[* 1] SCANNED ON 5/1/2013

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D.S. WRIGHT PART 62
Justice

ASTRA MEDAI GROUP, LLC,

INDEX NO. 600793/09

Plaintiff
- v -

MOTION DATE

CLEAR CHANNEL TAXI MEDIA, LLC, CLEAR CHANNEL OUTDOOR HOLDINGS, INC., CC MEDIA HOLDINGS, INC., and THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

MOTION SEQ. NO. 002
MOTION CAL. NO.

Defendants

The following papers, numbered 1 to 4 were read on this motion to/for amend the summons and complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

FILED
MAY 01 2013
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion/petition of the Defendants Clear Channel Taxi Media, LLC, Clear Channel Outdoor Holdings, Inc., CC Media Holdings, Inc., and the New York City Taxi And Limousine Commission to dismiss the complaint are consolidated for disposition. The motion by the Clear Channel Defendants is granted to the extent of dismissing the first, second, third and fourth causes of action. The motion is denied as to the fifth cause of action, a/p/o. The motion by the City to dismiss the complaint is granted as to all claims, a/p/o.

Dated: Apr 24, 2013

GEOFFREY D. WRIGHT J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 62

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ASTRA MEDIA GROUP, LLC,

Plaintiff-Petitioner(s),

-against-

CLEAR CHANNEL TAXI MEDIA, LLC, CLEAR CHANNEL OUTDOOR HOLDINGS, INC., C.C. MEDIA HOLDINGS, INC., and THE NEW YORK TAXI AND LIMOUSINE COMMISSION,

Defendant-Respondent(s),

----------X

Index #600793/09
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	2
Replying Affidavits & Exhibits Annexed	4
Other (Cross-motion) & Exhibits Annexed	
Supporting Affirmation	3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Motions by the New York City Taxi and Limousine Commission ("TLC") and the Clear Channel Taxi Media, LLC, CLEAR CHANNEL OUTDOOR HOLDINGS, INC., C.C. MEDIA HOLDINGS, INC., ("C.C. Defendants") move to dismiss the complaint. The Plaintiff, which constructed advertising signs for placement on the roofs of taxi cabs had for some time, enjoyed a place of prominence in the City of New York. There are two types of signs, static, which takes the form of placards. The other type of sign is digital. The Plaintiff designed a roof unit with four sides, so that it could be seen from fore and aft as well starboard and lee. From the papers, it appears that the Plaintiffs had the ability to produce both static and digital signs.

The lynchpin of the complaint is the change in rules by the Taxi and Limousine Commission, beginning in 2007, and culminating in a change the Rules of the City of New ("RCNY")to prohibit the static four sided sign that was the meat and potatoes of the

Plaintiffs' business plan. Missing from the complaint, as well as the opposing papers, is any indication that the change was one that the Plaintiff could not make. Its papers seem to acknowledge that it had the capacity to compete, but chose to go all in with the four sided sign, which, it appears, was somewhat of a monopoly in favor of Astra.

Prior to the change in the rule on the shape of roof top signs, the Taxi and Limousine Commission held public hearings. The stated purpose of the hearings and the new rule was to encourage competition, and thus raise for revenue for the taxi industry, or at least the medallion owners. This would indicate the existence, at the time of the formulation of the rule change, an artificially narrow field that was the exclusive, or nearly exclusive fiefdom of one or two companies. It certainly appears that with the four-sided display, there was one player, the Plaintiff.

The creation of the advertising medium did not entail any recondite scientific principle, it is an artistic design that may or may not be popular with the target audience, proprietary license, copyright or patent that was or would be unavailable to the Plaintiffs, they already the ability to work in the digital medium. The fact that the Plaintiff would be required to retool, is of no moment. The same is true of any other company using a four-sided sign. Indeed, the Plaintiffs did attempt to acquire for themselves a monopoly on the four-sided sign, when they requested an exemption from the new rule.

The new way of doing business in the field of taxi roof advertising began of October 2011, pursuant to ***35 RCNY 67-16(B).*** Before that date, roof advertising appears to have been negotiated on an *ad hoc* basis, with applications being submitted to the Taxi and Limousine Commission, which in turn would lead to individual memoranda of understanding for each applicant. According to Defendant TLC, this procedure was changed in order to create a level playing for all businesses participating in the taxi roof arena. As mentioned above, this rule was enacted after public hearings. Presumably the Plaintiff knew of the hearings and was able to attend and be heard.

The complaint alleges five causes of action: (1) violation of the Donnelly Act (***GBL340, ET SEQ.***); (2) tortious interference with existing contracts; (3) tortious interference with potential contracts; (4) unfair competition and (5) conversion. For the reasons set forth below, the motions to dismiss the complaint must be and are granted, with the exception of the claim for conversion against the Clear Channel Defendants.

First and foremost, the claim against the City must be dismissed pursuant to Admin. Code 7-201, which requires a plaintiff to serve a notice of claim prior to the commencement of an action. In this case, there is no dispute that no notice of claim has been served. None of the claims in the complaint sounds in Civil Rights. No State or Federal statute is cited. The facts alleged do not support any civil rights claim.

Undermining all of the causes of action, is the lack of specificity. All of the claims are supported, both in the complaint, and in opposition to the motions to dismiss, by precatory

and conclusory language. First and foremost, there is no civil cause of action for conspiracy[*1766–68 ASSOCIATES, LP v. CITY OF NEW YORK*, 91 A.D.3d 519, 937 N.Y.S.2d 33, 2012 N.Y. Slip Op. 00296; *ZARABI v. INCORPORATED VILLAGE OF ROSLYN HARBOR*, 90 A.D.3d 1037, 936 N.Y.S.2d 220, 2011 N.Y. Slip Op. 09635], which seems to be the focus of the allegations against the Defendants here. Next, in order to successfully state a cause of action under the *DONNELLEY ACT*, a plaintiff is obligated to set forth some evidentiary facts.

In order to adequately plead a violation of the *DONNELLEY ACT* a plaintiff must "allege a conspiracy or a reciprocal relationship between two or more legal or economic entities, identify the relevant market affected, describe the nature and effect of the alleged conspiracy and the manner in which the economic impact of that conspiracy restrains trade in the market." [*SHAW v. CLUB MGRS. ASSN. OF AMERICA, INC.*, 84 A.D.3d 928, 929, 923 N.Y.S.2d 127 [2d Dept. 2011]. No such allegation has been sufficiently pled here. No individuals have been named, no reciprocal promises in restraint of trade have been alleged. Indeed, reading the complaint, in conjunction with all of the other submissions, leaves only the issue of expanding a market, not shrinking it.

Turning to the allegations of tortious inference, this requires a showing that the Defendants improperly interfered with "the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract.." [*GUARD-LIFE CORP. v. S. PARKER HARDWARE MFG. CORP.*, 50 N.Y.2d 183, 406 N.E.2d 445, 428 N.Y.S.2d 628]. Here, as with the *DONNELLY ACT* , except for conclusory statements, unsupported by any allegations of the exact statements made, or to whom, or by whom, the pleading requirements cannot be satisfied.

The same applies to the claim for tortious interference with a potential contract, in this case the alleged Disney contract. In order to show tortious interference with an existing contract, a plaintiff must "show more culpable conduct on the part of the defendant.. [G]reater protection is accorded an interest in an existing contract (as to which respect for individual contract rights outweighs the public benefit to be derived from unfettered competition) than to the less substantive, more speculative interest in a prospective relationship (as to which liability will be imposed only on proof of more culpable conduct on the part of the interferer)" [*GUARD–LIFE CORP. v. PARKER HARDWARE MFG. CORP.*, 50 N.Y.2d 183, 193, 428 N.Y.S.2d 628, 406 N.E.2d 445]. This has not even been outlined, factually, in either the complaint or the opposing papers. Actions which cannot be identified as "solely malicious," must then be wrongful [*GUARD–LIFE CORP.* , *supra*]. "Wrongful means" include "fraudulent representations, threats, or a violation of a duty of fidelity owed to the plaintiff by reason of a confidential relationship between the parties" [*JURLIQUE v. AUSTRAL BIOLAB PTY.*, 187 A.D.2d 637, 639, 590 N.Y.S.2d 235; see *GUARD–LIFE CORP. v. PARKER HARDWARE MFG. CORP.*, 50 N.Y.2d at 191, 428 N.Y.S.2d 628, 406 N.E.2d 445; *BGW DEV. CORP. v. MOUNT KISCO LODGE NO. 1552 OF THE BENEVOLENT & PROTECTIVE ORDER OF ELKS OF THE U.S. OF AM.*, 247 A.D.2d at 568, 669 N.Y.S.2d 56].

If the playing field is level, that is all roof top displays are limited to two sides, then

the contract, if at the point of execution, should not have been in jeopardy. The Plaintiff has not explained why or how the removal of the end display would have led to the cancellation of the contract. Any other suitor for the Disney account would have been limited to two sides, and would have had to start the design process from scratch, meaning that the Plaintiff was ahead of the competition. This allegation, based on the submissions, is a red herring. The claim of the Plaintiff is without sufficient factual representations, leaving only the conclusion without stating the basis for arriving at the conclusion. To the extent that the Plaintiff rests its claim on the allegation that Clear Channel was spreading roomers that the Plaintiff was using illegal rooftop displays after October 2007, this has the ring of truth, as the Taxi and Limousine Commission sent a letter to the Plaintiff in January 2008, referring to an October 2007 memorandum of understanding, and advising the Plaintiff that it was then in violation of the rule of the Commission. Therefore, any claim stemming from the alleged representations that the Plaintiff was in violation of TLC rules, is girded in the defense of truth.

Persuasion is not interference with a contract [*NBT BANCORP INC. v. FLEET/NORSTAR FINANCIAL GROUP, INC.*, 87 N.Y.2d 614, 664 N.E.2d 492, 641 N.Y.S.2d 581]. Thus, the claim for unfair competition must fail. Both sides had equal access to the Taxi and Limousine Commission to lobby for their preferred outcome, assuming that this was the case. The Defendant cannot be penalized for being persuasive.

On the issue of unfair competition, there is no inference, much less evidence, that Clear Channel had any confidential relationship with the Plaintiff. There is no misappropriation of any labor, skill or good will to support a claim for unfair competition [*VOLT DELTA RESOURCES LLC v. SOLEO COMMUNICATIONS INC.*, 11 Misc.3d 1071(A), 816 N.Y.S.2d 702 (Table), 2006 WL 800791 (N.Y.Sup.), 2006 N.Y. Slip Op. 50497(U), "A cause of action for unfair competition is generally predicated upon the alleged bad faith misappropriation of a commercial advantage belonging to another "by exploitation of proprietary information or trade secrets' " (Beverage Mktg. USA, Inc. v. South Beach Beverage Co., Inc., 20 AD3d 439, 440 [2d Dept 2005], quoting Eagle Comtronics, Inc. v. Pico Prods., Inc., 256 A.D.2d 1202, 1203 [4th Dept 1998], lv denied 688 N.Y.S.2d 372 {251 A.D.2d 1102} [1999]). Bad faith is an essential element of the cause of action (Eagle Comtronics, Inc., 256 A.D.2d at 1203; see also Empresa Cubana del Tabaco v. Culbro Corp., 399 F3d 462, 485 [2d Cir2005]). Defendant has failed to allege that plaintiff exploited any proprietary information or trade secrets."].

The motion by the City to dismiss the complaint is granted. The motion by the Clear Channel Defendants is granted as to the first four causes of action. The fifth, alleging conversion of property, may proceed.

This constitutes the decision and order of the Court.

GEOFFREY D. WRIGHT
A.J.S.C.

Dated: April 24, 2013