

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

TAXI TOURS, INC.,

Plaintiff,

-against-

GO NEW YORK TOURS, INC.,

Defendant.

Index No. 653012/2019

Hon. Jennifer G. Schechter

GO NEW YORK TOURS, INC.,

Counterclaim-Plaintiff,

-against-

BIG BUS TOURS LIMITED, *et al.*,

Counterclaim-Defendants.

**MEMORANDUM OF LAW IN OPPOSITION
TO COUNTERCLAIM-DEFENDANTS'
MOTION TO PRECLUDE THE EXPERT
REPORT AND TESTIMONY OF STEVEN M.
SHEFFIELD AND IN SUPPORT OF
COUNTERCLAIM-PLAINTIFF'S CROSS-
MOTION TO CONDUCT THIRD-PARTY
DISCOVERY**

Defendant-Counterclaim Plaintiff Go New York Tours, Inc., (“Go New York”) by and through its undersigned counsel submits this Memorandum of Law in Opposition to Counterclaim-Defendants’ Motion to Preclude the Expert Report and Testimony of Steven M. Sheffield (“Motion to Preclude”) (NYSECF No. 290). Go New York also submits this Memorandum of Law in Support of its Cross-Motion to Conduct Third-Party Discovery.

The Motion to Preclude should be denied in its entirety because it is premature and this Court should not impose such a drastic sanction on Go New York without giving the parties the benefit of the full expert discovery process, including depositions, to fully assess the bases for his opinions. Mr. Sheffield’s opinions meet the basic requirements of Commercial Division Rule 13(c) governing expert reports. Indeed, the data underlying Mr. Sheffield’s report are no longer available to him and apparently no longer public, as discussed further below. However, for the

reasons below and set forth in the annexed Affidavit of Maurice Ross (Ross Aff.), this Court should grant Go New York's Cross-Motion to Conduct Third-Party Discovery to investigate whether the data still exist, could be recovered, or are missing due to some effort to scrub improper reviews from the Internet.

ARGUMENT

I. Mr. Sheffield's Report Should Not be Precluded Without Additional Discovery

At this juncture, it would be premature to preclude Mr. Sheffield's report and opinion before additional expert discovery takes place. Rule 13(c) sets forth the requirements for expert reports, and Mr. Sheffield's report complies substantially (and it was timely served). While there is little caselaw interpreting the Commercial Division's expert report requirements, the Appellate Division for the First Department recently declined to strike an expert opinion outright for failing to provide sufficient information about his underlying methodology. In *Munoz v. Rock Grp. NY Corp.*, 200 A.D.3d 486, 155 N.Y.S.3d 81 (1st Dep't 2021), the plaintiff sought to preclude the defendant's biomechanical engineering expert's opinion at trial because his expert disclosure did not sufficiently describe the underlying methodology and data used to reach that opinion. The court declined, explaining that, "[a]t this stage of the proceedings, . . . precluding the expert's testimony is too drastic a remedy." *Id.* (citing *Rutledge v. Petrocelli Elec. Co., Inc.*, 309 A.D.2d 506, 765 N.Y.S.2d 243 (1st Dep't 2003)). Instead, the court ordered further discovery into the underlying methodology and data. The Court should do the same here. Commercial Division Rule 13(c) also now permits depositions of expert witnesses, which would give Counterclaim-Defendants the opportunity to question Mr. Sheffield about his methodology. Therefore, this Court should deny the Motion to Preclude in its Entirety.

II. Go New York's Cross-Motion to Conduct Third-Party Discovery Should be Granted

In addition to denying Counterclaim-Defendants' Motion to Preclude, this Court should grant Go New York's Cross-Motion to Conduct Third-Party Discovery into the missing data underlying Mr. Sheffield's opinion.

As this Court is aware, this lawsuit began when Plaintiff-Counterclaim-Defendant Taxi Tours sued Go New York accusing Go New York of "astroturfing"—"procur[ing] fake, positive reviews to boost the online reputation of its business or products." Ross Aff. ¶ 2. Go New York decided to investigate these allegations for itself. As part of the investigation, in or about late 2019, Go New York contracted the Risk Assistance Network and Exchange ("RANE") to investigate anomalous reviews with respect to all parties. *Id.* ¶ 3. RANE created a team, overseen by Mr. Sheffield to produce a report detailing their findings regarding the Big Bus Defendants (the "RANE Report"). *Id.* In late 2019 and January 2020, the RANE team scraped contemporary reviews of Big Bus from review sites. *Id.* During this process, the team found an unusual pattern of positive reviews, suggesting astroturfing by Big Bus. *Id.* Go New York accordingly asserted Counterclaims alleging astroturfing by Big Bus. *Id.*

Go New York then decided to retain Mr. Sheffield as a testifying expert witness in this litigation, using the reports he created as the basis for his testimony. *Id.* ¶ 4. Go New York timely disclosed Mr. Sheffield as a testifying expert in accordance with Commercial Division Rule 13(b) on March 31, 2023 and indicated that Mr. Sheffield would be adopting the RANE reports as his expert reports on April 1, 2023. *Id.* After opposing counsel requested the reviews on which Mr. Sheffield's team relied when preparing the RANE Report, Mr. Sheffield informed counsel that after corporate mergers and personnel departures from RANE, the laptops that originally held the underlying reviews were lost. *See id.* ¶ 5, Ex. A. Critically, however, Mr.

Sheffield stated that could not re-search the reviews that he had previously found online because “[t]he offending posts were deleted from public view, **most likely by the users that created it.** The only way to recreate the reports and data is to subpoena the original posts from backups the platforms maintain.” *Id.* Ex. A (emphasis added).

Therefore, third party discovery of TripAdvisor, Yelp, and Groupon, the websites that contained the original reviews, is necessary to discover whether, why, and how the allegedly fake reviews were deleted. If indeed discovery reveals that individuals connected to Big Bus deleted the allegedly fake reviews, it would be unfair to preclude use of Mr. Sheffield’s reports when deliberate action by Big Bus precluded Sheffield from retrieving the underlying data.

CONCLUSION

For the forgoing reasons, this Court should deny Counterclaim-Defendants’ Motion to Preclude the Expert Report and Testimony of Steven M. Sheffield and grant Counterclaim-Plaintiffs’ Cross-Motion to Conduct Third Party Discovery.

Dated: New York, New York
July 10, 2023

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WORD COUNT CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Civil Rules For the Supreme Court & the County Court, I hereby certify that the foregoing memorandum of law, contains 906 words, exclusive of the caption and signature block according to the Microsoft Word word-processing system on which the affirmation was prepared.

Dated: New York, New York
July 10, 2023

/s/ Maurice Ross
Maurice Ross