SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AIRBNB, INC., Petitioner,	:	Index No.: 5593-13
-against-	:	RJI No.: 01-13-111676
ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Respondent.	:	Judge Gerald W. Connolly

MEMORANDUM IN OPPOSITION TO AIRBNB, INC.'S MOTION TO QUASH AND IN SUPPORT OF THE ATTORNEY GENERAL'S CROSS-MOTION TO COMPEL RESPONSES TO AN INVESTIGATORY SUBPOENA

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The State of New York, by Attorney General Eric T. Schneiderman ("NYAG"), respectfully submits this memorandum of law in opposition to AirBnb Inc.'s ("AirBnb") motion to quash and/or modify an investigatory third-party subpoena served by NYAG, and in support of the NYAG's cross-motion pursuant to CPLR § 2308(b), for an order compelling AirBnb to comply with the NYAG's investigatory subpoena immediately upon service of notice of entry of this Court's order, or on such other date as the Court may direct.

PRELIMINARY STATEMENT

AirBnb readily admits that the data subpoenaed by the NYAG will identify illegal activity, yet AirBnb takes the extreme step of seeking to quash what is a narrowly-tailored law enforcement subpoena issued to the only source of that information. AirBnb does not begin to meet the heavy burden necessary to quash a subpoena issued pursuant to the NYAG's law enforcement powers. As such, its motion should be denied and it should be compelled immediately to produce the requested data.

AirBnb owns a website that allows owners/lessees of apartments ("Hosts") to rent their homes to tourists and other transients ("Guests") on a short-term basis for a fee. It is illegal for residents of Class A buildings to rent out their apartments for any period of time less than 30 days unless they are also present in the apartment. Law enforcement has received numerous

complaints and the NYAG has conducted its own investigation demonstrating that many Hosts are renting their apartments illegally. In addition, the NYAG's investigation has revealed that an extremely small percentage of individual Hosts actually collect the required hotel occupancy tax on behalf of the Guests who stay in their apartments.

AirBnb acknowledges that many of its users are violating the law. It has stated publically that it wants to work with law enforcement to "remove bad actors" and that "illegal hotel operators ... have no place on AirBnb." They have also admitted that "it makes sense for our community to pay hotel occupancy tax." And yet AirBnb has been wholly uncooperative, seeking to instead to step into the shoes of law enforcement and dictate the scope of the NYAG's investigation.

To fully uncover the scope of the illegal activity, the NYAG served an investigatory, third-party subpoena on AirBnb requesting a list of Hosts in New York, the gross revenue generated from the short-term rental of those apartments, and related information. The subpoena was purposefully narrowed to seek information only about Hosts that would be violating the law. The NYAG is entitled to a presumption of good faith in the issuance of subpoenas and recipients of subpoenas must comply unless the subpoena seeks documents that are "utterly irrelevant" to the inquiry. Given the evidence of numerous violations of law by the AirBnb Hosts and the NYAG's public purpose of enforcing the laws, NYAG easily meets this threshold.

In a desperate attempt to complicate what is a simple matter, AirBnb argues that the subpoena should be quashed because the New York State laws regarding short-term rentals and

hotel occupancy tax are "unconstitutionally vague." But, because the NYAG is not seeking to enforce these laws against AirBnb it has absolutely no standing to object to the laws. Moreover, the constitutionality of these laws is not ripe for determination until they are actually applied. Currently, no charges have been brought and there is no factual record for the Court to make the necessary "as-applied" determination. Moreover, the NYAG's powers of enforcement and potential legal claims extend *beyond* the zoning and tax laws and afford the NYAG additional bases for the production of the information.

AirBnb also argues that the subpoena is overly broad and unduly burdensome. However, it offers no proof demonstrating how it would be unduly burdensome. The majority of information requested by the NYAG, including Host name, address of accommodation, and dates/cost of rental is collected as part of the electronic booking process on AirBnb.com. AirBnb also argues that it does not have information as to whether the Hosts stayed at the apartment during the rental period; yet it previously offered to provide the NYAG with the top 40 Hosts by gross revenue, where the Host did not stay at the apartment. Indeed, when a Host posts his or her apartment on the website, he or she is required to indicate whether they are renting the "entire apartment" or a "shared room."

Finally, AirBnb argues that the subpoena seeks confidential and private information, including tax returns. AirBnb does not cite to any applicable laws that would protect the information sought, and completely ignores that the subpoena is requesting *business transaction* information, such as the number of times the Host rented his or her apartment and the gross

revenue derived. While the subpoena requests tax-related communications, it only seeks information regarding what AirBnb disclosed to the Host concerning the type of taxes they have to pay, and related correspondence. The NYAG does not seek, and the subpoena should not be interpreted as seeking, tax returns for Hosts.

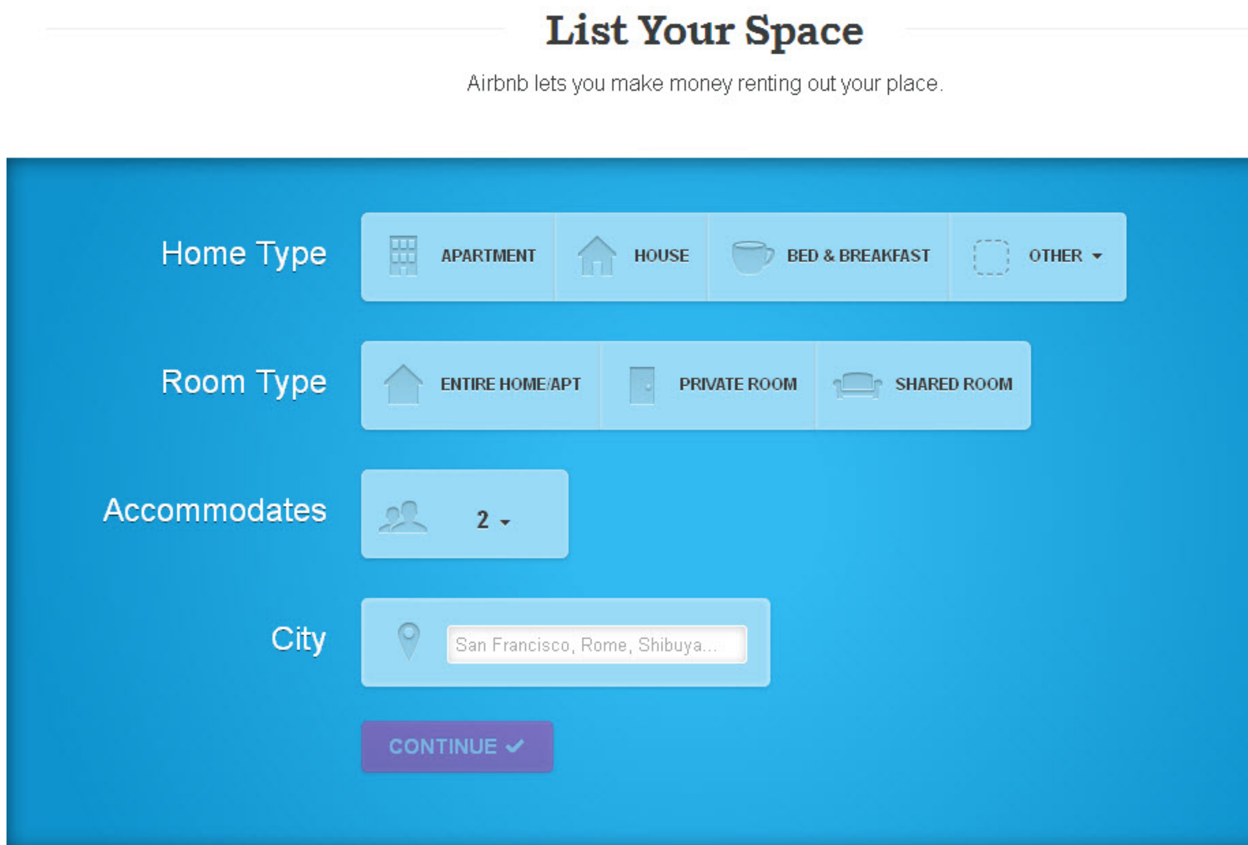
The only way that the NYAG can investigate the illegal activities of the Hosts is for AirBnb to provide the subpoenaed information. AirBnb should not be allowed to effectively close an investigation before it even starts, or otherwise shield its Hosts from illegal conduct. As set forth herein, this Court should deny AirBnb's motion to quash the subpoena, or any attempt to modify it, and grant the NYAG's cross-motion to compel, as well as costs incurred in connection with this motion.

FACTS

A. AirBnb's Business of Listing Apartments for Rent on the Internet

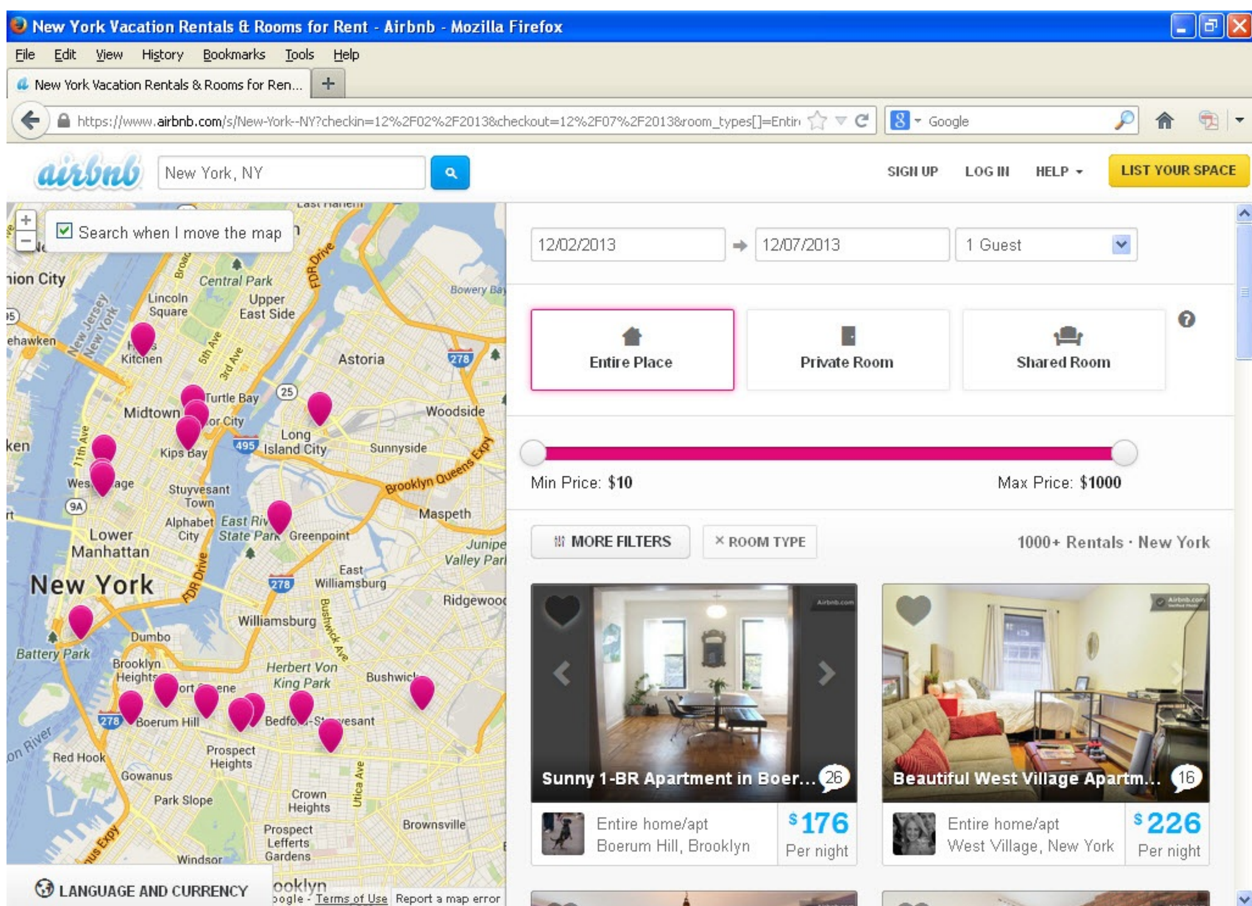
AirBnb owns a website located at <www.airbnb.com> ("AirBnb.com"), which provides an online platform for individuals, referred to as "Hosts," to rent their apartments to tourists and other third party transients. In New York City alone, AirBnb has more than 25,000 listings from over 15,000 Hosts. See Affidavit of Vanessa Ip, NYAG Investigator, dated November 7, 2013 ("Ip Affidavit") ¶ 6 (airbnb.com/locations/New-York). Brian Chesky, the founder and CEO of AirBnb.com, is quoted as saying the average New York City Host grosses $21,000 a year. Id. Ex. A.

To list on AirBnb.com, a Host must create an account and profile, select the property type (*e.g.,* "Apartment," "House," "Bed & Breakfast"), the room type (*e.g*., "Entire Home/Apt." or "Shared Room"), the number of people it accommodates (1 to 16+) and the host city. Below is a sample screen shot from AirBnb.com presented to proposed Hosts:



Id. ¶ 10. The Host completes the listing profile by determining availability and price, adding a description of the rental space, posting photos, and providing details, such as the number of bedrooms, beds, accessible bathrooms, amenities, and an address. Id.

To find a rental property on AirBnb.com, a prospective Guest must search the Host listings by providing a destination, check-in and check-out dates, and the number of guests. Id. ¶ 9. After the initial search, where a list of available rentals appears, the Guest can then refine the search by the aforementioned property and room type, size (*i.e.,* minimum number of bedrooms, bathrooms, and beds), neighborhood, amenities, and Host language spoken. Id. Below is a sample screen shot from AirBnb.com after the Guest conducts a search:



Id.

Hosts are provided clear notice that information about them will be provided in response to a government subpoena. The privacy policy on AirBnb.com provides:

> Compliance with Laws and Law Enforcement; Guarantee Program
>
> Airbnb cooperates with government and law enforcement officials and private parties to enforce and comply with the law. We will disclose any information about you to government or law enforcement officials or private parties as we, in our sole discretion, believe necessary or appropriate to respond to claims and legal process (including but not limited to subpoenas), to protect the property and rights of Airbnb or a third party, to protect the safety of the public or any person, or to prevent or stop activity we may consider to be, or to pose a risk of being, any illegal, unethical or legally actionable activity.
>
> We will disclose any information about you to government or law enforcement officials and to our insurance services providers as we, in our sole discretion, believe necessary or appropriate to administer our Airbnb Host Guarantee www.airbnb.com/terms, to protect the property and rights of Airbnb or a third party, to protect the safety of the public or any person, or to prevent or stop activity we may consider to be, or to pose a risk of being, any illegal, unethical or legally actionable activity.

Russell Aff. ¶ 20 and Ex. 10 (Airbnb Privacy Policy at https://www.airbnb.com/home/terms (last updated August 15, 2011)).

B. The Short-Term Zoning Laws

During the past decade, as residential apartment buildings have been increasingly utilized for short-term occupancy by tourists and other transient occupants, legislators and city and state agencies received growing numbers of complaints from their constituents. For example, between 2006 and 2012, the Mayor's Office of Special Enforcement reported over 2,500 complaints to its "311" line. See Russell Aff., Ex. 1 (Affidavit of Kathleen McGee, Director of the Mayor's

Office of Special Enforcement, ¶¶ 11-12, 15 ("McGee Aff.")). Many of the complaints arise in buildings that are in essence "illegal hotels," *i.e.*, buildings where most of the units are rented to transient guests.

The complaints reflect a variety of quality of life, safety and security problems for the permanent residents of these buildings, including:

> overcrowding of rooms with up to twelve bunk-beds in a room (McGee Aff., ¶ 13);
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> puddles of vomit and baggage strewn in hallways (Id. ¶ 12);
>
> increased pest infestation;
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> late night parties including "visitors" blasting late-night music (Id.; Ip. Aff. ¶ 5 and Ex. B); and
>
> arguments between a real estate agent and guests in Stuy Town. (Ip. Aff. ¶ 5 and Ex. B).

Unlike true hotels, apartment buildings do not have the security required to address this

conduct.[1]

In addition, the complaints reflect landlords and operators of these illegal hotels pressuring the permanent residents to vacate their apartments so they can pursue the more lucrative transient market. McGee Aff. ¶ 12. There are reports of landlords withholding heat and other basic services, verbal harassment and illegal eviction. Id.

Facing these growing concerns, in 2010, the New York State Legislature enacted Chapter 225 of the Laws of New York State of 2010 ("Chapter 225"). The law applies to "Class A" multiple dwellings, as defined under the New York Multiple Dwelling Law ("MDL") and the

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[1] Courts have acknowledged the safety and security problems associated with short-term rentals in proceedings to restrain apartment owners in New York City from renting out their apartments. For example, in The City of New York v. Smart Apartments LLC, Robert K.Y.Chan, Toshi Inc, No. 402255/12 (Sup. Ct. N.Y. Cnty, Feb. 13, 2013), the court wrote:

> The New York City Fire and Building Codes require transient residences to observe significantly higher fire safety standards than non-transient residences, ... the occupants of the former are less familiar than the latter with their surroundings, with fire evacuation procedures, etc.

Id. at 3. A copy of this decision is attached hereto as Exhibit A.

Similarly, in Board of Managers of the South Star v. Sophie Grishanova, No. 159101/2012 (Sup. Ct. N.Y. Cnty, Feb. 7, 2013), the court issued a temporary restraining order prohibiting the defendant from renting out her apartment amid concerns of safety and security:

> the unit owners were concerned about the risk to their families' safety and security posed by large numbers of strangers (none of whom had a background check) passing through the Unit and the Condominium's lobby and hallways on a routine basis. The New York state legislature even label the practice of furnishing short-term rentals in a residential business as "fundamentally unsafe" and "dangerous" because of the increased risk of fire causes by the presence of transients in such building…. the ongoing nuisance and interference with the unit owner's use and enjoyment of their property caused by defendant's illegal rooming house business was sufficient to establish the existence of irreparable harm.

Id., p. 3. A copy of this decision is also attached hereto as Exhibit A.

New York City Housing Maintenance Code ("HMC") (collectively, the "Short-Term Zoning Laws") and states:

> A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more.

New York Multiple Dwelling Law, Art. 1, § 4.a.8(a); New York City Administrative Code, tit. 27, Ch. 2, Subchap. 1, Art. 1 § 27-2004.8(a) (1980).[2] Thus, Class A dwellings may only house permanent residents – and to be a permanent resident one has to reside in the unit for 30 days or more. There is an exception allowing occupancy for fewer than 30 consecutive days when the permanent resident is present and has house guests or lawful boarders, roomers or lodgers. Section 304 of the MDL provides that '…every person who shall violate or assist in the violation of any provision of this chapter [of the MDL] shall be guilty of a misdemeanor…." Id. at § 304.

The stated purposes of Chapter 225 were to: (1) prevent building owners from circumventing the strict fire safety standards applicable to hotels;[3] (2) prevent "unfair competition to legitimate hotels that have made substantial investments to comply" with building

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[2] The New York City Environmental Control Board ruled that short-term occupancy in even one apartment in a Class A residential building is a violation of Section 28-118.3.2 of the Building Code. NYC v. 364 West 51st Street Associates LP, ECB Appeal No. 1200294 (July 26, 2012).

[3] A description of the reasons that buildings zoned for transient housing have stricter building and fire codes is provided in the Affidavit of James Colgate, Department of Buildings Assistant Commissioner of Technical Affairs and Code Development for the New York City Department of Buildings, ¶¶ 4-11, and in the Affidavit of Thomas Jensen, Chief of Fire Prevention for the New York City Fire Department supporting the City of New York's action against a short-term renting company in The City of New York v. Smart Apartments LLC, Robert K.Y.Chan, Toshi Inc, No. 402255/12 (Sup. Ct. N.Y. Cnty, Feb. 13, 2013), which are attached to the Russell Aff. as Exhs. 2 and 3 respectively.

codes; (3) protect the rights of permanent occupants who "must endure the inconvenience of hotel occupancy in their buildings;" and (4) preserve the supply of affordable permanent housing. See New York State Assembly Memorandum in Support of Legislation (S. 6873-B, 233rd Leg. (N.Y. 2010 (Sponsor's Memo) Bill No. A10008).

C. Apartment Buildings' Contractual Prohibitions on Short-Term Occupancy

Out of safety and security concerns similar to those underpinning the Short-Term Zoning Laws, many apartment buildings contractually prohibit short-term rentals by apartment-unit owners through by-laws and lease terms. With the growth of AirBnb.com and related websites, there has been an increase in legal actions to enjoin these prohibited rentals by building managers. See, e.g., Board of Managers of the South Star v. Sophie Grishanova, No. 159101/2012 (Sup. Ct. N.Y. Cnty Feb. 7, 2013)(Plaintiff building won temporary restraining order restraining the tenant from renting her apartment on a short-term basis because it violated the by-laws expressly limiting non-owner occupancy of a unit to legitimate family members, guests, and employees); 256 East 10th Street NY LLC v. Nicole Elizabeth Beall, No. 158392/2013 (Sup. Ct. N.Y. Cnty Sept. 13, 2013) (Plaintiff building filed for an injunction to enjoin the tenant from using the apartment as a hotel by listing it for rent on Airbnb.com, after receiving multiple complaints from tenants about the flow of improper residents); Board of Managers of Grammercy Condominium v. Blodget, No. 150977/2013 (Sup. Ct. N.Y. Cnty Jan. 23, 2013) (Plaintiff building, citing safety concerns, filed for a permanent injunction to prevent defendant individual tenant from continuing to rent out a unit in the condominium apartment as a

vacation rental for periods of less than thirty days in violation of the condominium's by-laws.); Olmstead Condo v. Samuels et al., No. 153779/2013 (Sup. Ct. N.Y. Cnty Apr. 25, 2013) (Plaintiff building filed to enjoin defendant tenants from renting out their apartment units to transient guests for periods shorter than thirty days in violation of condominium by-laws).[4]

D. The Hotel Occupancy Tax Law

In New York City, hotel rooms are subject to a 14.75% tax.[5] A hotel may include an apartment, boardinghouse, bungalow, or club, whether or not meals are served. Russell Aff., Ex. 4 (http://www.nyc.gov/html/dof/html/business/hotel.shtml); see also Ex. 5 (http://www.nyc.gov/html/dof/downloads/pdf/faq/hotel_occuupancy_tax.pdf) and Ex. 6 (NYC Department of Finance Memorandum dated August 23, 2011, where "the term hotel includes… bungalows, furnished apartments and other furnished living units intended for single family use (regardless of whether rentals are for one week or more, and regardless of whether meals, maid service or other common hotel services are provided)). The law further states that "the operator… shall be personally liable for the portion of the tax collected or required to be collected… ." NYC Admin. Code § 11-2502(f)(2). An "operator" is "[a]ny person operating a hotel in the city of New York, including but not limited to, the owner or proprietor of such premises, lessee,

[4] These complaints are attached hereto as Exhibit B.

[5] These rates are comprised of the following: 5.875% (New York City Hotel Room Occupancy Tax, NYC Admin. Code § 11-2502 (2012); 4.87% (New York City Sales Tax, NYC Admin. Code § 11-200i (2012); and 4.00% (New York State Sales Tax, N.Y. Tax Law § 1105(e)(2012). The New York State Hotel Unit Fee also applies a $1.50 per unit per day fee. N.Y. Tax Law § 1104 (2004).

sublesse, mortgagee in possession, licensee or any other person otherwise operating such hotel." Id. at § 11-2501(2).

The operator must collect the tax for all rental of apartments or rooms, except in the case of: (1) rental of only one room in an owner occupied home; (2) rentals for less than 14 days, or for fewer than three occasions during the year (for any number of total days); (3) "long-term leases", *i.e.* rentals for a continuous period of 180 consecutive days; and (4) rental of "bungalows" *outside the limits of New York City*.[6] Russell Aff., Ex. 6 (NYC Department of Finance Memorandum dated August 23, 2011, at 2).

In addition to the duty to collect and remit taxes and fees, every operator of a hotel must file a certificate of registration application with the New York City Department of Finance and obtain a certificate of authority empowering the operator to collect the hotel room occupancy tax See Affirmation of Randall Fox, Bureau Chief of the Taxpayer Protection Bureau, ¶ 2, ("Fox Aff.").

E. The New York State Attorney General's Investigation Reveals Compelling

[6]A "bungalow" is a "furnished living unit, designed for single-family occupancy." Russell Aff., Ex. 5 (http://www.nyc.gov/html/dof/downloads/pdf/faq/hotel_occuupancy_tax.pdf).

Evidence that AirBnb Hosts Are Violating Various Laws[7]

Amid a growing chorus of complaints from legislators, reports of illegality in newspapers and elsewhere, and in response to complaints filed with the NYAG and the Mayor's Office of Special Enforcement, the NYAG began investigating AirBnb and other short-term rental websites for their Hosts' violations of law.

1. AirBnb Hosts Violate the Short-Term Zoning Laws.

The NYAG conducted a number of searches on AirBnb.com which revealed that Hosts are violating the Short-Term Zoning Laws. For example, the results of a single search seeking non-shared apartments between December 2nd and December 7, 2013 in New York City, resulted in over 1000 units. Ip Aff. ¶ 9. On their face, these listings violate the Short-Term Zoning Laws because they are rentals for under 30 days in New York City in non-shared spaces. Unfortunately, the search results did not provide sufficient information to allow the NYAG to identify the Host, by name, address and/or the number of times they rent their apartment in a year. Indeed, absent a subpoena to AirBnb, the NYAG would have to enter into undercover transactions with each Host in order to merely identify them.

In fact, AirBnb freely admits they have Hosts that violate the Short-Term Zoning Law. Id. Ex. E ("Bad actors like illegal hotel operators and slumlords aren't part of our vision and have

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[7]Newspaper articles report that other jurisdictions are investigating AirBnb and its Hosts as well. *See, e.g.,* Quebec (See http://www.theglobeandmail.com/life/travel/quebec-cracks-down-on-airbnb/article12162984/); California (http://www.sfgate.com/realestate/article/Short-term-rentals-disrupting-SF-housing-market-3622832.php); Arizona and Louisiana (http://abcnews.go.com/Business/users-airbnb-breaking-law-critics-claim/story?id=20148183); Paris (http://www.nytimes.com/2010/07/07/business/global/07rent.html?_r=0); Amsterdam (http://www.itworld.com/it-management/340255/amsterdam-using-airbnb-listing-service-identify-illegal-rentals) and Spain (http://www.cyclefiesta.com/multimedia/article/is-airbnb-legal.htm.)

no place on AirBnb and we hope we can work with State leaders to weed out these individuals.”). Indeed, one third-party estimated that over 50% of the listings on AirBnb.com violate the Short-Term Zoning Laws. Russell Aff., Ex. 7 (*Airbnb's Growing Pains Mirrored in New York City, Where Half its Listings are Illegal Rentals*, SKIFT.COM, at http://skift.com/2013/01/07/airbnbs-growing-pains-mirrored-in-new-york-city-where-half-its-listings-are-illegal-rentals/ (Jan. 7, 2013)). However, the full extent of Hosts' illegal activities cannot be discerned until the requested data is produced and analyzed.

2. AirBnb Hosts Do Not Pay the Hotel Occupancy Tax

To determine the extent of Hosts' payment of HOT, the NYAG reviewed the NYC Department of Finance hotel certificates of registration and discovered fewer than 1300 entities that paid HOT in 2012. Fox Aff. ¶ 5. Moreover, the vast majority were well-known hotel companies, like Hilton and Hyatt, that cannot be expected to have used AirBnb's services. Id. ¶ 6. Furthermore, only 91 of the registrants listed themselves as “individuals,” and only 144 entries described their properties as “Apartments.” Id. ¶¶ 6, 7. Because AirBnb Hosts are required to file a certificate of registration in order to pay the HOT, even the most cursory review of the certificates of registration reveals that the vast majority of the over 15,000 AirBnB Hosts in New York City are not paying HOT. If AirBnb Hosts were paying the HOT, there would be

well in excess of 91 registrations to individuals, and more than 144 describing their properties as "Apartments."[8]

F. The NYAG Information Request to AirBnb

Given that the identity of the Hosts is not readily available from the website AirBnb.com, NYAG sought the information from AirBnb.[9]

1. The August 19, 2013 Letter Request

On or around August 12, 2013, the NYAG contacted AirBnb and requested that the company accept service of a third-party investigatory subpoena duces tecum. After some discussion with AirBnb's subsequently-hired outside counsel, AirBnb requested, and the NYAG agreed to serve, an information request via letter in lieu of a formal subpoena. AirBnb agreed it would later accept service of a subpoena if the parties were unable to agree on the production of information. Russell Aff. ¶¶ 11, 12. Furthermore, the parties agreed that if the NYAG was required to serve a subpoena for purposes of enforcement, it would date back to August 19, 2013, the date of the letter. Id.

2. Discussion Regarding Compliance by AirBnb with the August 19th Letter

Between August 20, 2013 and October 3, 2013, the NYAG engaged in discussions with AirBnb regarding the production of the information sought by its letter. These discussions

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[8] In a blog post dated October 3, 2013, the owner and founder of Airbnb.com, Brian Chesky, admitted that its Hosts should pay HOT: Our hosts are not hotels, but we believe that it makes sense for our community to pay occupancy tax, with limited exemptions for those who earn under certain thresholds. Ip Aff., Ex. D (Who we are, what we stand for, AIRBNB.COM, at http://blog.airbnb.com/who-we-are/).

[9] The NYAG also sent subpoenas to other companies that own websites that list apartments in New York for rent, including Homeaway.com and Roomarama.com.

included several in-person meetings with AirBnb and counsel, as well as several telephone calls. Id. ¶ 13. During these meetings, AirBnb indicated that it would not produce the information sought by NYAG because it would "hurt their business and upset their customers." Id. It never indicated that (i) the request was too burdensome or (ii) the NYAG sought information it did not have. It also never requested a confidentiality agreement. Id. ¶ 14.

3. The NYAG Subpoena Served on AirBnb

On October 4, 2013, in light of AirBnb's continuing refusal to produce any information or documents responsive to the NYAG's letter request, the NYAG served AirBnb's counsel with a subpoena. Id. ¶ 16. Per the prior agreement with AirBnb, the subpoena dated back to Auguest 19 and had a deadline of October 7, 2013. Id. Upon AirBnb's request, the return date was extended to October 9, 2013. Id. ¶ 17.

The subpoena, issued pursuant to Executive Law § 63(12), requested:

> 1. An Excel spreadsheet Identifying all Hosts that rent Accommodation(s) in New York State, including: (a) name, physical and email address, and other contact information; (b) Website user name; (c) address of the Accommodation(s) rented, including unit or apartment number; (d) the dates, duration of guest stay, and the rates charged for the rental of each associated Accommodation; (e) method of payment to Host including account information; and (f) total gross revenue per Host generated for the rental of the Accommodation(s) through Your Website. The Excel spreadsheet should be capable of being organized by gross revenue per Host and per Accommodation.
>
> 2. For each Host identified in response to Request No. 1, Documents sufficient to Identify all tax-related communications Your Website has had with the Host, including tax inquiries or tax document requests whether initiated by the Host or You.

The definition of “Accommodation” provided in the subpoena excluded shared spaces:

> “Accommodation” means the room or group of rooms which a Person or Entity offers to rent to a guest or guests in exchange for payment on Your Website, but not including where the Host stays at the Accommodation during the rental period.

Id. Ex. 9. The definition of “Accommodation” was specifically designed to exclude Hosts that were complying with the zoning laws by remaining present during the rental period. Thus, the subpoena did not seek information from Hosts that rented a “shared” room where the Host was present.

4. AirBnb’s Last-Minute Offer in Lieu of Compliance with the Subpoena

On October 8, 2013, after weeks of refusal and on the eve of the deadline, AirBnb offered to provide the identity of only the top 40 Hosts by gross revenue in non-shared spaces in lieu of compliance with the subpoena. These Hosts amounted to tens of million dollars in rental income to the Hosts over the last three years, reflecting millions in potential hotel tax liability alone. Id. ¶ 19. Because AirBnb has over 15,000 Hosts in New York, its proposal constituted an offer to provide only a fraction of 1% of the information sought by the subpoena, and was insufficient to reveal the extent of illegal use. Id.[10]

To date, AirBnb has refused to produce any of the information sought, even though it has publically acknowledged that there are Hosts on its website who do not pay the HOT and who

[10] Contrary to AirBnb’s argument (AirBnb Pet. ¶ 7), the NYAG did not reject their offer to enhance disclosure about the Host’s responsibility to pay HOT on AirBnb.com. The NYAG acknowledged that additional disclosure would be helpful in ensuring that their Hosts pay HOT and was willing to assist AirBnb in drafting these disclosures. Russell Aff., ¶ 15. However, the NYAG rejected any suggestion that the enhanced disclosures would be sufficient to address its concerns and that it would withdraw its request. Id.

violate zoning laws. The only way for the NYAG to identify Hosts who are violating Short-Term Zoning Laws, apartment building by-laws and other contractual prohibitions, and not paying HOT is for AirBnb to provide the information requested in the subpoena. Rather than comply with the subpoena, AirBnb filed its motion to quash.

ARGUMENT

POINT I

THE SUBPOENA IS WELL WITHIN THE ATTORNEY GENERAL'S BROAD INVESTIGATORY AUTHORITY

It is well-established that "[t]he Attorney-General has been given broad investigatory responsibilities to carry out his vital role to protect the public safety and welfare." LaRossa, Axenfeld & Mitchell v. Abrams, 62 N.Y.2d 583, 589 (1984). Accordingly, "[an] application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry." Hogan v. Cuomo, 67 A.D.3d 1144, 1145 (3d Dep't 2009) (quoting Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 331-332 (1988)(internal quotation marks omitted)); Matter of Abbruzzese v. N.Y. Temp. State Comm'n. On Lobby, 43 A.D.3d 518, 518 (3d Dep't 2007). "The person challenging a subpoena bears the burden of demonstrating a lack of authority, relevancy or factual basis for its issuance." Hogan, 67 A.D.3d at 1145 (citing Matter

of Dairymen's League Coop Assn. Murtagh, 274 A.D. 591, 595 (1948), aff'd, 299 N.Y. 634 (1949)).

There is a strong public interest "in maintaining the Attorney-General's investigatory powers free from unnecessary hindrance." LaRossa, 62 N.Y.2d at 589. That interest is reflected in the very bare-bones threshold showing that is needed to sustain an investigatory subpoena, lest "[i]nvestigation . . . be paralyzed." Matter of La Belle Creole Int'l, S.A. v. Attorney General, 10 N.Y.2d 192, 196-97 (1961) (quotation marks omitted). "The reason for this standard is obvious. An investigation would be stymied at the outset if law enforcement officials had to pinpoint exactly what the subpoenaed materials were expected to reveal." American Dental Coop., Inc. v. Attorney Gen. of New York, 127 A.D.2d 274, 283 (1st Dep't 1987).

Equally important, the NYAG enjoys a presumption of good faith in the discharge of his investigatory responsibilities. Hogan, 67 A.D.3d at 1145, citing Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327 at 332. There is no "probable cause" requirement; nor must the NYAG "disclose the details of his investigation" or "pinpoint exactly what the subpoenaed materials [are] expected to reveal." American Dental, 127 A.D.2d at 280, 283 (quoted in Pavillion Agency, Inc. v. Spitzer, 9 Misc. 3d 626, 632-633 (Sup. Ct. N.Y. Cnty 2005)). All the NYAG is required to show in support of a subpoena issued pursuant to his investigatory authority is that the records and books sought bear "a reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." LaBelle Creole, 10 N.Y.2d at 196. The test established in LaBelle Creole has been consistently applied by New York courts for over fifty years.

Here, the NYAG has uncontroverted authority to issue the subpoena pursuant to Executive Law § 63(12). According to the statute, the Attorney General may investigate "repeated fraudulent or illegal acts" where "illegal acts" include violations of any state or federal law, including criminal law, or any local law, or any regulation. N.Y. Exec. Law § 63(12). See State of New York v. Princess Prestige Co., Inc., 42 N.Y.2d 104, 107 (1977); People v. Empyre Inground Pools, Inc., 227 A.D.2d 731, 733 (3d Dep't 1996); Lefkowitz v. E.F.G. Baby Prod., 40 A.D.2d 364, 366 (3d Dep't 1973); Freedom Discount Corp. v. Korn, 28 A.D.2d 517, 517 (1st Dep't 1967) (violation of Penal Law §§ 1370 and 1371). The statute grants the Attorney General "broad" investigative authority to issue subpoenas to "conduct investigations into possible violations of the law." American Dental, 127 A.D.2d at 279; see Matter of Roemer v. Cuomo, 67 A.D.3d 1169, 1170(3d Dep't 2009) ("the [Attorney General] has authority to investigate potential fraud and illegality…").

The NYAG's factual basis for the investigation greatly exceeds the applicable standard. Hogan, 67 A.D.3d at 1146 ("as long as the futility of the process is not inevitable or obvious"). First, there is widespread evidence that a substantial number of Hosts violate the Short-Term Zoning Law, and by extension, their apartment building bylaws and related contractual prohibitions. Statement of Facts ("SOF") at 14. Indeed, AirBnb does not dispute that at least some of its Hosts violate the law. It has been estimated that over 50% of the listings on AirBnb.com violate the zoning laws. Id.

Second, there is substantial evidence that the majority of Hosts are not paying HOT. Id. at 15. AirBnb has more than 100 times as many Hosts in New York City than there are individuals registered to collect or pay the tax. Id. The only conclusion that can be drawn from this data is that the vast majority of Hosts are not paying the HOT. This fact alone more than justifies the subpoena.

AirBnb cannot escape its obligation to comply, nor carry its burden on this motion, by characterizing the NYAG inquiry as a "fishing expeditions." See AirBnb's "Memorandum of Law In Support of the Verified Petition," ("AirBnb's Br."), at 5. The cases to which it cites are inapposite because, unlike the present situation, they all involved circumstances where there was *no* factual basis to support an investigation (*e.g.*, Hill v. Cuomo, 2009 N.Y. Misc. LEXIS 2370 (Sup. Ct. Ulster Cnty Mar. 17, 2011) or *no* relationship between the documents sought and the investigation (*e.g.*, In Re Future Tech. Assoc. LLC v. Special Comm'r. of Investigation of the NY City School Dist., 2011 N.Y. Misc. LEXIS 1352 at 12 (Sup. Ct. N.Y. Cnty Mar. 17, 2011). See also In re Brodsky v. New York Yankees, 26 Misc. 3d 874, 886-887 (Sup. Ct. Albany Cnty 2009)).

Here, the NYAG seeks the identity of Hosts in New York, the address of the apartment(s) rented, the duration of the rental, and the gross revenue generated from the apartments, for only those apartments where the Host did not stay in the apartment during the rental period. SOF at 17. The information requested is directly related to the NYAG's investigation to determine who is in violation of the law. The data will identify the Hosts, the buildings they are renting in, and

the revenue they are generating from the rental, which are critical components of establishing violations of the Short-Term Zoning Laws, the apartment building bylaws, or failure to pay HOT. Such requests easily satisfy the applicable legal standards. Cf. Virag v. Hynes, 54 N.Y.2d 437, 442 (1981) (reasonable relationship requirement "is not very exacting"); LaBelle Creole, 10 N.Y. 2d at 196 (Unless a subpoena calls for "documents which are utterly irrelevant to any proper inquiry," or its "futility ... to uncover anything legitimate is inevitable or obvious," courts will sustain it.).[11] Indeed, the only way to obtain information about the legal violations is from AirBnb, as only AirBnb knows who its Hosts are (other than the Hosts themselves of which there are over 15,000). Thus, the NYAG's narrowly-tailored request to the only source of the actual information, is the antithesis of a fishing expedition.

Despite the NYAG's clear authority to issue a subpoena to AirBnb, the indisputable, widespread evidence of AirBnb Hosts' illegal conduct, the relevance of the information sought to the investigation, and repeated requests by the NYAG for the information, AirBnb has failed to fully comply with the subpoena and has failed to establish a legitimate basis for its lack of compliance.

POINT II

AIRBNB'S CONSTITUTIONAL ARGUMENTS ARE NOT JUSTICIABLE IN THIS PROCEEDING

[11] AirBnb also argues that the information should not be produced because the NYAG can only bring an action for failure to collect or pay a tax "upon the request of the tax commission," such as in the form of a referral, under Tax Law § 1141(a). AirBnb Br. at 6. The NYAG does not need such a referral because it can proceed under other laws, such as the False Claims Act, Executive Law § 63(12) or various criminal laws. Moreover, there is no reason to believe the tax commission would not provide a referral if the NYAG discovered tax law violations.

Lacking any proper basis for avoiding the subpoena, AirBnb seeks to shield its Hosts, including the admitted "bad actors," by launching a purported constitutional challenge to the Short-Term Zoning Laws and the HOT law. AirBnb Br. at 6-13. This effort must fail because AirBnb does not have standing to challenge the constitutionality of these laws and the issue is not otherwise ripe for determination.[12]

The NYAG is investigating AirBnb's Hosts, not AirBnb, for potential violations of law, including the Short-Term Zoning Laws and HOT. SOF at 16. A party does not have standing to challenge the constitutionality of a statute unless it is subjected to the provisions of that statute. People v. Nelson, 69 N.Y.2d 302, 308 (1987) (dismissing a void for vagueness challenge where the statute did not apply to the defendants, and "therefore, any element of vagueness in this statute has had no effect on these defendants and they have no standing to complain of it.").

For example, in Rent Stabilization Ass'n of the City of New York v. Dinkins, 5 F.3d 591 (2d Cir. 1993), the Second Circuit dismissed for lack of standing an "as applied" due process challenge to sections of New York City's rent stabilization laws, as brought by the Rent Stabilization Association on behalf of 25,000 New York City building owners. The plaintiff association lacked standing because the proceeding required participation of individual association members. The court ruled that to make the "as applied" determination it needed the individualized financial data of the building owners. Id. at 596.

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[12] In the event that the Court determines that it is appropriate to consider the constitutionality of the Short-Term Zoning Laws and HOT, the NYAG requests an additional briefing schedule to address those particular arguments.

Here, AirBnb seeks a similar "as applied" challenge to the constitutionality of certain laws as applied to its Hosts, some of which even AirBnb admits are violating the law. But, AirBnb is not a Host. Indeed, Airbnb is not even *an association representing the Hosts*, as in Dinkins, rendering their standing argument even more tangential. And even if it were an association, AirBnb has not developed the necessary record of individual data for an as-applied challenge to either statutory scheme. AirBnb has not provided the necessary material for the Court to even consider its argument. Indeed, AirBnb is refusing to produce any individual data and filed its motion in an effort to avoid doing so. As such, AirBnb has no standing to challenge the constitutionality of the laws.

Even is AirBnb did have standing, its constitutional challenge is premature. "To be ripe, there must be 'an actual controversy between genuine disputants with a stake in the outcome.'" Matter of Town of Riverhead v. Central Pine Barrens Joint Planning & Policy Commn., 71 A.D. 3d 679, 681 (2d Dep't 2010) (internal citations omitted). "To determine whether a matter is ripe for judicial review, it is necessary 'first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied'" Id. (quoting Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 519 (1986) (quoting Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158, 162 (1967)). Issues are not appropriate for judicial resolution if the agency has not arrived at a definitive position on the issue that inflicts an actual concrete injury or the resolution requires additional fact finding. Id.

Here, the issues are not appropriate for judicial resolution. First, the NYAG has not filed,

enforced or otherwise made a determination as to whether it will enforce the Short-Term Zoning Laws and HOT against a Host, including what AirBnb describes as "bad actors."

Second, as there has been no application of these laws to any Hosts, there is no set of facts before the Court to make the "as applied" decision. Arriaga v. Mukasey, 521 F.3d 219, 223 (2d Cir. 2008) ("[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statue is judged on an as-applied basis" quoting Maynard v. Cartwright, 486 U.S. 356, 361); Pharm. Inc. v. United States, 391 F.3d 377, 396 (2d Cir. 2004) ("a principle long 'embedded in the traditional rules governing constitutional adjudication… that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court'" quoting Parker v Levy, 417 U.S. 733, 759 (1974)); see also United States v. Rybicki, 354 F.3d 124, 129 (2d Cir. 2003) (acknowledging long-standing principle that a vagueness challenge to a statute that does not implicate First Amendment rights must be examined "in light of the specific facts of the case at hand and not with regard to the statute's facial validity").

As there is no factual record of any Host's rental conduct, AirBnb improperly asks the Court to guess at the rental conduct of "hypothetical" Hosts and then apply the law to decide whether it is vague for these theoretical Hosts. For these reasons, their "as applied" claims of vagueness must be dismissed. See also Barwick, 67 N.Y.2d 510 (dismissing "as applied" constitutional challenge because it requires careful examination of facts not before the court);

Matter of New York Blue Line Council, Inc. v Adirondack Park Agency, 86 A.D.3d 756, 761-62 (3d Dep't 2011) (holding that a pre-enforcement challenge was not ripe for review as "the alleged injuries are merely hypothetical at this time" and "the harm sought to be enjoined is contingent upon events which may not come to pass" and, thus, "the claim[s] … [are] nonjusticiable as wholly speculative and abstract.").

Finally, there is also no harm to AirBnb by failing to determine the constitutionality of the Short-Term Zoning Laws and HOT at this time. The subpoena is a third-party subpoena and AirBnb is not facing any enforcement risk. More importantly, AirBnb would *still* have to respond to the subpoena and produce the requested information, even if the Short-Term Zoning Laws and HOT were found unconstitutional, because the NYAG can proceed under *other* causes of action involving *other* laws. For example, the NYAG is investigating whether any Hosts are violating their buildings bylaws, leases or other contractual provisions in renting out their apartments to tourists and other transients. SOF at 11. If they are, the NYAG can pursue claims of persistent fraud and illegality under Executive Law § 63(12) or deceptive trade practices under GBL § 349 against the individual Hosts.[13] Thus, there can be no harm to AirBnb if the court were to pass on hearing their constitutional challenge to the Short-Term Zoning Laws and HOT

[13] For example, in The City of New York v. Smart Apartments LLC, Robert K.Y.Chan, Toshi Inc, No. 402255/12 (Sup. Ct. N.Y. Cnty Feb. 13, 2013), the court found a deceptive trade practice where the owner failed to disclose the legality and safety of the apartments. The court wrote "Whether or not, in our cynical age, most people would consider engaging in illegal activity as a plus, minus, or neutral, they have the right to know whether it is or is not." Id., at p. 4. Setting aside whether the rental violates the Short-Term Zoning Laws, tourists and other transients have a right to know whether the apartment they are renting violates the apartment buildings bylaws or lease terms of the Host, and thus whether they face the risk of removal for that violation. The failure to do so presents a cause of action for the NYAG.

if they are required to produce the data anyway.

Indeed, AirBnb and/or a Host will be given another opportunity to challenge constitutionality of the Short-Term Zoning and HOT Laws if the NYAG actually enforces these laws. See Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164–65 (1967) (holding that pre-enforcement challenge to regulation requiring manufacturers to allow inspections was unripe because there can be a later challenge to the regulation).[14]

POINT III

THE ATTORNEY GENERAL'S TARGETED SUBPOENA IS NOT OVERLY BROAD OR UNDULY BURDENSOME

For the first time since receiving the NYAG subpoena, AirBnb claims that responding to the subpoena would be unduly burdensome. AirBnb Br. at 13. This argument cannot be credited because AirBnb did not raise it previously, has provided no factual support for any claim of undue burden, and has demonstrated that it can, in fact, provide precisely the type of data that has been requested. Moreover, neither a claim of burden, nor requests for an amount of data that a subpoenaed party considers to be substantial, renders a subpoena invalid. See Hogan, 67 A.D. 3d at 1145-46; see also Matter of Sachs v. New York State Racing & Wagering Board, 227 A.D. 2d 802 (3d Dep't 1996).

[14] Note that the only New York court to address an argument that a hotel tax was unconstitutionally vague quickly dispensed of the argument. John Hunter v. Warren Cnty, 21 A.D.3d 622 (3d Dep't 2005).

A "party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome." Hire Counsel New York LLC v. Zelda Owens, Index No. 112012/2011, 2012 N.Y. Misc. LEXIS 3652, at *7 (Sup. Ct. N.Y. Cnty. July 24, 2012) (internal citations omitted). AirBnb has not satisfied this burden. It has provided no explanation that describe the steps that must be taken to respond, nor the time and cost that would be entailed. It offers only conclusory assertions.

Indeed, there is every reason to believe that AirBnb can provide the information that the NYAG has requested. The information in the spreadsheet requested by the NYAG (with Host name, address of accommodation, dates of stay, rates, method of payment and total revenue from rental) is collected *electronically* through Airbnb.com during the online listing and booking processes. SOF at 5-7. AirBnb generates 1099 income tax forms for its thousands upon thousands of Hosts in New York. In creating such forms, it must have identified its Hosts, their addresses, and the extent of their business through AirBnb.

The claims of undue burden are particularly inappropriate because the NYAG narrowly tailored its subpoena to seek only information necessary to establish legal violations. For example, the name and address of the Host are necessary to identify the hosts; the address of the accommodation is necessary to confirm Class A dwelling status and to identify specific units being rented (as opposed to where a Host may live permanently); the dates of stay are necessary to confirm the length of the stays under 30 days and whether there are more than 2 rental

transactions or rentals of more than 14 consecutive days for purpose of the HOT law; and total gross revenue is necessary to confirm HOT liability.

In an attempt to further narrow its request, NYAG only requested data where the Host was not present during the rental. AirBnb never indicated it could not produce this data; indeed, AirBnb previously offered to provide the top 40 Hosts by gross revenue, where the Host did not stay at the apartment. SOF at 18. Now, AirBnb argues that it does not have that information even though it previously offered such data, and in creating a listing on AirBnb.com, Hosts must explicitly provide whether the accommodation is an "entire apartment/home," or a "shared room." SOF at 5. As such, AirBnb is capable of distinguishing those listings that are for a "shared room." But, even if AirBnb does not have the information necessary to discern whether a Host was present, it should produce the requested information without that limitation. The NYAG will seek any additional information it needs to determine illegality through other sources, including the Hosts.[15]

To the extent the NYAG seeks tax communications, it only seeks what AirBnb has generally advised its Hosts, such as in form emails sent to all Hosts regarding their tax obligations, and not individual communications regarding specific Hosts. The NYAG is not seeking completed 1099 forms or any tax returns. Thus, compliance with this subpoena does not require a specific search for each Host, as AirBnb wrongly asserts.

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[15]AirBnb also argues that the subpoena requests information from Hosts that would be under no obligation to pay HOT. AirBnb's Br. at 14. AirBnb would limit the NYAG's investigation to tax violations where, as described above, NYAG has enforcement authority over numerous other laws the Hosts are potentially violating.

AirBnb's offer in support of its argument, Myerson v. Lentini Bros. Moving & Storage Co., 33 N.Y.2d 250 (1973), is inapposite. In Myerson, the Commissioner of the Department of Consumer Affairs of the City of New York investigated petitioner, a moving company, for misrepresenting the cost of its services, among other deceptive trade practices. The Commissioner issued a subpoena seeking "all books and records" from the petitioner. The court concluded that the limitless scope of the subpoena was not justified by a record of "isolated or rare complaints from disgruntled customers." Id. at 258. Unlike Myerson, the NYAG has an *overwhelming* factual basis to support its subpoena, with not only thousands of complaints to the NYAG and the Mayor's Office of Special Enforcement, but listings on AirBnb.com that facially violate the Short-Term Zoning Laws, and an overwhelming shortage of tax certificates of registrations which are required to pay HOT. SOF at 8-15. And the NYAG issued a tailored request seeking targeted information, not a subpoena for "all" documents. AirBnb has not sustained its burden that the subpoena was overbroad or unduly burdensome.

POINT IV

THE SUBPOENA SEEKS INFORMATION NOT PROTECTED FROM DISCLOSURE

AirBnb argues that the NYAG subpoena seeks "confidential, private information" from AirBnb Hosts. AirBnb Br. at 16. However, it provides no cases and no other law that categorize the information requested as "confidential" or "private" or otherwise dictates that it is the kind of information that is protected from law enforcement subpoenas. While it does cite a few cases

that tax returns are protected in some circumstances, they are inapplicable because the NYAG is not seeking that information.

The NYAG subpoena (Request No. 1) seeks information pertaining to the business transactions between AirBnb and its Hosts. In particular, it seeks the following information about Hosts: "(a) name, physical and email address, and other contact information; (b) Website user name; (c) address of the Accommodation(s) rented, including unit or apartment number; (d) the dates, duration of guest stay, and the rates charged for the rental of each associated Accommodation; (e) method of payment to Host including account information;[16] and (f) total gross revenue per Host generated for the rental of the Accommodation(s) through Your Website." SOF at 17. It is well-established that information conveyed in the ordinary course of business, including apartment rental information, is readily discoverable. See, e.g., Wiener v. Abrams, 119 Misc. 2d 970, 975 (Sup. Ct. Kings Cnty. 1983) (upholding NYAG subpoena in investigation into petitioner building owner's violation of rent stabilization laws and compelling production of building addresses and records including rental histories of individual units).

AirBnb has not shown – nor can it – that the information sought should be protected from disclosure to law enforcement agencies. AirBnb relies heavily on In re Pavillion Agency Inc. v. Spitzer, 9 Misc. 3d 626 (Sup. Ct. N.Y. Cnty. 2005), where the NYAG served a subpoena on a

[16] The subpoena seeks "bank account information" to identify "dummy profiles," or profiles that may appear to be operated by several independent Airbnb users, but are in fact operated by a single user, or a coordinated network of users. Bank account information would provide the NYAG with the ability to cross-reference apartment addresses with requested account numbers, rather than with user profiles, which as stated, are not necessarily indicative of a user's identity or an accommodation's owner. Nevertheless, the court may deem it appropriate that account information be partially redacted to the "last four digits" or similar format. The NYAG does not seek credit card information.

domestic worker referral service as part of an investigation into violations of, *inter alia*, the Human Rights Law, Executive Law § 292(6). AirBnb Br. at 17. The Human Rights Law prohibits a broad range of discriminatory conduct, but it does not apply to domestic servants, as the Legislature "never intended 'to extend its reach into private homes and to subject private employment relationships of the most personal kind to governmental control.'" In re Pavillion Agency Inc., 9 Misc. 3d at 631 (quoting Matter of Thomas v. Dosberg, 249 A.D.2d 999, 1000 (4th Dep't 1998)). The court upheld the majority of the NYAG subpoena request, including requiring the production of the names and addresses of the applicants, except to the extent it sought information about the identity of prospective employers of the domestic servants. Id. at 633-34.

Contrary to AirBnb's arguments, In re Pavillion does not offer broad confidentiality to client records. The court refused to allow production of just one category of information, related to prospective employers, only within the context of the Human Rights Law and its legislative intent. Here, neither the zoning laws nor HOT exempt any category of information from enforcement. Thus, there is no legal basis to withhold the information from the NYAG.

Finally, AirBnb argues that tax secrecy laws that apply to tax returns can somehow be used to shield it from disclosing business transaction information that are not tax returns.[17] AirBnb Br. at 17. The NYAG subpoena Request No. 2 seeks "documents sufficient to Identify all tax-related communications Your Website has had with the Host, including tax inquiries or tax

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[17] See Tax Law § 1146(a) (sales and compensating tax returns to be secret); N.Y.C. Admin Code § 11-2516 (hotel occupancy tax returns to be secret); Wonder Works Const. Corp. v. Seery, Index No. 100096/2010, 2011 N.Y. Misc. LEXIS 4833, at *4 (Sup. Ct. N.Y. Cnty. Oct. 12, 2011) (tax return treatment under §1146(a)); New York State Dep't Taxation & Fin. v. New York State Dep't of Law, 44 N.Y.2d 575, 579 (1978) (same); People v. Wedelstaedt, 77 Misc. 2d 918, 920 (Sup. Ct. Bronx Cnty. 1974) (same).

document requests whether initiated by the Host or You." SOF at 17. Contrary to AirBnb's characterization, the NYAG does not seek tax returns or 1099s for individual Hosts. AirBnb Br. at 17. (To the extent that the NYAG's subpoena could be interpreted to request tax returns, the NYAG respectfully requests modification of those sections of the subpoena so as to avoid disclosure of any actual tax returns.) The NYAG seeks AirBnb *form* communications to Hosts regarding what taxes a Host must pay or what tax forms must be filled out. The NYAG does not seek individual Host-specific communications. These form communications are not afforded special protection and the fact that the subpoena requests such information is not a ground to quash. Thus, AirBnb offers no reason why New York's policy of liberal discovery should prevent disclosure of what AirBnb tells its Hosts about taxes on a uniform basis.

CONCLUSION

For all the foregoing reasons, the Court should deny AirBnb's motion to quash and grant the NYAG's motion to compel compliance with the subpoena.

Dated: New York, New York
November 8, 2013

Respectfully submitted,

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