

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

TAXI TOURS INC.,

Plaintiff,

-against-

GO NEW YORK TOURS, INC.,

Defendant.

Index No. 653012/2019

I.A.S. Part 54

Hon. Jennifer G. Schechter, J.S.C.

**MEMORANDUM OF LAW IN
SUPPORT OF COUNTERCLAIM-
DEFENDANTS' MOTION TO
PRECLUDE THE EXPERT REPORT
AND TESTIMONY OF STEVEN M.
SHEFFIELD**

GO NEW YORK TOURS, INC.,

Counterclaim-
Plaintiff,

-against-

BIG BUS TOURS LIMITED, OPEN TOP
SIGHTSEEING USA, INC., TAXI TOURS,
INC., GO CITY LIMITED, GO CITY NORTH
AMERICA, LLC, GO CITY, INC., GRAY LINE
NEW YORK TOURS, INC., TWIN AMERICA,
LLC, and SIGHTSEEING PASS LLC,

Counterclaim-
Defendants.

Counterclaim-Defendants Open Top Sightseeing USA, Inc., Taxi Tours, Inc., Go City North America, LLC, and Go City Inc. (collectively, “**Counterclaim-Defendants**”), by their undersigned counsel, respectfully submit this memorandum of law in support of their motion for an order (a) excluding the expert report of Steven M. Sheffield dated April 27, 2023, proffered by counterclaim-plaintiff Go New York Tours, Inc. (“**Go New York**”) and precluding Go New York from proffering testimony by Mr. Sheffield in connection with any substantive motions or

at trial; and (b) granting all other relief to counterclaim-defendants as this Court deems just and proper.

Background

Go New York's third counterclaim alleges, in part, that Counterclaim-Defendants engaged in deceptive business practices in violation of N.Y. General Business Law Section 349 by posting fake *positive* online reviews of its hop-on / hop-off tour bus service on TripAdvisor and other travel review aggregation websites, and by posting fake *negative* reviews of Go New York's competing tour bus service on those websites—conduct that Go New York terms “astroturfing.” (Countercl.¹ ¶¶ 51-53, 79.) According to Go New York, Counterclaim-Defendants have directed the posting of fake consumer reviews on popular travel sites for the purpose of skewing its consumer ratings on those sites in its favor and to divert customers and sales from its competitors in the New York City hop-on, hop-off sightseeing tour bus market, including Go New York, to Big Bus.

(Countercl. ¶ 54.)

In discovery, one would have expected Go New York to produce copies of these alleged “fake” reviews, which comprise the fundamental basis of its “astroturfing” claim. Go New York did not do that. (Sartorius Aff. ¶¶ 5-6.) Instead, Go New York seeks to prove its claim by introducing two memoranda prepared in early-2020 by Risk Assistance Network + Exchange (“RANE”)—a consulting firm engaged by Go New York's counsel—prior to the filing of its counterclaims in this action in February 2020. (Sartorius Aff. ¶ 6.)

The two memos authored by RANE (the “**RANE Memos**”) purport to summarize RANE's “analysis” of online reviews of Go New York's and Big Bus's respective hop-on / hop-off tour bus services in New York City on TripAdvisor between 2013 and 2019. The RANE

¹ Citations to “Countercl.” refer to Go New York's Amended Verified Answer and Counterclaims dated May 28, 2021, and filed at NYSCEF Doc. No. [119](#).

Memos state that RANE “analyzed” 6,416 online reviews “from TripAdvisor, Yelp, and Groupon” to arrive at various “potential” conclusions drawn from various trends in the review data analyzed by RANE, including that various “anomalies” in the trends “may” be the result of a fake review “astroturfing” campaign by one of Go New York’s un-named competitors (while simultaneously acknowledging that it could also be the result of non-nefarious factors such as “increased tourist activity” in certain months as compared to others, or typical “competition in the industry”). (Sartorius Aff. Ex. B.)

As described below, Commercial Division Rule 13(c) contains a host of requirements that a party must meet before introducing expert testimony at trial. Among these requirements is the disclosure of a written expert report containing both “a complete statement of all opinions and the bases and the reasons for them” and “the data or other information considered by” the expert in forming his or her opinions. (Comm. Div. R. 13(c)(A), (B)). The rationale for these requirements is obvious: to test the reliability of an expert’s opinion, an adversary must not only have full disclosure of the expert’s opinions, but also the data and information upon which those opinions are based. Without the latter, it is virtually impossible to fully rebut the former.

Here, the Sheffield Report does not contain the review data and other information that purportedly form the basis of the opinions reflected in the RANE Memos, as required by Commercial Division Rule 13(c). That omission could easily be rectified by Go New York’s subsequent production of that material, but Go New York’s counsel recently advised that it has been deleted, is lost, or is otherwise no longer available to Mr. Sheffield. (Sartorius Aff. ¶ 12.) As Go New York would have it, Counterclaim-Defendants (and the factfinder) should take Mr. Sheffield at his word, that the various conclusions in the RANE Memos correctly reflect the data

and information relied upon by the author of the RANE Memos more than three years ago, even though that is now impossible to independently verify.

Because the Sheffield Report does not comply with Commercial Division Rule 13(c), and because that failure is prejudicial to Counterclaim-Defendants' ability to fully rebut Mr. Sheffield's purported expert opinions, Counterclaim-Defendants respectfully request that Mr. Sheffield's expert report should be excluded and Go New York should be precluded from proffering Mr. Sheffield's testimony in connection with any substantive motions or at trial.

Argument

THE SHEFFIELD REPORT DOES NOT COMPLY WITH COMMERCIAL DIVISION RULE 13(c) AND SHOULD BE PRECLUDED

Commercial Division Rule 13(c) ("Adherence to Discovery Schedule, Expert Disclosure") sets forth the requirements a party must satisfy to introduce expert testimony in actions assigned to the Commercial Division, such as this one. Among other things, this rule provides that expert disclosure "must" be accompanied by a written report, signed by the expert, that meets various requirements and contains certain specified material:

Unless otherwise stipulated or ordered by the court, expert disclosure must be accompanied by a written report, prepared and signed by the witness, if either (1) the witness is retained or specially employed to provide expert testimony in the case, or (2) the witness is a party's employee whose duties regularly involve giving expert testimony. **The report must contain:**

(A) **a complete statement of all opinions the witness will express and the basis and the reasons for them;**

(B) **the data or other information considered by the witness in forming the opinion(s);**

(C) any exhibits that will be used to summarize or support the opinion(s);

(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and

(F) a statement of the compensation to be paid to the witness for the study and testimony in the case.

The note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial.

(22 N.Y.C.R.R. 202.70, Rule 13(c)) (emphasis supplied).

A critical component of an expert's proffered testimony is his or her opinions. Accordingly, Rule 13(c) requires the written expert report to include "a complete statement of all opinions" that will be offered by the expert, as well as "the bases and reasons" for those opinions. (Comm. Div. R. 13(c)(A).)

Rule 13(c) also provides that the written report "must" contain "the data or other information considered by" the expert in forming his or her opinions. (Comm. Div. R. 13(c)(B)). The reason for this requirement is self-evident: the reliability of an expert's opinion is necessarily dependent on both (a) the accuracy and completeness of the underlying information upon which the opinion is based, as well as (b) the extent to which the assumptions and conclusions drawn from that information is warranted. Stated simply, to test (and rebut) an expert's opinion, an adverse party—as well as the factfinder—must know what information on which the expert claims to base his or her opinion.

Here, Go New York's "astroturfing" expert, Mr. Sheffield, purports to "adopt the substance and conclusions contained in [the RANE Memos]" as his formal expert report. (Sartorius Aff. Ex. B at p.2.) The "conclusions" contained in the RANE Memos² include:

² Although Mr. Sheffield refers to "conclusions" in the RANE Memos, this is a misnomer as the RANE Memos do not contain statements that can accurately be described as "conclusions." Instead, the key findings from the RANE Memos are nearly universally qualified with such

- “Research identified suspicious and historically anomalous negative review activity from April to November 2019 which may require further investigation” (Sartorius Aff. Ex. B at GNY000234);
- there were “three potential positive review campaigns by the client [*i.e.*, Go New York], as well as one potential negative review campaign by their [unidentified] competitor in 2019” (Sartorius Aff. Ex. B at GNY000234);
- “the [unidentified] competitor may have potentially been experimenting with purchasing negative reviews in sets of 5 in July 2018 and December 2018, prior to the larger summer campaign in 2019” (Sartorius Aff. Ex. B at GNY000234);
- “th[is] negative event corresponded to a sophisticated user profile, with 1-4 other reviews, the accounts would occasionally indicate their location” (Sartorius Aff. Ex. B at GNY000238);
- Big Bus’s TripAdvisor page reflected “[u]nusual 4- & 5-star volume and rating activity from September 2015 to June 2017 (Sartorius Aff. Ex. B at GNY000238);
- “[t]here is an unusual volume trend showing a substantial and steady decrease in the number peak summer user reviews on Big Bus’s TripAdvisor from July 2016 to July 2019” (Sartorius Aff. Ex. B at GNY000238); and
- an explanation for certain review trends identified by RANE “may be that Big Big [sic] engaged in a review purchasing in response to review purchases potentially conducted by TopView in 2015” (Sartorius Aff. Ex. B at GNY000239).

According to the RANE Memos, these “conclusions” were based on a “volumetric analysis” (Sartorius Aff. Ex. B at GNY000238) of data comprised of “6,416 reviews from Trip Advisor, Yelp, and Groupon” from an unstated period of time collected by RANE (Sartorius Aff. Ex. B at GNY000234). The RANE Memos report that this data was then “normalized” and unidentified “fluctuations” removed to create “forecasts,” presumably for the purpose of

words as “may,” “might,” “potential,” etc. Remarkably, the author of the RANE Memos acknowledges that the observations reflected in the RANE Memos are not “conclusions” at all: “Because it is possible that the signals we are detecting are the result of competition in the industry, we need more industry data to understand what is out of the ordinary and what is not. . . . The additional data will require more time to collect and analyze before we can confidently make new assertions.” (Sartorius Aff. Ex. B at GNY000239.)

identifying supposed “anomalies” in the data from which the author of the RANE Memos had drawn his or her conclusions. (Sartorius Aff. Ex. B at GNY000234.)

The Sheffield Report does not contain “the data or other information considered by the witness in forming” the opinions reflected in the RANE Memos—including the underlying review data, as well as other “forecasts” and “models” referenced in the RANE Memos—as required by Commercial Division Rule 13(c)(B). Counterclaim-Defendants have requested this data and information numerous times since Go New York first disclosed Mr. Sheffield as its “astroturfing” expert on March 31, 2023. (Sartorius Aff. ¶ 10.) In response, Go New York’s counsel advised each time—in substance—that Mr. Sheffield was trying to locate the underlying review data and other information relied upon for the various assertions in the RANE Memos. (Sartorius Aff. ¶ 11.)

Finally, on May 23, 2023, Go New York’s counsel reported that “RANE has not been able to find the actual online reviews relied upon for the conclusions stated in the reports from early 2020.” Go New York has likewise been unable to produce the “forecasts” and “models” utilized in creating the various tables and graphs reproduced in the RANE Memos, from which many of the assertions set forth in the RANE Memos were based. (Sartorius Aff. ¶ 12.)

Go New York’s inability to provide the data and information underlying the assertions in the RANE Memos, and adopted in the Sheffield Report, severely prejudices Counterclaim-Defendants’ ability to rebut those assertions. As described in the accompanying affidavit of Brett Hollenbeck, Counterclaim-Defendants’ rebuttal expert, the starting point for fully evaluating and rebutting the various opinions set forth in the RANE Memos and adopted by Mr. Sheffield is the underlying review data relied upon by the author of the RANE Memos. Without that data, Counterclaim-Defendants are unable to fully test those opinions, confirm whether those opinions

are warranted based on the data reviewed by the author of the RANE Memos, or proffer alternative explanations for the trends identified by the author of the RANE Memos in the review data he or she analyzed. Without access to the underlying review data, Counterclaim-Defendants' rebuttal expert cannot confirm whether any analysis was even conducted by the author of the RANE Memos, or whether the visual "trends" identified result from coding, transcription or other errors that might have inadvertently skewed the results reflected in the RANE Memos, or otherwise misrepresent the underlying data. (Hollenbeck Aff. ¶ 11.)

Similarly, without access to the various "analyses," "forecasts," and "models" referenced in the RANE Memos, Counterclaim-Defendants and their rebuttal expert cannot examine what assumptions were made in RANE's analysis and assess the impact of those assumptions on the results presented in the RANE Memos, or otherwise evaluate the reliability of the analysis conducted by the author of the RANE Memos in formulating his or her opinions. (Hollenbeck Aff. ¶ 12.)

Because the Sheffield Report fails to comply with Commercial Division Rule 13(c)(B), and the failures go to the heart of the opinions expressed in the Sheffield Report and the reliability of those opinions, Counterclaim-Defendants respectfully submit that the Sheffield Report should be excluded and that Go New York should be precluded from proffering Mr. Sheffield's testimony at trial or on any dispositive motion in this action.

Conclusion

For the foregoing reasons, counterclaim-defendants Open Top Sightseeing USA, Inc., Taxi Tours, Inc., Go City North America, LLC, and Go City Inc. respectively request that the Court grant this motion and direct entry of an order (a) excluding the expert report of Steven M. Sheffield dated April 27, 2023, proffered by counterclaim-plaintiff Go New York Tours, Inc., and precluding counterclaim-plaintiff from proffering testimony by Mr. Sheffield in connection

with any substantive motions or at trial; and (b) granting all other relief to counterclaim-defendants as this Court deems just and proper.

Dated: New York, New York
June 15, 2023

OLSHAN FROME WOLOSKY LLP

By: /s/ Peter M. Sartorius
Peter M. Sartorius
Natasha G. Menell
Attorneys for counterclaim-defendants
Open Top Sightseeing USA, Inc., Taxi
Tours, Inc., Go City North America,
LLC, and Go City Inc.
1325 Avenue of the Americas
New York, New York 10019
(212) 451-2300

CERTIFICATION

I hereby certify that the word count of this document complies with the word limits of 22 New York Codes, Rules and Regulations § 202.8-b. According to the word-processing system used to prepare this document, the total word count for all printed text exclusive of the material omitted under the aforementioned rule is 2,342 words.

Dated: New York, New York
June 15, 2023

/s/ Peter M. Sartorius

PETER M. SARTORIUS