. You said it that happens  
5 broadly. So when it happens broadly, is that also true  
6 because a representative of those attractions, these other  
7 attractions, kind of broadly out of the market, has made  
8 the same or similar statements, again, that if they do  
9 business with your client, they will not be able to - - -

10 MR. ROSS: Yes.

11 JUDGE RIVERA: - - - do business with these other  
12 companies?

13 MR. ROSS: Yes. We allege that very specifically  
14 - - -

15 JUDGE RIVERA: Okay.

16 MR. ROSS: - - - throughout the complaint. And  
17 here's the thing. I think that should be sufficient at the  
18 pleading stage to draw an inference of a potential  
19 conspiracy arrangement - - -

20 JUDGE RIVERA: Do you - - - do you allege  
21 anywhere why or how or when the representative from those  
22 attractions came to this understanding - - - this - - -  
23 this knowledge that if they do business with your company -  
24 - - or with your client - - - excuse me - - - they will not  
25 be able to do business with the other companies?

1 MR. ROSS: Yes, Your Honor. We allege that  
2 either Big Bus or Gray Line in every instance told them - -  
3 -

4 JUDGE RIVERA: Okay.

5 MR. ROSS: - - - that if you do business with Go  
6 New York, we're going to pull our contract with you.

7 CHIEF JUDGE WILSON: So suppose that is done  
8 unilaterally by Gray Line - - - let's just take Gray Line  
9 for a second - - - is that sufficient evidence of a  
10 horizontal conspiracy or an arrangement?

11 MR. ROSS: No, Your Honor.

12 CHIEF JUDGE WILSON: Is it evidence of a - - -

13 MR. ROSS: This is not a case - - - this is  
14 distinguishable from, for example, State v. Mobil Oil,  
15 which I think the court correctly decided that case. That  
16 involved unilateral action. This is distinguishable from  
17 the - - - from that case. It's very important. That case  
18 was unilateral action.

19 But we are alleging a conspiracy, and we have a  
20 real basis for it. And the key to this is these  
21 attractions where both Big Bus and Gray Line operate, but  
22 one or the other has exclusive rights, and yet they waive  
23 those exclusive rights to permit both of them to share that  
24 attraction, but not Go New York.

25 JUDGE HALLIGAN: But what - - - where are your





1           allegations that the action is concerted?

2                       MR. ROSS: For example - - - well, in paragraph  
3           37, for example, we talked about the fact that the One  
4           World Observatory is shared despite an exclusive  
5           relationship. So that shows that there has to be something  
6           going on there. There had to be a waiver of exclusivity.  
7           That shows exclusivity - - -

8                       JUDGE HALLIGAN: So you're basically saying that  
9           there's an inference that can be drawn, given the nature of  
10          the relationships up the - - - up the chain, as it were?

11                      MR. ROSS: I think it's more than an inference.  
12          In other words, I agree with Your Honor that an inference  
13          can be drawn. But here we have exclusivity in the hands of  
14          one party. They allow the other party in. They know that  
15          the - - - that both parties are sharing - - - I mean, this  
16          is a small industry. It's not like they're blind to the  
17          fact that they are sharing this attraction. They know  
18          that. So there had to be a waiver of exclusivity. That is  
19          - - - that is a concerted action.

20                      JUDGE CANNATARO: Counsel - - -

21                      MR. ROSS: And I think - - - let me come back to  
22          the - - -

23                      JUDGE RIVERA: Because they don't object - - -  
24          because they don't object to the entity that has the  
25          exclusive rights?

1 MR. ROSS: Sure. Yes - - - Judge - - -

2 JUDGE RIVERA: Or the nonexclusive rights - - -  
3 I'm sorry - - - the entity that doesn't have the exclusive  
4 rights to be able to have the attraction listed on, you  
5 know, the stop - - - stop on, stop off, hop on, hop off  
6 access.

7 MR. ROSS: Yes, that's correct Judge Rivera. But  
8 also because they have to know about it. And the  
9 attraction, unless the attraction had permission - - -

10 JUDGE RIVERA: They may know about it, but do you  
11 assert anything else? I mean, do they know about it?

12 MR. ROSS: Well, no, we - - - we - - - we don't.  
13 But this is the problem with - - - with the decision of the  
14 lower court. They say, well, you don't assert the  
15 discussions. They use the word discussions both in the  
16 First Department and the trial - - - Judge Schechter, the  
17 trial court.

18 Where are the discussions? Where - - - where - - -  
19 - where are the - - - the meeting minutes? You don't say  
20 when the meeting occurred. With whom? I don't believe,  
21 respectfully, under the liberal pleading standard in this  
22 court, we have to go that far. That's asking us to prove  
23 the case at the trial.

24 JUDGE CANNATARO: Justice Schechter didn't say  
25 there was an absence of minutes. I mean, she specifically

1 noted that there was a failure to identify a specified  
2 place. How, to whom, who did it. It's there are no  
3 allegations concerning the specifics of the arrangement or  
4 the collusion or whatever it is.

5 MR. ROSS: Well, respectfully, I think that's  
6 incorrect. I think the complaint - - -

7 JUDGE CANNATARO: Wait a second. That there are  
8 no allegations - - -

9 MR. ROSS: There are allegations that identify  
10 each attraction over what - - - which period of time.  
11 There's even that - - - for example, in paragraph 37, we  
12 talked about - - - we had identified Mark Marmurstein, the  
13 president of Gray Line.

14 There are very specific allegations, but I would  
15 also submit, Your Honor, that at the pleading stage - - -  
16 this is a notice pleading state. The Donnelly Act is  
17 supposed to be supporting the broad policy of maintaining  
18 free competition in New York markets.

19 I think the pleadings that we have that identify  
20 all of these attractions, that identify some at least  
21 concerted activity, should be sufficient to allow us to get  
22 into discovery and to get beyond the motion to dismiss.

23 JUDGE CANNATARO: So is that your argument that  
24 your allegations represent the extent of what you know, and  
25 they're - - - they're sufficient on their face, and you

1 need discovery to fill in the blanks?

2 MR. ROSS: Yes, Your Honor. And - - - and here's  
3 the thing, as a matter of public policy, attorneys such as  
4 myself ought to be encouraged to enforce the antitrust laws  
5 and to take steps to support free competition in the  
6 market. And I think what's happened here is the courts  
7 have been too reluctant to allow these cases to go forward  
8 into the discovery phase. I think we should be permitted,  
9 given this pleading - - - this pleading is more than  
10 sufficient, I think, to support an inference of concerted  
11 action and anti-competitive action.

12 And let me say one thing. One of the - - - one  
13 of the - - - sorry.

14 CHIEF JUDGE WILSON: The federal - - - the  
15 federal court didn't allow you to go forward with the - - -  
16 essentially these allegations, right, but said try them out  
17 in state court effectively, right?

18 MR. ROSS: Correct. And - - - and - - - and that  
19 - - -

20 CHIEF JUDGE WILSON: So why is it that you can  
21 succeed here and not there?

22 MR. ROSS: Well, thank you for that question,  
23 Judge Wilson. The pleading standard in federal court is  
24 much stricter. And in federal court, the judges are  
25 encouraged to look at whether or not there might be a

1 rational, good faith reason for this conduct, okay? I  
2 submit that in New York State, the decision about whether  
3 there might or might not be a rational reason for this  
4 conduct or for this concerted action is a - - - is a  
5 question of fact that should be determined by the jury. It  
6 should not be determined at the pleading stage.

7 And in Judge Schecter's opinion, and in the First  
8 Department's opinion, they talk about the fact, well, there  
9 may be rational reasons for this conduct. Well, that's  
10 true. We - - - we acknowledge there may be rational  
11 reasons for this conduct. We don't believe that's the  
12 case. We think the - - - the conduct was in bad faith and  
13 was anti-competitive. But those are questions of fact that  
14 should be decided by the jury.

15 JUDGE TROUTMAN: So are you saying - - - so are  
16 you saying because here, taken as true against the  
17 nonmoving party viewing the - - -

18 MR. ROSS: That's - - -

19 JUDGE TROUTMAN: - - - that that's why you could  
20 succeed in state court or be able to at least proceed at  
21 the initial juncture?

22 MR. ROSS: Yes, I think so, Your Honor. I think  
23 that's true. And also, the Donnelly Act is broader than -  
24 - -

25 JUDGE GARCIA: But Counsel, just to the pleading

1 point, didn't the Appellate Division find in this case that  
2 - - - nor does the record support Go New York's contention  
3 that Supreme Court applied the more restrictive federal  
4 pleading standard?

5 MR. ROSS: Well, the First Department said that,  
6 but I think if you examine both the First Department's  
7 opinion in its substance and the trial court's opinion, the  
8 trial court talks about discussions, you haven't shown  
9 discussions. And the trial court goes on about how there  
10 may be rational reasons for this behavior. But that's a  
11 determination of substance at the pleading stage, and I  
12 believe, under the policy of New York, that's improper.

13 JUDGE RIVERA: But what - - - what - - - what - -  
14 - what's the conspiracy arrangement that you say is  
15 inferable? Are you saying the other two entities - - -

16 MR. ROSS: In cross, yes.

17 JUDGE RIVERA: - - - get together, talk to each  
18 other, and put pressure on the representative from, you  
19 know, the observation tower, whatever you want to call it?

20 MR. ROSS: Correct. The theory in this case - -  
21 -

22 JUDGE RIVERA: Okay. The - - - and - - - and was  
23 that an allegation you made?

24 MR. ROSS: Absolutely. The theory - - - the  
25 basic theory - - -

1 JUDGE RIVERA: Where - - - where is that? What  
2 paragraph - - - what paragraph on this - - -

3 MR. ROSS: I'm not sure - - - that's the basic  
4 theory of the complaint from the - - - at the very outset.  
5 The theory of the complaint is that Big Bus and Gray Line  
6 conspired - - -

7 JUDGE RIVERA: Uh-huh.

8 MR. ROSS: - - - or agreed, or engaged in  
9 arrangements - - -

10 JUDGE RIVERA: Uh-huh.

11 MR. ROSS: - - - to shut Go New York out of the  
12 attraction market. I mean - - -

13 JUDGE RIVERA: But again, that - - - that's based  
14 on the fact that a representative from one of - - - one or  
15 more attractions, fair enough, said - - - said to you, if I  
16 do business with the - - - your company, I - - - I will not  
17 be able to do business with these other two companies.

18 MR. ROSS: Correct. And we've alleged throughout  
19 the - - - the pleading - - -

20 JUDGE RIVERA: It's not that the other entities  
21 said something, whispered something to your company. Where  
22 - - -

23 MR. ROSS: No, we don't have a smoking gun that  
24 says there was meeting - - -

25 JUDGE RIVERA: No - - - no, I understand. I'm

1 just - - - I - - -

2 MR. ROSS: Yes.

3 JUDGE RIVERA: - - - I - - - yes, I - - -

4 MR. ROSS: But - - - but it's because we - - - Go  
5 to New York, was told, and every place they turned in the  
6 market, that either Gray Line or Big Bus said, if you work  
7 with us, we're going to stop working with you, we're going  
8 to cut you out.

9 JUDGE RIVERA: Uh-huh.

10 MR. ROSS: And then that even occurred on  
11 attractions where the two share the attraction.

12 JUDGE RIVERA: Uh-huh.

13 MR. ROSS: So I think it is reasonable in that  
14 circumstance to infer a conspiracy.

15 JUDGE HALLIGAN: So - - - so the - - - the nub of  
16 the relationships is you have several tour companies, each  
17 tour company has a purportedly exclusive relationship with  
18 an attraction, and they enforce that exclusivity as against  
19 you, but they don't enforce the exclusivity as against one  
20 of the other defendant tour companies. Do I have that  
21 right?

22 MR. ROSS: You have that right. That's one part  
23 of the allegations at play.

24 JUDGE HALLIGAN: Okay. What's the other part  
25 then?





1 MR. ROSS: The other part is that - - - that  
2 aside from the attractions that have these exclusive  
3 relationships - - -

4 JUDGE HALLIGAN: Yes.

5 MR. ROSS: - - - there are other attractions that  
6 are not exclusive, but nonetheless, Go New York is shut out  
7 because they - - - they have relationships with both of the  
8 other defendants but not Go New York.

9 JUDGE HALLIGAN: And so from the pattern of  
10 relationships, I take it you're alleging that the  
11 attractions have with the defendant tour companies, you  
12 think that's sufficient to - - - to put together either  
13 conspiracy or an arrangement?

14 MR. ROSS: Look, it - - - yes, Your Honor. It  
15 makes no sense from an - - -

16 JUDGE HALLIGAN: I just want to make sure I  
17 understand the theory.

18 MR. ROSS: - - - from an economic point of view,  
19 it makes no sense, in my view, for each of these  
20 attractions to say, we're not going to do business with Go  
21 New York.

22 JUDGE HALLIGAN: Just one other question, if I  
23 can. What is the difference, in your view, between what's  
24 required to allege a conspiracy and what's required to  
25 allege an arrangement?

1 MR. ROSS: I think that's an important question,  
2 Your Honor. I think under - - - this - - - this court,  
3 under State v. Mobil Oil, framed the issue as follows.  
4 There has to be proof of a reciprocal - - - a concerted  
5 reciprocal commitment. And I think the term commitment  
6 itself is somewhat ambiguous. I would say that there has  
7 to be a reciprocal arrangement that involves mutual  
8 benefits. That is, the parties are - - - have a mutually  
9 beneficial relationship.

10 JUDGE HALLIGAN: And how is that distinct from a  
11 conspiracy? What's the difference between the two?

12 MR. ROSS: Because a conspiracy or an agreement  
13 reflects something more formal. There doesn't have to be a  
14 meeting of the minds that, you know - - - like, such as a  
15 criminal conspiracy. There can be an informal implicit  
16 arrangement which is mutually beneficial.

17 I'd like to - - - I see my red light is on. I'd  
18 like to finish this one thought.

19 CHIEF JUDGE WILSON: Yes.

20 MR. ROSS: I think the concept of mutual  
21 beneficiary - - - mutually beneficial really is what the  
22 State v. Mobil Oil standard should be clarified. If you  
23 clarify it that way, then you look at the allegations in  
24 this complaint, I believe they are sufficient to allow this  
25 case to go forward.

1 Thank you, Your Honors.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. EDELSON: Good afternoon, Your Honors, and  
4 may it please the court. I'd like to start to correct  
5 something that Mr. Ross said. There are no allegations at  
6 all in the counterclaims that specifically name Gray Line,  
7 Big Bus, or any other counterclaim defendant, as ever,  
8 having said, we'll cut you off if you work with Go New  
9 York. That's simply not there.

10 JUDGE SINGAS: Well, why isn't your adversary  
11 right that at least you can raise the inference of a  
12 concerted action with this idea of exclusivity that's only  
13 exclusive to everyone else except each other? Why isn't  
14 that enough?

15 MR. EDELSON: Sure. I'd be glad to address the  
16 theory of waivers of exclusivity. To begin with, it's only  
17 alleged for two of the ten attractions named in the  
18 complaint. And there are no facts in the pleadings that  
19 support concerted action connected to waivers of  
20 exclusivity between Gray Line and Big Bus. This is the  
21 best they have.

22 The One World Observatory said it had an  
23 exclusive with Gray Line. Big Bus also sold tickets, and  
24 the One World Observatory - - - Observatory decided not to  
25 partner with Go New York, all at unspecified times.

1 JUDGE SINGAS: But do you think it would be a  
2 little difficult for them to come up with more proof, given  
3 the nature of conspiracies and how secretive they are  
4 without getting to a discovery stage?

5 MR. EDELSON: Well, Judge Singas, I'll put it  
6 this way. They need to plead facts that support concerted  
7 action to survive a motion to dismiss, and they haven't  
8 done that. So absent some allegations of contacts,  
9 coordination, they can't survive a motion to dismiss.

10 JUDGE SINGAS: So in your mind, they haven't met  
11 the Mobil Oil baseline requirements?

12 MR. EDELSON: No, they haven't, Your Honor. For  
13 these reasons, State v. Mobil defined an arrangement as a  
14 reciprocal relationship of commitment. There are two  
15 problems here. There aren't facts that point to a  
16 connection between Gray Line and Big Bus, or a relationship  
17 between them. But more fundamentally, there aren't any  
18 facts that connect allegations of a relationship between  
19 Gray Line and Big Bus with any of the alleged vertical  
20 pressure, whether related to exclusivity or not related to  
21 exclusivity for any of the attractions.

22 CHIEF JUDGE WILSON: What about the allegation in  
23 paragraph 35 that with regard to Top of the Rock?

24 MR. EDELSON: Yeah.

25 CHIEF JUDGE WILSON: That Top of the Rock said,

1 we're not going to deal with you, Go New York, and if you  
2 want to change that, go talk to the president of Gray Line.

3 MR. EDELSON: Your Honor, and - - - an allegation  
4 that the president - - - that the tourist attraction said  
5 talk to the president of Gray Line is not an allegation  
6 that the president of Gray Line is colluding horizontally  
7 with Big Bus.

8 CHIEF JUDGE WILSON: Well, clearly they're not in  
9 the same business horizontally, Top of the Rock and - - -  
10 and - - - but that does infer that there's some  
11 arrangement, right, where Top of the Rock has ceded its  
12 authority to partner with people to Gray Line.

13 MR. EDELSON: To the extent they are alleging  
14 that relationship as something that violates the Donnelly  
15 Act. It's a vertical relationship.

16 CHIEF JUDGE WILSON: Yeah.

17 MR. EDELSON: It's treated much more leniently -  
18 - -

19 CHIEF JUDGE WILSON: Yeah.

20 MR. EDELSON: - - - than a horizontal one. Under  
21 the antitrust laws, they'd need to show market wide harm to  
22 competition under global reinsurance to do that. They  
23 haven't come close to that because they only plead harm to  
24 themselves.

25 CHIEF JUDGE WILSON: But will you pair that,

1           though, with the various horizontal reciprocal exclusivity  
2           and the refusals? I mean, there are other refusals that  
3           don't specifically say we have an exclusive relationship,  
4           but they say we don't want to annoy our other trade  
5           partners, those sorts of things.

6                       MR. EDELSON: Sure.

7                       CHIEF JUDGE WILSON: Wrap that all up. Isn't  
8           that enough to suggest that, especially if you believe, as  
9           we have to, the allegations in the complaint - - -

10                      MR. EDELSON: Yeah.

11                      CHIEF JUDGE WILSON: - - - that Gray Line and Big  
12           Bus are not shutting each other out. Right. They're  
13           waiving exclusivity, or at least they're partnering with  
14           all these same tourist attractions. And Go New York is the  
15           only one shut out of all this and using different sets of  
16           words different times. Why isn't that plus the vertical  
17           enough?

18                      MR. EDELSON: Judge Wilson, this is the point of  
19           the argument about parallel conduct in our brief. It's a  
20           neutral fact from an antitrust perspective that they were  
21           turned down by a handful of tourist attractions at  
22           unspecified times. I mean, these are businesses that are  
23           in the same position. They're evaluating a partnership  
24           with Go New York. It's rational for them to make a  
25           decision about whether they want to partner or not in the

1 same way.

2 What you don't have that you'd need to state a  
3 Donnelly Act claim under New York procedural and  
4 substantive law is facts that support concerted action on  
5 top of that. So some indication that Gray Line and Big Bus  
6 had a relationship with each other and that that was  
7 connected to efforts to get tourist attractions to exclude  
8 them. You don't have any facts that support those - - -

9 JUDGE CANNATARO: Counsel?

10 MR. EDELSON: Yes?

11 JUDGE CANNATARO: This is not my world at all.  
12 And - - - and I'm - - - I understand the argument you're  
13 making, but it seems to me that people don't - - - if  
14 they're colluding in a horizontal fashion like this, they  
15 don't advertise that fact. That's not something you want  
16 people to know. And - - - and it further seems to me that  
17 if you want to find out about it, you kind of need to see  
18 some text messages or emails or - - - so that's where you  
19 might discover some evidence of it. So can you just  
20 explain to me how a successful claimant might allege these  
21 facts in a way that would be sufficient because - - -  
22 because I don't understand what's missing in their claim.

23 MR. EDELSON: Of course, Judge Cannataro. Here's  
24 what you need. You need facts that show coordination. And  
25 here's where 3013 comes in. This is insufficiently

1 particular to show coordination. They make these  
2 allegations about exclusivity, but there's no time - - - I  
3 mean, these attractions transitioning from exclusive  
4 relationships to nonexclusive relationships, we don't know  
5 if they're in any kind of temporal proximity to each other  
6 to suggest that, you know, exclusivity and waivers of  
7 exclusivity were swapped between Gray Line and Big Bus.  
8 And there's only allegations with regard to those two on  
9 that front.

10 JUDGE CANNATARO: And how would one - - - in the  
11 normal course of things, a successful claimant, how would  
12 one come across that information?

13 MR. EDELSON: They could have put facts in, for  
14 example, that said, this specific attraction told us that  
15 this specific, you know, defendant told us on this date,  
16 and then the dates line up in close proximity. And you  
17 have - - -

18 JUDGE HALLIGAN: The theory - - -

19 MR. EDELSON: Yeah.

20 JUDGE HALLIGAN: I take it you're saying the  
21 theory could be viable, you just think there's not enough  
22 specificity with respect to who - - - who denied whom  
23 access on what date?

24 MR. EDELSON: Those facts would be needed to  
25 start bringing it closer, Judge Halligan. But I think the



1 main problem that they would still have is that there is -  
2 - - are no facts that suggest a connection between the two  
3 of them.

4 JUDGE HALLIGAN: Okay. And how, absent discovery  
5 - - -

6 MR. EDELSON: Yeah.

7 JUDGE HALLIGAN: - - - might one obtain that, to  
8 Judge Cannataro's question? I take it you mean - - -

9 MR. EDELSON: Yeah.

10 JUDGE HALLIGAN: - - - something along the lines  
11 of a text or email as between the two - - - the two  
12 defendants, correct?

13 MR. EDELSON: Your Honor, there - - - it doesn't  
14 need to be a text or an email, necessarily, but there need  
15 to be facts pled in the complaint that suggest - - -

16 JUDGE HALLIGAN: So how - - - how would you - - -  
17 you come across that evidence without - - - without  
18 discovery?

19 MR. EDELSON: You could be much more specific  
20 about the experiences that their client had with regard to  
21 these rejections and when they happened and what was said  
22 to them.

23 JUDGE HALLIGAN: Okay. But that, I take it, is  
24 about the circumstances of the interactions - - -

25 MR. EDELSON: Yes.



1 JUDGE HALLIGAN: - - - that your adversary has  
2 with the attractions - - -

3 MR. EDELSON: Yeah.

4 JUDGE HALLIGAN: - - - and the responses they get  
5 about why they won't do business with them.

6 MR. EDELSON: Yes.

7 JUDGE HALLIGAN: I - - - I thought I heard you  
8 say that something beyond that, that more directly evidence  
9 of communications as between the - - - the defendants was  
10 necessary, but - - - but maybe you're suggesting that's not  
11 the case.

12 MR. EDELSON: I mean, as - - - as an example, in  
13 conspiracy cases, sometimes it's alleged these two  
14 companies were at the same trade show at the same time, and  
15 we're - - - we know that. I mean, there are particular  
16 facts that come up time and again where contacts come in -  
17 - -

18 JUDGE RIVERA: But the same trade show at the  
19 same time, and therefore you can infer that they had a  
20 meeting during which they conspired?

21 MR. EDELSON: When a certain quantum of facts are  
22 piled up, courts begin to infer that potentially there are  
23 horizontal connections. We are way short of that bar here  
24 because there's nothing that suggests any connection.

25 JUDGE RIVERA: I'm interested if you could to go

1 a little bit further on your point of the exclusivity  
2 contracts, if they could have had some additional facts  
3 that might suggest that - - - I think what you were saying,  
4 please correct me if I'm misunderstood - - - if they had  
5 something else, that from which - - - well, factual  
6 allegations - - - from which either the facts expressly or  
7 one could infer, that there are indeed these exclusive  
8 contracts that are not abided by with respect to the other  
9 two Big Bus companies, at the time that they allege they  
10 are informed by a representative from the attraction that  
11 they will not do business with them. Is that what you were  
12 saying, something like that would be enough?

13 MR. EDELSON: That would be a start, Judge  
14 Garcia, but that still wouldn't be enough because if we put  
15 - - -

16 JUDGE RIVERA: Rivera, but thank you.

17 MR. EDELSON: Excuse me?

18 JUDGE RIVERA: It's okay. Go ahead.

19 CHIEF JUDGE WILSON: Garcia is over there.

20 MR. EDELSON: Oh, I'm sorry.

21 CHIEF JUDGE WILSON: Rivera is over here.

22 MR. EDELSON: I'm - - - Judge Rivera.

23 JUDGE RIVERA: It's okay.

24 MR. EDELSON: That would be a start, but it would  
25 not be enough to put a reciprocal relationship - - - it

1 would not be enough to plead a reciprocal relationship  
2 between them, and it would not be enough to put that  
3 reciprocal relationship in connection with any of the  
4 allegations of vertical pressure on tourist attractions.

5 JUDGE RIVERA: So okay, if they said that - - -

6 MR. EDELSON: Yeah.

7 JUDGE RIVERA: - - - then what else might I - - -  
8 I - - - I think I understand your point that that they  
9 might be able to get without discovery, they might have  
10 some way, and maybe they only need to do it for one or two  
11 attractions, not for every single attraction that's  
12 involved in this market. Then - - - then what would be the  
13 plus? You're saying there's a plus that needs to go with  
14 that. What - - - what might that look like? Given the  
15 nature of this industry - - -

16 MR. EDELSON: Yeah.

17 JUDGE RIVERA: - - - and - - - and - - - and what  
18 they're claiming they believe is going on, and they want an  
19 opportunity to prove that.

20 MR. EDELSON: If they said, for example - - - I  
21 mean, so these allegations are nonspecific as to the time  
22 in which any of this happened. If they said all of these  
23 rejected us within a span of - - - within a short amount of  
24 time - - -

25 JUDGE RIVERA: I see.

1 MR. EDELSON: - - - that would be potentially  
2 something from which you could infer this, but I - - - for  
3 the - - -

4 JUDGE RIVERA: Because it's looking like it's not  
5 just happenstance, and it's looking like it's not just  
6 perhaps business choices that have nothing to do with  
7 arrangements that would be in violation of the statute. Am  
8 I understanding that part of what you're arguing?

9 MR. EDELSON: Yes, I think that's something where  
10 you could say, on a reasonable reading of the facts, we're  
11 going to infer that this was coordinated. But we're not -  
12 - - we're not close to that. And this is public  
13 information. We don't need to rely on this, but the court  
14 should be aware that Go New York's website, topviewnyc.com,  
15 shows that it's currently partnered with the Empire State  
16 Building and the One World Observatory and The Intrepid for  
17 its attraction pass. It's not true that they're cut out of  
18 all of the attractions in the complaint.

19 JUDGE RIVERA: What - - - what's the share, if  
20 you know, of the market that, not their company, obviously,  
21 the other two companies have?

22 MR. EDELSON: So Your Honor, it's - - - it's in  
23 flux. The facts are not in the pleadings that would allow  
24 us to - - - to know. What I can say is that - - -

25 JUDGE RIVERA: Uh-huh.

1 MR. EDELSON: - - - there is a new tour bus  
2 entrant, and our client's bus business has shut down  
3 because of the COVID pandemic, and the ticket business is  
4 still open. So the - - - the market is dynamic and new  
5 parties are entering, and they're obviously - - -

6 JUDGE CANNATARO: This really comes down to the  
7 tickets more than the buses, right? Because I imagine  
8 buses can still take people anywhere. The streets are  
9 public. You don't need anyone's permission to use that.  
10 It's about these special discounted passes, right?

11 MR. EDELSON: Those - - - that seems to be the  
12 allegation is how - - - who can we partner with for our  
13 pass.

14 JUDGE CANNATARO: Right. So - - - so - - -

15 JUDGE RIVERA: Yeah. They become more attractive  
16 - - - sorry, who was that - - - they become more marketable  
17 and get more share of the market. Of course, if I wanted  
18 to ride their bus and they're saying, look, these are all  
19 the attractions that have partnered with us. And then I go  
20 to another bus company and they say, we've got double the  
21 attractions, or I've got the hot attractions, and they're  
22 not able to get the hot attractions - - -

23 MR. EDELSON: Right.

24 JUDGE RIVERA: - - - that everyone wants to go  
25 to, right, that's - - - that's sort of what's going on with

1 the attractions.

2 MR. EDELSON: It's true. Although, they do plead  
3 that they've grown rapidly since entering the market in  
4 2012, and that they have become roughly equal as of the  
5 time of the - - - the pleadings in size and revenues with  
6 the others. So it doesn't appear just from the facts in  
7 the complaint that having a - - - either differentiated  
8 passes has had a competitive impact on them. And it's  
9 clear that also they're - - - they're achieving these  
10 partnerships.

11 JUDGE RIVERA: I'll - - - I'll show my business  
12 ignorance, which will not surprise any of my colleagues  
13 with these questions. Why - - - why would an attraction  
14 buckle under - - - let me put it that way - - - to what  
15 they allege has happened. Why would you - - - doesn't the  
16 attraction have the leverage because people want to go to  
17 your attraction?

18 MR. EDELSON: I - - -

19 JUDGE RIVERA: They don't care what bus gets them  
20 there, but they just want to go to your attraction.

21 MR. EDELSON: So just going on the facts that are  
22 alleged - - -

23 JUDGE RIVERA: Uh-huh. Yeah.

24 MR. EDELSON: - - - I - - - I cannot tell you why  
25 a particular - - -

1 JUDGE RIVERA: Okay. Fair enough.

2 MR. EDELSON: - - - attraction made it - - - made  
3 the particular choice that it did.

4 JUDGE RIVERA: Okay. Okay.

5 JUDGE HALLIGAN: But they're alleging that there  
6 is no rational business reason that would lead them to do  
7 that. I think, to Judge Rivera's question and - - - and I  
8 understand we're at the pleading stage, but there's not  
9 something that is apparent that you want to share with us.

10 MR. EDELSON: I would say the following. The  
11 conclusion that there is no rational reason, therefore  
12 there must be a conspiracy is a - - - there are two ways of  
13 seeing that - - -

14 JUDGE HALLIGAN: Uh-huh.

15 MR. EDELSON: - - - that's a legal conclusion.  
16 It's the equivalent of having a sentence that said, this  
17 happened, therefore they violated the Donnelly Act. The  
18 language conspiracy comes straight from the pleading  
19 standard and the First Department.

20 It's also - - - if you look at the New York  
21 motion to dismiss cases, can they succeed on a reasonable  
22 view of the facts? Justice Schecter, when she rejected  
23 that inference of conspiracy, was saying this is not a  
24 reasonable view of the facts. She was empowered to make  
25 that determination when she rejected that, and she was not



1 applying federal law and saying, you need to plead facts  
2 that rule out other reasons they might have done this. She  
3 was just saying - - -

4 JUDGE RIVERA: But it's a de novo question of law  
5 for us whether or not - - -

6 MR. EDELSON: Yes.

7 JUDGE RIVERA: - - - the complaint satisfies our  
8 liberal pleading standard, right?

9 MR. EDELSON: Correct.

10 JUDGE RIVERA: Okay.

11 MR. EDELSON: Got it.

12 JUDGE RIVERA: Okay. Thank you. But just  
13 following up on this - - -

14 MR. EDELSON: Sure.

15 JUDGE RIVERA: - - - the argument to be that they  
16 say, look, everything we've said means that, at a minimum,  
17 you can draw the inference that, yes, these other two bus  
18 entities are conspiring, have an arrangement, have an  
19 agreement to - - - to ensure we don't get access to these  
20 attractions. And I think your point in your briefing was,  
21 they may have other reasons. Yes?

22 MR. EDELSON: Is - - - I'm sorry. Can you - - -

23 JUDGE RIVERA: That the attractions may have  
24 other reasons - - - business reasons, even assuming for one  
25 moment - - -

1 MR. EDELSON: Yes.

2 JUDGE RIVERA: - - - that they are indeed  
3 specifically choosing not to do business with his client,  
4 but to do business with one or both of these other  
5 entities.

6 MR. EDELSON: That's right, Your Honor. The  
7 rationale - - - and there were a number of facts in the  
8 pleadings that suggest maybe why that was the case. You  
9 know, they were a new entrant. These businesses already  
10 had multiple partners. Perhaps they didn't want to - - -

11 JUDGE RIVERA: So his - - - so under our liberal  
12 pleading standard then, does - - - however, regardless of  
13 whether or not there might be other reasons - - -

14 MR. EDELSON: Uh-huh.

15 JUDGE RIVERA: - - - is - - - is - - - does it  
16 boil down to the question whether or not he's just made  
17 enough allegations that you can infer - - - factual  
18 allegations that one could either expressly or infer from  
19 those allegations that there might be something to his  
20 reason?

21 MR. EDELSON: Your Honor, I would not make it  
22 about the reason. I would say - - -

23 JUDGE RIVERA: Uh-huh.

24 MR. EDELSON: - - - if the pleading standard is  
25 liberal but it has limits, you need facts to support every

1 element of a claim. You don't get the benefit of  
2 conclusory allegations. It has to be sufficiently  
3 particular and you - - - inferences are made subject to it  
4 being a reasonable view of the facts in the complaint.

5 So I would say, you need factual matter in the  
6 complaint to support the element of concerted action. A  
7 connection between Gray Line and Big Bus that is somehow  
8 then brought into relationship with the vertical pressure  
9 on the tourist attractions that's missing at both stages.  
10 And that's why we think under the pleading standards, they  
11 don't have a Donnelly Act claim.

12 JUDGE HALLIGAN: What do you make of the  
13 distinction between arrangement and conspiracy? I know  
14 what we said in Mobil Oil, but in your view, how does that  
15 translate into what one would need to plead to allege each  
16 of them, or is it the same?

17 MR. EDELSON: Your Honor, I don't think it's that  
18 far. And to the extent that the Donnelly Act is broader  
19 than the Sherman Act because of the addition of the term  
20 arrangement, and to the extent that notice pleading is more  
21 liberal than Twombly, we know because of the basic motion  
22 to dismiss case - - -

23 JUDGE HALLIGAN: Well, in - - - in Mobil Oil - -  
24 -

25 MR. EDELSON: Yeah.



1 JUDGE HALLIGAN: - - - we do suggest, I think,  
2 that it's broader because Mobil Oil says that - - - that  
3 arrangement is similar to, but not embraced within, what we  
4 call the more exacting terms: contract, combination, or  
5 conspiracy - - -

6 MR. EDELSON: We agree with Your Honor.

7 JUDGE HALLIGAN: - - - which suggests to me is -  
8 - - okay - - - so what does that translate into in terms of  
9 - - - of kind of practical pleading requirements in your  
10 view?

11 MR. EDELSON: It would mean in that court's  
12 language that you need a commitment between two entities  
13 and that routine bilateral business dealings don't cut it.  
14 Mere bilateralness, as the case says, isn't enough. There  
15 has to be some kind of commitment, and there are no facts  
16 to support that here. And we accordingly say that they  
17 don't have a case under the - - -

18 JUDGE HALLIGAN: But you think the same types of  
19 facts - - - there's not - - - there's not a difference, in  
20 your view, about the sorts of facts that would - - - that  
21 would evince a reciprocal relationship of commitment and a  
22 conspiracy?

23 MR. EDELSON: No, Your Honor, and we're - - -  
24 we're not aware of any case law that says - - - that  
25 suggests that this particular constellation would be a

1 conspiracy where - - - or I'm sorry - - - an arrangement  
2 where something else would not.

3 In concluding, a number of judges have looked at  
4 this under federal and state law and concluded that the  
5 facts don't support an antitrust claim, and we request  
6 affirmance of the First Department. Thank you.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. ROSS: I'll be brief, Your Honors. The  
9 problem that I have is I believe the Donnelly Act, as a  
10 matter of policy, wants lawyers like me to file complaints  
11 to support the New York policy of free market competition.  
12 But how do I draft the complaint with sufficient detail to  
13 satisfy my friend? I don't have emails. I don't have text  
14 messages. I can only infer from the business environment  
15 that my client endures that something must be going on.  
16 And I don't have just - - - I'm not just guessing - - -

17 JUDGE GARCIA: But Counsel - - -

18 JUDGE RIVERA: Doesn't it just boil down to  
19 whatever the representative from the attraction said,  
20 because otherwise they just don't want to do business with  
21 you?

22 MR. ROSS: No, Your Honor, there's more to it  
23 than that because it's not just one representative.  
24 There's a pattern throughout the industry - - -

25 JUDGE RIVERA: But that's what I'm saying. Isn't



1 that - - - oh, I'm sorry. I'm sorry. Go ahead.

2 MR. ROSS: I'm sorry, Your Honor. But no - - - I  
3 don't mean to interrupt. There's a pattern throughout the  
4 industry, number one. And number two, we have these two  
5 instances where exclusive arrangements are being shared.  
6 That is, to me, a smoking gun, if you will, that there is  
7 some concerted action going on here. I believe at the  
8 pleading stage I should not be required to do more. I  
9 don't have the text messages. I don't have the emails.

10 JUDGE HALLIGAN: Where exactly are you - - -  
11 where exactly are you alleging that exclusive relationships  
12 are shared?

13 MR. ROSS: In paragraph 37.

14 JUDGE HALLIGAN: Uh-huh.

15 MR. ROSS: For example - - - and also, with  
16 regard to Madame Tussauds exhibit. Madame Tussauds - - -  
17 Madame Tussauds is the Big Bus side of this. Madame  
18 Tussauds is exclusively owned by Big Bus and let - - - yet  
19 they let Gray Line in. So they're sharing their exclusive  
20 rights with Gray Line.

21 JUDGE HALLIGAN: So in paragraph 37, you say that  
22 One World Observatory told you that it has an exclusive  
23 relationship with Marmurstein, I think, at Gray Line.  
24 Where are you - - - and then are you - - - is your point  
25 that when you say counterclaim defendants also advertise

1 and sell One World Observatory admission, is that where  
2 you're alleging - - -

3 MR. ROSS: Correct.

4 JUDGE HALLIGAN: - - - sharing?

5 MR. ROSS: That - - - that means that - - - that  
6 they are allowed in the door. Despite the exclusive  
7 relationship, they have been allowed in the door. And of  
8 course - - -

9 JUDGE HALLIGAN: Okay. That other - - - others  
10 are allowed in, but you're not, would show sharing?

11 MR. ROSS: That's correct. And - - - and it must  
12 be because they have knowledge of each other. This is - -  
13 - you know, this isn't happening in secret. One World - -  
14 - the One World attraction is a big deal in the New York  
15 market. It's one of the most valuable attractions that  
16 there is. And here, Go New York is shut out, and these two  
17 guys are sharing it. That seems to me to be pretty  
18 powerful evidence that there's something concerted going  
19 on, and certainly it should be enough at the pleading stage  
20 to allow me to conduct discovery.

21 And here's the policy issue. How do - - - how do  
22 we support - - - how do we enforce the Donnelly Act if at  
23 the pleading stage, we impose these - - - these  
24 requirements that essentially make - - - make me prove my  
25 case at the pleading stage before I get discovery - - -

1 JUDGE GARCIA: But you're arguing for a standard  
2 lower than the New York pleading stage, right?

3 MR. ROSS: No, I'm arguing for the same standard,  
4 but the New York standard is much more liberal than the  
5 federal standard.

6 JUDGE GARCIA: Understood. Understood that  
7 argument.

8 MR. ROSS: And I think that under that standard,  
9 we have more than satisfied it. I mean, if this was a  
10 discrimination claim, for example, and you show a disparate  
11 impact, that's enough to allow the discrimination claim to  
12 go forward. Well, we've shown disparate impact here.  
13 We've at least done that. Why shouldn't I be allowed to  
14 pursue - - - to prosecute this case?

15 Now, maybe at the summary judgment phase of this  
16 case, I will lose. Maybe - - - maybe - - - maybe I'm wrong  
17 about it. But - - -

18 JUDGE GARCIA: Well, I think we're struggling  
19 with - - - what I'm struggling with here, Counsel, is that  
20 line between - - - I mean, the pleading stage, there are  
21 requirements even under the New York liberal pleading  
22 standard, and enough to get by that standard without  
23 imposing too high a burden, especially given the aims of  
24 Donnelly Act, but more than, I alleged a secret conspiracy,  
25 so how do you expect me to prove it now?



1 MR. ROSS: Well, my red light is on. May I  
2 answer this, Your Honor?

3 CHIEF JUDGE WILSON: Go ahead.

4 MR. ROSS: Because we've alleged way more than a  
5 conclusion - - - a conclusory conspiracy. We go through  
6 ten attractions. We have separate paragraphs on each one  
7 where we talk about why Go New York is shut out. We then  
8 have the paragraphs that talk about the sharing of certain  
9 of these attractions. I think that specificity should be  
10 sufficient under the liberal pleading standard of the State  
11 of New York.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. ROSS: Thank you.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Taxicab Tours v. Go New York Tours, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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