

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.

GO NEW YORK TOURS, INC.,

Counterclaim-Plaintiff,

-against-

BIG BUS TOURS LIMITED, *et al.*,

Counterclaim-Defendants.

Index No. 653012/2019
Hon. Jennifer G. Schecter

**REPLY MEMORANDUM OF LAW IN
FURTHER 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 Reply Memorandum of Law in Further Support of its Cross-Motion to Conduct Third-Party Discovery (NYSCEF No. 293).

First, in their opposition to Go New York’s Cross-Motion, Counterclaim Defendants fundamentally misstate Go New York’s and its expert Mr. Sheffield’s position, and do not offer this Court any reason to deny their cross-motion for third-party discovery. Counterclaim Defendants are incorrect that “Go New York’s suggestion that Counterclaim-Defendants might have been involved in the deletion of those reviews is pure speculation.” NYSCEF No. 297, at 3. The review sites from which Go New York seeks discovery have unambiguous policies that they **do not remove** content that does not violate their terms of service. For example, Tripadvisor’s Terms of Service states that:

The Services may contain discussion forums, bulletin boards, review services, travel feeds or other forums in which you may post your Content, such as reviews of travel experiences, messages, materials or other items (“Interactive Areas”) . . . You understand that the Tripadvisor Companies do not edit or control the user messages posted to or distributed through the Services, including through any chat rooms, bulletin boards or other communications forums, and will not be in any way responsible or liable for such messaging. In particular, Tripadvisor **does not edit or control users’ Content that appears on the websites**. The Tripadvisor Companies nevertheless reserve the right to remove without notice any such messaging or other Content from the Services, where they believe in good faith that such Content breaches this Agreement...

Tripadvisor Terms of Service, https://tripadvisor.mediaroom.com/us-terms-of-use#OLE_LINK6 (last accessed July 17, 2023) (emphasis added). Thus, the reviews could have been removed only one of two ways—either the reviewers themselves removed those reviews, or Tripadvisor removed the reviews because Tripadvisor determined that those reviews violated the terms of service, *potentially because they themselves were fake*. *Id.* (stating that it is a violation of the terms of service to post content that is “false, unlawful, misleading...[or] fraudulent”). Either way, the mysterious removal of the reviews underlying Mr. Sheffield’s report merits investigation.

It is for this very same reason that Counterclaim Defendants’ assertion that “this is a problem **solely of Go New York’s own making . . .**” is false. Mr. Sheffield was entitled to the presumption that the reviews, if they were legitimate, would stay up, per the Tripadvisor Terms of Service. To the extent that Counterclaim Defendants argue that Go New York “could have scraped or made copies of any alleged ‘fake’ reviews from the online review platforms at any time during the three-plus years since Go New York asserted its counterclaims, but it chose not to . . .” (NYSCEF No. 297 at 6), such an action is also prohibited by the applicable terms of service: “For all Content other than your Content, you agree not to otherwise modify, copy, distribute, transmit... reproduce... additionally, you agree not to... reproduce, distribute, transmit...copy or otherwise exploit any Content of the Services, ...using any robot, spider, scraper or other

automated means or any manual process . . .” Tripadvisor Terms of Service, https://tripadvisor.mediaroom.com/us-terms-of-use#OLE_LINK6 (last accessed July 17, 2023). And if the subject reviews were not legitimate and removed for that reason or some other violation of the Terms of Service, then it would prove why this third-party discovery was necessary from the outset.

To the extent that Counterclaim Defendants take issue with Mr. Sheffield adopting an analysis performed under his supervision or that his statements regarding the mysterious disappearance of the reviews underlying his reports are “inadmissible hearsay” has no bearing on the Court’s analysis. As an expert witness, Mr. Sheffield is entitled to rely on what otherwise would be inadmissible hearsay in developing his opinions. *See People v. Goldstein*, 6 N.Y.3d 119, 124, 843 N.E.2d 727, 730 (2005) (explaining that an expert witness “may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion”). In adopting the RANE Report as his own expert testimony, Mr. Sheffield affirmatively stated that “I can attest to the accuracy and factual and evidentiary basis for these reports, as well as the research methodologies and protocols that were employed in the analysis of the enumerated websites and the published data. All ratings for both companies were accurately reflected in the reports presented by RANE.” NYSCEF No. 285, Expert Report of Steven Sheffield at 2.

Counterclaim Defendants also wrongly claim that any problems caused by the missing data cannot be cured by deposition, but that is not what Go New York suggests. Go New York has offered that Mr. Sheffield be produced for a deposition about his underlying methodology *and* is seeking third-party discovery to determine whether, why, and how the missing reviews no longer exist on the review sites. It is with this additional discovery that any purported defects in

Mr. Sheffield's report may be explored. And, it is for this reason that Go New York has said that Counterclaim Defendants' Motion to Preclude Mr. Sheffield is premature—Counterclaim Defendants have not articulated a basis to preclude Mr. Sheffield without any further discovery, and that Motion should be denied.

CONCLUSION

For the forgoing reasons, and those set forth in Counterclaim-Plaintiffs' Memorandum of Law in Support of Its Cross-Motion to Conduct Third-Party Discovery, this Court should grant Counterclaim-Plaintiffs' Cross-Motion to Conduct Third Party Discovery.

Dated: New York, New York
July 17, 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 1064 words, according to the Microsoft Word word-processing system on which the affirmation was prepared.

Dated: New York, New York
July 17, 2023

/s/ Maurice Ross
Maurice Ross