

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. Schecter, J.S.C. <u>REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF COUNTERCLAIM-DEFENDANTS' MOTION TO PRECLUDE THE EXPERT REPORT AND TESTIMONY OF STEVEN M. SHEFFIELD AND IN OPPOSITION TO GO NEW YORK'S CROSS- MOTION TO RE-OPEN FACT DISCOVERY</u>
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-Defendants¹, by their undersigned counsel, respectfully submit this reply memorandum of law in further support of their motion for an order excluding the expert report of Steven M. Sheffield dated April 27, 2023, proffered by counterclaim-plaintiff Go New York and precluding Go New York from proffering testimony by Mr. Sheffield in connection with any

¹ Capitalized terms herein have the same meaning as in "Counterclaim-Defendants' Memorandum of Law in Support of their Motion to Preclude the Expert Report and Testimony of Steven M. Sheffield," dated June 15, 2023 [NYSCEF Doc. No. [290](#)].

substantive motions or at trial; and in opposition to Go New York's cross-motion to re-open fact discovery.

Preliminary Statement

Go New York seeks to proffer the Sheffield Report as its sole evidentiary support for its “astroturfing” claim—in discovery, Go New York failed to identify or produce a single allegedly “fake” review posted by Counterclaim-Defendants or any other competitor. Although this is not surprising (because Counterclaim-Defendants never participated in any “astroturfing”), it is nevertheless remarkable for several reasons.

First, it is baffling that Go New York asserted and prosecuted its “astroturfing” claim in this action without basic evidence to support that claim, namely, the allegedly “fake” reviews.

Second, when Go New York failed to uncover any evidence of “astroturfing” by Counterclaim-Defendants during discovery in this action, it did not bother issuing non-party subpoenas to TripAdvisor or any of the other online review websites that Go New York claims Counterclaim-Defendants used to post the allegedly “fake” reviews.

Finally, because it does not have a shred of *actual* evidence to support its “astroturfing” claim, Go New York must resort to various assertions in the RANE Memos, the “substance and conclusions” of which Mr. Sheffield “adopts” as his expert report. But Mr. Sheffield did not author the RANE Memos, did not conduct the analysis described in the RANE Memos, and apparently does not possess or have access to any of the underlying review data or other “forecasts” and “models” analyzed by the author of the RANE Memos.

Against this backdrop, Counterclaim-Defendants seek to preclude the Sheffield Report. Go New York does not dispute that the Sheffield Report fails to comply with Commercial Division Rule 13(c)(B) because it does not include (and Go New York otherwise has not produced) the “data or other information” considered by the author of the RANE Memos in

arriving at the assertions set forth in those documents. Nor does Go New York seriously dispute that this omission prejudices Counterclaim-Defendants' ability to rebut those assertions. ***In fact, Go New York does not even dispute that preclusion of the Sheffield Report is warranted in these circumstances***—instead Go New York contends that preclusion is “premature.” (Opp. Mem. at p.1.)

Go New York’s opposition rests on two arguments, both of which are meritless.

Its first argument—that Mr. Sheffield is available for a deposition wherein he can describe his “methodology”—is a red herring. The problem is not only one of the methodology employed by the author of the RANE Memos. Instead, Counterclaim-Defendants require the underlying “data and information” against which that methodology was employed to evaluate the reliability of that methodology as well as the supposed analysis conducted by the author of the RANE Memos in formulating his or her opinions adopted by Mr. Sheffield.

Go New York’s second argument—that the Court should permit Go New York to serve subpoenas on TripAdvisor and other online review websites for documents and information that might reveal what users deleted the supposed “fake” reviews in the intervening three-plus years since the RANE Memos were drafted—is baseless. Go New York’s suggestion that Counterclaim-Defendants might have been involved in the deletion of those reviews is pure speculation, based on nothing more than Mr. Sheffield’s unverified hearsay.

For these reasons, Counterclaim-Defendants respectfully submit that the Sheffield Report should be precluded, Go New York should be precluded from proffering any expert opinion from Mr. Sheffield in this matter at trial or in connection with any dispositive motion, and that Go New York’s cross-motion to re-open discovery should be denied.

ARGUMENT

I. THE SHEFFIELD REPORT SHOULD BE PRECLUDED BECAUSE IT DOES NOT COMPLY WITH COMMERCIAL DIVISION RULE 13(c)(B)

Go New York does not dispute that the Sheffield Report fails to comply with Commercial Division Rule 13(c), which provides that a written expert report “must” contain “the data or other information considered by” the expert in forming his or her opinions. (Comm. Div. R. 13(c)(B)).

As described in Counterclaim-Defendants’ moving memorandum of law (Mem. at pp. 4-8), the author of the RANE Memos² claims to have analyzed “6,416 reviews from Trip Advisor,

² The Sheffield Report is peculiar, to say the least. 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.](#)) But Mr. Sheffield did not author the RANE Memos. Instead, he claims to have been “part of the team that conducted and supervised the research and deployment of software that led to the two RANE [Memos].” ([Sartorius Aff. Ex. B at p.1.](#))

In an email to Go New York’s counsel, attached to the affirmation of Go New York’s counsel in connection with Go New York’s opposition to this motion ([Ross Aff. Ex. A](#)), Mr. Sheffield reports that RANE did not even prepare the RANE Memos, but instead “contracted” the project to a third party called “Dunami Inc.” in late-2019 and January 2020. He also concedes that he did not conduct any of the supposed analyses underlying the RANE Memos, and cannot even validate that analysis without himself having access to the underlying review data—which is no longer available. According to Mr. Sheffield:

In late 2019, the works delivered in January of 2020 were contracted to Dunami Inc. *The analyses were conducted by a data analyst named Jake K. I was both aware of and consulted on his work. . . .*

The 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. *If that condition is met, I can apply the techniques that were employed by Jake K to validate and recreate his analysis.*

([Ross Aff. Ex. A](#)) (emphasis supplied).

Yelp, and Groupon” from an unstated period of time ([Sartorius Aff.³ Ex. B at GNY000234](#)), “normalized” that data to create “forecasts” and “models,” and from those “forecasts” and “models” identified supposed “anomalous events” which, according to the author of the RANE Memos, “may” be indicative of online review “astroturfing” by one or more of Go New York’s un-named competitors ([Sartorius Aff. Ex. B at GNY000234](#).) Mr. Sheffield purports to “adopt the substance and conclusions contained in [the RANE Memos]” as his formal expert report in this action. ([Sartorius Aff. Ex. B at p.2.](#))

But neither the Sheffield Report nor the RANE Memos contain, and Go New York has otherwise failed to produce, any of the “6,416 reviews” and other “forecasts” and “models” upon which the various conclusions in the RANE Memos are based.

The resulting unfair prejudice to Counterclaim-Defendants cannot be remedied by a deposition of Mr. Sheffield, as Go New York casually suggests. ([Opp. Mem. at p.2.](#)) This is not just a matter of learning more about the methodology employed by the author of the RANE Memos. Without the underlying review data, Counterclaim-Defendants cannot evaluate or test the assertions contained in the RANE Memos (and adopted by Mr. Sheffield), and a deposition of Mr. Sheffield would not change that. ([Sartorius Aff. Ex. B; Hollenbeck Aff. ¶ 11–12.](#))

Go New York’s reliance on [Munoz v. Rock Group NY Corp., 155 N.Y.S.3d 81 \(1st Dep’t 2021\)](#), is misplaced for several reasons. ([Opp. Mem. at p.2.](#)) In *Munoz*, the First Department determined that the I.A.S. Court correctly denied preclusion, but held that the I.A.S. Court should have ordered further disclosure, acknowledging that the defects in the subject expert disclosure could be cured. [Munoz, 155 N.Y.S.3d at 81](#). Here, by contrast, Go New York has

³ References to “Sartorius Aff.” are to the previously filed “Affirmation of Peter M. Sartorius in Support of Counterclaim-Defendants’ Motion to Preclude the Expert Report and Testimony of Steven M. Sheffield,” dated June 15, 2023. [[NYSECF Doc. No. 283.](#)]

confirmed that the underlying review data and other material relied upon by the author of the RANE Memo, and adopted by Mr. Sheffield, is lost and cannot be recreated. ([Opp. Mem. at p.3–4](#)) Moreover, whereas the expert report at issue in *Munoz* was found to be defective because it did not explain the expert’s “methodology”—a defect that could be remedied with additional discovery—the Sheffield Report is defective not only for that reason, but also because it does not contain (and Go New York has otherwise not produced) the underlying review data which has been destroyed.

As a backdrop to all of this, it should be noted that this is a problem **solely of Go New York's own making:**

- Go New York retained RANE in late-2019 to conduct its analysis, and RANE provided the RANE Memos in January and February 2020, mere days before Go New York incorporated RANE’s assertions in its counterclaims in this action on February 6, 2020 [NYSCEF Doc. No. [31](#)]. Go New York should have ensured that RANE retained the underlying review data, or even requested a copy of the data for itself, but apparently failed to do so.
- Go New York is well aware that it bears the burden of demonstrating that Counterclaim-Defendants planted “fake” reviews to prove its “astroturfing” claim. It 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.
- Go New York apparently failed to retain copies of any alleged “fake” reviews for use in this action, and has not produced a single alleged “fake” review in discovery (Sartorius Reply Aff.⁴ ¶ 4)—a fact which Go New York does not dispute.
- Go New York could have served non-party discovery on TripAdvisor and other online review platforms during fact discovery in this action to obtain copies of the alleged “fake” reviews, but they chose not to.

⁴ References to “Sartorius Reply Aff.” are to the “Affirmation of Peter Sartorius in Further Support of Counterclaim-Defendants’ Motion to Preclude the Expert Report and Testimony of Steven M. Sheffield and In Opposition to Go New York’s Cross-Motion to Re-Open Fact Discovery,” filed concurrently with this brief.

- Go New York deposed Counterclaim-Defendants' representatives, each of whom denied Counterclaim-Defendants' involvement in any supposed "fake" review campaign. (Sartorius Reply Aff. ¶ 3.)
- Instead of relying on the actual alleged "fake" reviews that form the basis of its "astroturfing" claim, Go New York instead elected to rely on the assertions contained in the RANE Memos to prove the existence of the "fake" reviews (Sartorius Reply Aff. ¶ 4)—a strategic decision which is problematic because their designated expert apparently is unable to recreate the analysis described in the RANE Memos due to Go New York's failure to retain copies of the underlying review data analyzed by the author of the RANE Memos.

For these reasons, the Sheffield Report should be precluded.

II. THERE IS NO BASIS TO REOPEN FACT DISCOVERY

Rather than owning up to its own failures in retaining the critical documents necessary to prove its "astroturfing" claim, Go New York asks for another bite at the discovery apple to serve subpoenas on TripAdvisor and other online review platforms seeking the review data that Go New York should have had all along. ([Opp. Mem. at 11.](#)) According to Mr. Sheffield, with that data, he might be able to "recreate" the analysis of "Jake K," who was apparently employed by a subcontractor of RANE and who actually performed the underlying analysis reflected in the RANE Memos. ([Ross Aff. Ex. A.](#)) This request is meritless and should be denied.

The parties engaged in significant document discovery in 2021 and 2022, and completed fact depositions in November 2022. (Sartorius Reply Aff. Ex. A at p.2.) The Court-ordered close of fact discovery was September 12, 2022 [NYSECF Doc. No. [265](#)], but the Court permitted the parties to take fact depositions through November 17, 2022, due to prior scheduling conflicts. (Sartorius Reply Aff. Ex. A at p.5-6.)

On December 7, 2022, and December 22, 2022, following the close of fact discovery, Go New York requested and granted permission to pursue additional *limited* fact discovery related to post-deposition document requests. (Sartorius Reply Aff. Ex. A at p.1-4.)

In February 2023, Go New York again sought to reopen fact discovery for the purpose of deposing certain additional officers and employees of Counterclaim-Defendants and its UK-parent company—a request which the Court rejected. [NYSCEF Doc. No. [276](#).]

Against this backdrop, Counterclaim-Defendants respectfully submit that Go New York’s latest request to re-open fact discovery should be rejected for two reasons.

First, Go New York proffers no excuse for why it waited until now—three years after it asserted its counterclaims, and eight months after the close of fact discovery—to seek review data from TripAdvisor and other online review platforms. Go New York’s failure to do so is astonishing given that these documents are critical evidence for its “astroturfing” claims, it apparently failed to retain copies of those reviews itself, and it is inconceivable that Go New York could sustain its burden of proof on that claim without that evidence.

Second, Go New York’s request to re-open fact discovery is premised on Mr. Sheffield’s assertion that the underlying review data has been deleted from TripAdvisor in the 3.5 years since the RANE Memos were generated. ([Opp. Mem. at 3-4.](#)) According to Go New York, “[this requested] 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.” ([Opp. Mem. at 4.](#))

Mr. Sheffield’s speculations about why the reviews were apparently deleted, and who was responsible for their deletion, is inadmissible hearsay, not to mention utterly baseless.

And Go New York’s suggestion that the requested discovery might possibly reveal that Counterclaim-Defendants were somehow responsible for the apparently deleted reviews—without proffering any evidence at all to support that accusation—reveals that Go New York’s request to reopen discovery is nothing more than a fishing expedition.

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 their 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; (b) denying Go New York's cross-motion to re-open fact discovery; and (c) granting all other relief to counterclaim-defendants as this Court deems just and proper.

Dated: New York, New York
July 14, 2023

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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 2,508 words.

Dated: New York, New York
 July 14, 2023

/s/ Peter M. Sartorius

PETER M. SARTORIUS