SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: **HON. JENNIFER G. SCHECTER** **PART 54**

Justice

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INDEX NO. 653012/2019

TAXI TOURS INC., OPEN TOP SIGHTSEEING USA, INC., BIG BUS TOURS LIMITED, GO CITY, INC, GO CITY NORTH AMERICA, LLC, GO CITY LIMITED,

MOTION SEQ. NO. 009

Plaintiffs,

- v -

DECISION + ORDER ON MOTION & X-MOTION

GO NEW YORK TOURS, INC., GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA, LLC, SIGHTSEEING PASS LLC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 282, 283, 284, 285, 286, 287, 288, 289, 290, 292, 293, 294, 295, 297, 298, 299, 300

were read on this motion to/for PRECLUDE.

The expert report of Steven M. Sheffield must be precluded (*see* Dkt. 285). Go New York Tours, Inc. (Go New York) did not produce the documents on which the report was based, i.e., the "6,416 reviews from Trip Advisor, Yelp, and Groupon" (*id.* at 7; *see* Comm. Div. Rule 13[c][b]). It is too late and likely impossible to do so now. Fact discovery is over, and in any event neither Go New York nor Sheffield even have the reviews. Remarkably, they did not save or maintain copies of the reviews and they are no longer available on the internet.

The court rejects Go New York's argument that "Sheffield was entitled to the presumption that the reviews, if they were legitimate, would stay up, per the Tripadvisor Terms of Service" (*see* Dkt. 300 at 2). Reliance on a website's terms of service is not remotely justifiable. It is unreasonable to assume that key evidence located online and hosted on a third-party website will necessarily remain accessible online forever. There are countless reasons why the information could become inaccessible. For instance, the company hosting the website could go out of business and shut it down or the website could get hacked. Everyone knows this. That is why reasonable attorneys understand the inherent risk that information on the internet that they do not control could become inaccessible at any time and take steps to preserve that evidence accordingly. There simply was no excuse for failing to do so here.

Indeed, the court does not understand how Go New York intends to prove that counterclaim-defendants posted the allegedly fake reviews and that they are deceptive under GBL § 649 without actually introducing them into evidence. Go New York did not

disclose those reviews during discovery and now there is no way they will be able to introduce them at trial (*see* Part Rule 31). It cannot seek to avoid this evidentiary problem by effectively seeking to admit the reviews through expert testimony. Nothing could possibly be more prejudicial than admitting core evidence that a defendant has not seen based only on testimony from an expert that did not even personally view it (*see* Dkt. 297 at 4 n 2).

Likewise, it would be highly prejudicial to permit a party to rely on an expert's evaluation of reviews where the adverse party cannot even verify what they actually say or who posted them. If Go New York wanted to rely on an expert report, it was incumbent upon it to maintain and produce all documents on which its expert relied. It recklessly failed to do so. Counterclaim-defendants cannot be subjected to the extreme prejudice of having to defend against a report without being able to verify the accuracy (or even the existence) of the evidence on which it relied.

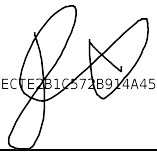
Go New York's argument that there is no New York state court case precluding an expert report under these circumstances is unavailing. The Appellate Division has held that courts may preclude expert testimony due to a "failure to comply with Commercial Division Rule 13[c]" (*Pope Invs. II LLC v Belmont Partners, LLC*, 214 AD3d 484, 485-86 [1st Dept 2023]). "This rule was promulgated in an effort to harmonize the disclosure rules of our state and federal courts" (*Singh v PGA Tour, Inc.*, 2017 WL 2152584, at *3 [Sup Ct, NY County May 17, 2017]; *see Howard Univ. v Borders*, 2021 WL 9563256, at *1 [SDNY Feb. 1, 2021], citing Fed. R. Civ. P. 26[a][2][B]). Preclusion would be warranted in federal court (*American Manufacturers Mut. Ins. Co. v Cosmec, Inc.*, 2008 WL 11517682, at *6 [SDNY Apr. 14, 2008] ["the appropriate sanction for a party's failure to comply with Rule 26(a)'s disclosure requirement ... is to preclude the noncomplying party from using the undisclosed evidence during motion practice or at trial"]). As discussed, Go New York's failure to disclose the reviews is not "substantially justified" or "harmless" (*see id.*). There is no way to "ensure that [counterclaim-defendants] would not be harmed by [Go New York's] nondisclosure" (*Hein v Cuprum, S.A., De C.V.*, 53 F Appx 134, 136 [2d Cir 2002]; *see Chen v New Trend Apparel, Inc.*, 8 F Supp 3d 406, 435-36 [SDNY 2014]). If Go New York or Sheffield still had the reviews, a lesser sanction due to belated production may have been warranted. But at this point there is no way to cure the prejudice of an expert relying on reviews that will not be in evidence.

But even in the absence of any Commercial-Division-rules precedent, no reasonable attorney should have assumed the court would permit an expert to opine on data when that data is not produced. If, after the close of fact discovery, an expert conducted a valuation based on financial records that were not produced during fact discovery and which were no longer available to the party or their expert, there is no question that the report would be precluded. That same result is warranted here.

A deposition asking the expert to explain his methodology cannot possibly cure this problem. Nor will the court permit fact discovery to be reopened at this late stage. If Go

New York wanted to take steps to collect the reviews through subpoenas it should have done so long ago (*see HAI-2, LLC v BlackRock Fin. Mgt., Inc.*, 213 AD3d 527, 528 [1st Dept 2023]).

Accordingly, it is ORDERED that counterclaim-defendants' motion to preclude the expert report and testimony of Steven M. Sheffield is GRANTED and Go New York will not be permitted to call Sheffield as an expert at trial. And it is further ORDERED that Go New York's cross-motion for leave to conduct additional non-party discovery is DENIED.



7/18/2023
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] **CASE DISPOSED** [X] **NON-FINAL DISPOSITION**

[ ] **GRANTED** [ ] **DENIED** [ ] **GRANTED IN PART** [X] **OTHER**