

Matter of City of New York v Airbnb, Inc.
2019 NY Slip Op 31377(U)
May 16, 2019
Supreme Court, New York County
Docket Number: 451409/2018
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JAMES E. d'AUGUSTE
Justice

PART 55

THE CITY OF NEW YORK

INDEX NO. 451409/2018

-v-

MOTION DATE _____

AIR BNB, INC.

MOTION SEQ. NO. 001

Corrected

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

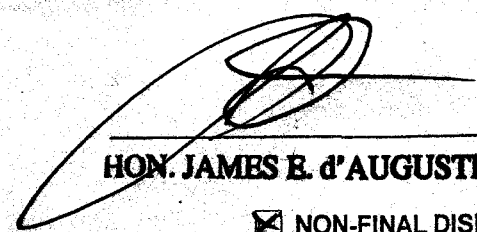
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/16/19


_____, J.S.C.
HON. JAMES E. d'AUGUSTE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X

In the Matter of the Application of

THE CITY OF NEW YORK,
Petitioner,

-against-

AIRBNB, INC.,
Respondent.

-----X

In the Matter of the Application of

THE CITY OF NEW YORK,
Petitioner,

-against-

AIRBNB, INC.,
Respondent.

-----X

In the Matter of the Application of

AIRBNB, INC.,
Petitioner,

-against-

CITY OF NEW YORK,
Respondent.

-----X

In the Matter of the Application of

AIRBNB, INC.,
Petitioner,

-against-

CITY OF NEW YORK,
Respondent.

-----X

Hon. James E. d'Auguste

DECISION AND ORDER

Index No. 451409/2018
Mot. Seq. No. 001

Index No. 451582/2018
Mot. Seq. No. 001

Index No. 157516/2018
UNDER SEAL
Mot. Seq. No. 001

Index No. 157517/2018
UNDER SEAL
Mot. Seq. No. 001

In the above-captioned special proceedings, which are hereby consolidated for disposition with respect to Motion Sequence Nos. 001, the City of New York (“City”), through the New York City Mayor’s Office of Special Enforcement (“OSE”), issued subpoenas *duces tecum* (collectively, the “Subpoenas”) to Airbnb, Inc. (“Airbnb”), pursuant to Chapter 396 of the Laws of 2016, which prohibits the advertising of “class A” multiple dwelling units for the occupancy or use of a term shorter than thirty (30) days.¹ The Subpoenas seek information that the City asserts is reasonably related to both its investigation of the purported illegal use and occupancy of permanent residences in multiple properties in Manhattan, Brooklyn, and Queens that have rentals advertised on Airbnb (the “Subject Buildings”) and to the public purpose of preventing the hazardous building conditions created by such illegal transient rentals. The City seeks an order, pursuant to the New York Civil Practice Law and Rules (“CPLR”) 2308(b) and New York Judiciary Law (“Judiciary Law”) Section 2-b(3), (1) finding that the Subpoenas issued by OSE seeking records from Airbnb

¹ Chapter 396 of the Laws of 2016 is codified, in relevant part, as Section 121 of the New York Multiple Dwelling Law (“MDL”) and Section 27-287.1 of the Administrative Code of the City of New York (“Administrative Code” or “Admin. Code”). Both provisions state that “[i]t shall be unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate subdivision eight of Section four of the multiple dwelling law defining a ‘class A’ multiple dwelling as a multiple dwelling that is occupied for permanent residence purposes.” Admin. Code § 27-287.1(1); *see also* MDL § 121(1) (same).

For completeness, a “class A” multiple dwelling is statutorily defined, with certain permitted uses not relevant herein, as the following:

A “class A” multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. This class shall include tenements, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, garden-type maisonette dwelling projects, and all other multiple dwellings except class B multiple dwellings. 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 and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit.

MDL § 4.8(a)

regarding illegal transient hotel activity at the Subject Buildings were authorized; (2) directing Airbnb to comply with the Subpoenas; (3) imposing costs and penalties as provided by CPLR 2308(b); and (4) granting such other and further relief as this Court deems just and proper. Airbnb seeks an order, pursuant to CPLR 2304, quashing or modifying the Subpoenas.

Background

The basis for the four petitions at issue herein is that the City, acting through OSE, “is engaged in efforts to find and stop illegal conversions of permanent residences in New York City into “ersatz” or “faux” hotels that deplete housing stock for New Yorkers, pose fire and building safety risks, and deceive consumers.” Index No. 451409/2018, NYSCEF Doc. No. 1, ¶ 1; Index No. 451582/2018, NYSCEF Doc. No. 1, ¶ 1 (the “City’s Petitions”).² This is consistent with the principal work of OSE—to determine whether buildings in New York City “are being used to perpetrate violations of state and local laws and regulations that protect the livability of communities, promote safety of guests and residents, and protect consumers.” *Id.*, ¶ 23. To this end, OSE has been conducting investigations (collectively, the “Investigation”) “to identify and halt the illegal use and occupancy of dwellings in [the Subject Buildings], and identify those wrongdoers who have taken permanent housing stock out of the market to advance their illegal business activity.” Index No. 451582/2018, NYSCEF Doc. No. 1, ¶ 2; *see also* Index No. 451582/2018, NYSCEF Doc. No. 1, ¶ 1. The Investigation has allegedly uncovered illegal transient use at each of the Subject Buildings, which have been unlawfully advertised on Airbnb.

² OSE is a city agency created under Mayoral Executive Order No. 96 of 2006 (“Executive Order No. 96”), to “address issues and combat adverse conditions that can impact quality of life, including those that threaten public safety, community livability and property values and can lead to serious crime.” Index No. 451409/2018, NYSCEF Doc. No. 1, ¶ 19. The City contends that, as supported by the text of Executive Order No. 96, the above adverse conditions “have historically been associated [with] apartment buildings that have been converted into hotels.” *Id.*; *see also* Index No. 451409/2018, NYSCEF Doc. No. 6. Executive Order No. 96 was later supplemented by Mayoral Executive Order No. 22 in 2016 to direct OSE to enforce “provisions of the Multiple Dwelling Law and the New York City Administrative Code prohibiting the advertisement of certain unlawful occupancies.” Index No. 451409/2018, NYSCEF Doc. No. 1, ¶ 21.

Id., ¶ 3.³

The Investigation has thus far resulted in the commencement of multiple actions pending before this Court, including the following actions: *City of New York v. Big Apple Management, LLC, et al.*, Index No. 451031/2018 (the “*Big Apple* litigation”),⁴ and *City of New York v. Pavlenok, et al.*, Index No. 451832/2018 (the “*Pavlenok* litigation”). The proceeding captioned herein as Index No. 451409/2018 (“Subpoena 1”) requests documents and information related to buildings that are the subject of the *Big Apple* litigation. The proceeding captioned herein as Index No. 451582/2018 (“Subpoena 2”) requests documents and information related to buildings that are the subject of the *Pavlenok* litigation.

The proceedings captioned herein as Index No. 157516/2018 (“Subpoena 3”) and Index No. 157517/2018 (“Subpoena 4”) requests documents and information related to buildings that are not the subjects of litigation at this time but are being investigated for illegal transient use and occupancy. In regard to the buildings that are the subjects of Subpoenas 3 and 4, the Investigation has resulted in the issuance of non-disclosure orders by the Criminal Term of this Court and, as a result, the two proceedings captioned herein as Index Nos. 157516/2018 and 157517/2018 are under seal.

³ Airbnb is a foreign corporation authorized to do business in New York that operates an online marketplace and hospitality service for people to list apartments for other individuals to book as accommodations. *See* Index No. 451409/2018, NYSCEF Doc. No. 1, ¶¶ 13, 27.

⁴ This action was initiated by the City against the *in rem* Subject Buildings and their owners and operators, known and unknown, to halt the illegal and unsafe short-term rentals that had allegedly been continuing unabated for seven (7) years despite administrative enforcement action. *See* Index No. 451409/2018, NYSCEF Doc. No. 11. In that action, the City moved for a temporary restraining order and preliminary injunction, detailing the legal and factual issues associated with the illegal use of units in the Subject Buildings for short-term occupancy. Index No. 451409/2018, NYSCEF Doc. Nos. 12, 13. On June 6, 2018, this Court issued a temporary restraining order in this matter directing the defendants to halt their advertising, offering, use, and occupancy of illegal transient rentals in the Subject Buildings. Index No. 451409/2018, NYSCEF Doc. No. 14. On April 9, 2019, this Court issued a preliminary injunction, which was entered on April 18, 2019. Index No. 451031/2018, NYSCEF Doc. No. 193.

The City alleges that information obtained from the Investigation indicates that multiple “class A” apartments in each of the Subject Buildings have been illegally advertised on Airbnb’s internet platform for transient use or occupancy in violation of state and local building and fire safety codes, as well as consumer protection laws. Specifically, the City’s petitions assert that the Investigation has uncovered that permanent dwelling units at the Subject Buildings have been regularly advertised on Airbnb for short-term stays of less than thirty (30) days. Index No. 451409/2018, NYSCEF Doc. No. 1, ¶ 37; Index No. 451582/2018, NYSCEF Doc. No. 1, ¶ 39. In one instance, the Investigation uncovered “that nearly non-stop unlawful short-term rentals have been taking place in at least 26 out of the approximately 93 apartments (almost 30%) within the Subject Buildings” located along 47th Street in Manhattan. Index No. 451409/2018, NYSCEF Doc. No. 1, ¶ 3. The Investigation has also revealed that the number of rent-stabilized units in the Subject Buildings has been significantly decreasing since at least 2009, with a number of units having been converted to illegal short-term rentals. *Id.*, ¶ 38.

As part of OSE’s powers, and to facilitate inquiries into alleged illegal transient use, the New York State Legislature specifically conferred upon OSE the power to issue subpoenas, pursuant to New York Real Property Actions and Proceedings Law (“RPAPL”) Section 715(5), and to compel evidence, pursuant to MDL Section 303(1-a), which includes the authority to issue subpoenas and compel the production of records. To further the Investigation, OSE issued four such Subpoenas, which focused on the alleged illegal use and occupancy of the Subject Buildings for transient stays in contravention of state and local laws since January 1, 2011, which is when the Investigation was commenced.

The Subpoenas seek various documents from Airbnb related to (1) each listing and resulting reservation associated with the Subject Buildings; (2) any hosts associated with listings that advertise and/or offer stays at the Subject Buildings; and (3) any guests who booked stays at the Subject Buildings through Airbnb during the relevant period. The Subpoenas in the unsealed proceedings (Subpoenas 1 and 2) specifically seek production of the following:

1. All documents pertaining to each **Airbnb user identity** associated with the Subject Premises and the Host(s), including for each such user identity documents provided the Airbnb host identification number, date each user identity was created, and all user information supplied in connection with the creation or maintenance of each user identity, including but not limited to first name, last name, address, email, phone number, country, market, native currency, hometown, employer, current city, about, bank accounts designated to receive payments for each user identity, and IP address used to create, access, modify, or otherwise maintain each user identity.
2. All documents pertaining to each **Airbnb listing** associated with the Subject Premises and the Host(s), including for each such listing, documents providing the listing identification number, date each listing was created, and all information supplied in connection with the creation or maintenance of each listing, including but not limited to address (including specific unit if available), availability, listing name, price, room type, bed type, person capacity, neighborhood, maximum and minimum nights, beds, bathrooms, bedrooms, guests included, description, house rules, house manual, check-in and check-out time, bank accounts designated to receive payments for each listing, and IP addresses used to create, access, modify, or otherwise maintain each listing.
3. All documents pertaining to each **Airbnb reservation** for each listing associated with the Subject Premises and the Host(s), including for each such reservation documents providing the date the reservation was created, country, name, host identification number, listing identification number, start date, nights, number of guests, base price, host fee, security price, extras price, host currency, reservation identification number, amount, payout info, reconciled date, charge amount native, native currency, comments, reviews, responses, bank accounts designated to receive payments for each reservation, and IP addresses used by the host to create, access, modify, or otherwise maintain each reservation.

Index No. 451409/2018, NYSCEF Doc. No. 3, at 7-8 (emphasis in original); *see also* Index No. 451582/2018, NYSCEF Doc. No. 4, at 13-14. The instructions accompanying the Subpoenas direct Airbnb to produce records reflecting advertisements and any resulting transactions wherein transient stays were booked at the Subject Buildings. The instructions to Airbnb also specifically exclude the production of any private communications.

The City contends that the Subpoenas seek records reasonably related to the City's Investigation and for the public purpose of preventing illegal transient rentals from taking place because such rentals deceive guests and create imminently hazardous building conditions. Further, the City contends that the information contained in the records sought is relevant to the ongoing Investigation and the City's efforts to identify additional witnesses to, victims of, and perpetrators in the advertisement and operation of illegal transient rentals as the Subject Buildings.

After the Subpoenas were served, outside counsel for Airbnb contacted OSE on multiple occasions to request additional time to respond to the Subpoenas, which OSE granted at least three times. On July 13, 2018, after the last adjournment granted by OSE, Airbnb sent OSE a letter describing its objections to the Subpoenas and, pursuant to CPLR 2304, proposing "certain modifications thereto that would address Airbnb's concerns and facilitate a mutually agreeable resolution." *See, e.g.*, Index No. 451409/2018, NYSCEF Doc. No. 5, at 1.

Airbnb objected to the Subpoenas as "overbroad and unduly burdensome, on the ground that the information [sought] is not reasonably limited in time or scope to matters for which the City has shown a sufficient factual basis supporting its inquiry." *Id.* Airbnb further stated that "[t]he City's filings in the Big Apple Litigation specifically identify a number of Airbnb host accounts, as well as specific listings and reservations from the 2017-2018 time period. The Subpoena[s herein], however, [are] not so limited, but instead seek[] records relating to all hosts,

listings and reservations for multiple properties dating back to 2011—and to that extent [they] are overbroad and improper as drafted.” *Id.* at 1-2 (footnote omitted).⁵

In its opposition and cross-motion, Airbnb indicates, for example, that Subpoena 1, as issued, would require disclosure of documents and information related to seventy-six (76) different host accounts that have been used to post listings in the subject buildings of that subpoena, even though only seven (7) host accounts are relevant to the pending *Big Apple* litigation as having been directly identified by the City as host accounts related to the defendants in that litigation. Of the remaining sixty-nine (69) accounts, during the seven (7) year relevant period, twenty-nine (29) never had a single reservation, six (6) accounts had only one reservation, and fourteen (14) accounts had between two (2) and seven (7) reservations. Index No. 451409/2018, NYSCEF Doc. No. 23, at 2. Airbnb asserts that “[r]equesting ‘utterly irrelevant’ data on the 69 accounts not implicated in the City’s lawsuit—and particularly data on the 49 hosts with little to no Airbnb activity at these properties—goes far beyond the pleadings in the case, is irrelevant to the City’s claims, and improperly seeks to amass data on New Yorkers who had nothing to do with the alleged illegal activities.” *Id.* at 2-3. Airbnb also claims that the litigation discussed herein is merely “an excuse to sue Airbnb rather than resolve issues in dispute” and that it timely responded to the Subpoenas with “a proper request to modify or withdraw” them in order to “proactively offer[] a

⁵ Airbnb also objects to producing certain documents requested in the Subpoenas because Airbnb is subject to the United States Stored Communications Act, 18 U.S.C. § 2701, *et seq.* (“SCA”). *Id.* at 2. This is because Airbnb “offers an electronic service for hosts and guests to communicate with each other” and, as such, “it qualifies as an ‘electronic communication service’ (ECS) under the SCA” and because “Airbnb also operates as a ‘remote computing service’ (RCS) for purposes of the SCA when it allows users to post and edit listings on its server.” *Id.* at 2-3. Airbnb objects to the Subpoenas on the grounds that it cannot produce user information such as “email addresses, log information regarding edits to listings, information related to the creation or maintenance of each listing, and IP addresses used to create, access, modify, or maintain each listing.” *Id.* at 3. Airbnb contends that it will limit the information produced in such requests for any user for whom Airbnb produces records “to the user ID, first and last name, date of account creation, email address, signup IP address, and phone number.” *Id.*

reasonable alternative approach that would protect user privacy in accordance with the law while allowing the City to investigate illegal activity. *Id.* at 3-4.

Airbnb's solution was to "produce records relating to the host accounts the City identified in the Big Apple [] Litigation, and any associated listings and reservations, from January 1, 2017 through the present (the time period covering the listings identified in the City's filings)," and after producing those records, it would be amenable to discussing "additional requests for data concerning other hosts/listings where the City believed it has a reasonable basis to seek that information." *Id.* at 7. This, according to Airbnb, "would balance the City's legitimate investigative needs relating to the Big Apple [] Litigation with the privacy rights of innocent and irrelevant hosts and guests." *Id.* at 7-8.

The City, however, contends that — despite Airbnb's attempts to limit the scope of OSE's issuing authority to the parameters of a litigation subpoena—these are investigatory subpoenas lawfully issued pursuant to the OSE's investigatory subpoena powers that exceed what might ordinarily be permitted in the context of a litigation subpoena. The City further contends that it has provided the Court with adequate factual and investigative basis to establish the records sought are relevant an authorized investigation. Index No. 451409/2018, NYSCEF Doc. No. 36, 5-8; Index No. 451582/2018, NYSCEF Doc. No. 24, 6-8.

Discussion

The City's Subpoena Power

A government agency must have "authority, relevancy, and some basis for inquisitorial action" to issue a subpoena *duces tecum*. *A'Hearn v. Comm. on Unlawful Practice of Law*, 23 N.Y.2d 916, 918 (1969). The City, through the OSE, has the power to issue subpoenas, such as the subpoenas *duces tecum* at issue herein, in support of investigations of illegal transient

occupancies pursuant to MDL Sections 303(1-a) and 121(4). Specifically, MDL Section 303(1-a) states that “[f]or the purpose of enforcing the provisions of this chapter, the department shall have the power to subpoena witnesses, administer oaths and take testimony, compel the production of books, papers, records and documents and to hold public or private hearings” (footnote omitted). MDL Section 121(4) specifically confers enforcement powers, such as the subpoena power stated in MDL Section 303(1-a), upon OSE in prohibiting advertising that promotes the use of dwelling units in a “class A” multiple dwelling for purposes other than permanent residence. The RPAPL also confers a similar subpoena power upon OSE:

[f]or the purposes of a proceeding under this Section, an enforcement agency of the state or of a subdivision thereof, which may commence a proceeding under this Section, may subpoena witnesses, compel their attendance, examine them under oath before himself or a court and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.

RPAPL § 715(5).

Once the administrative authority to issue a subpoena has been established, “[a]n 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.” *Kapon v. Koch*, 23 N.Y.3d 32, 38 (2014) (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-32 (1988)) (internal quotation marks and alterations omitted); see also *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 341 (1st Dep’t 1997) (same); *Roemer v. Cuomo*, 67 A.D.3d 1169, 1170 (3d Dep’t 2009) (stating that the same is true with respect to an agency’s investigative subpoena). “[I]f an administrative inquiry is within the authority of the requesting agency, and the demand for documents is not too indefinite, and the information is reasonably relevant, then the subpoena duces tecum will be sustained.” *Nicholson v. State Comm’n*

on *Judicial Conduct*, 67 A.D.2d 649, 650 (1st Dep't 1979) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)); see *Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d, 610-11 (1980) (“[A] motion to quash or to compel compliance raises only the issues of the authority of the investigating body and whether the inquiry falls within the scope of that authority.”).⁶ Further, “[s]ufficient authenticating detail may be found in the complaint itself” or can be “independently supplied” for such a subpoena to issue. *Levin v. Murawski*, 59 N.Y.2d 35, 41-42 (1983).

It is apparent from the papers and proceedings in the above-captioned matters that the City has established the requisite authority, relevancy, and basis for the inquisitorial action that was taken in the instant matters. Some of the subpoenaed material specifically relates to issues being litigated in several enforcement actions. Additional subpoenaed materials relate to buildings that the City is investigating in good faith and has already found certain potential violations, resulting in administrative proceedings. Further, the type of transactional records that the City now seeks have previously been deemed relevant in other similar actions as part of OSE’s enforcement power to abate short-term illegal tenancies in “class A” permanent residences. See, e.g., *City of New York v. NYC Midtown LLC*, 2018 N.Y. Misc. LEXIS 1800, at *16 (Sup. Ct. N.Y. County May 7, 2018); *NYC Hosts v. Airbnb, Inc.*, 2018 N.Y. Misc. LEXIS 1832 (Sup. Ct. N.Y. County May 15, 2018) (denying application for a temporary restraining order to prevent Airbnb’s compliance with an OSE subpoena); *City of New York v. Impact Virtual Tours, LLC*, 2017 WL 3440407, at *1 (Sup.

⁶ Contrary to the assertion in Airbnb’s papers, OSE, as a government agency, need not meet the high burden of showing the existence of probable cause in order to support the issuance of such an administrative subpoena. See, e.g., *Hynes v. Moskowitz*, 44 N.Y.2d 383, 393 (1978) (“[A] showing of probable cause or probative evidence to suspect illicit activity need not be shown to support a subpoena.”); *Hynes v. Lefkowitz*, 62 A.D.2d 365, 373 (1st Dep’t 1978) (“There is a fundamental difference between obtaining evidence pursuant to a subpoena duces tecum and pursuant to a search and seizure. A subpoena duces tecum is not the equivalent of a search warrant for which a showing of probable cause is required. To sustain the subpoena it is sufficient to show that the inquiry is lawfully and properly authorized and the description of the materials sought is reasonably definite. The question is one of relevance not of probable cause.”).

Ct. N.Y. County Aug. 7, 2017); *New York City Mayor’s Office of Special Enforcement v. Rahman Inc.*, 2017 WL 6761988, at *1 (Sup. Ct. N.Y. County Dec. 6, 2017).

The Court notes that Airbnb is not challenging OSE’s authority to issue the Subpoenas or the City’s authority to investigate legitimate violations of the MDL, including the rental or advertisement of illegal transient occupancies (*see* Index No. 451409/2019, NYSCEF Doc. No. 23, at 9; Index No. 451582/2018, NYSCEF Doc. No. 24, at 8). Rather, Airbnb appears to be asserting concerns regarding the scope of the Subpoenas and the privacy rights of its users. In reviewing the scope of a subpoena *duces tecum* on a motion to quash, the Court of Appeals has stated that in particular circumstances, “the more appropriate action to take . . . is to modify the subpoena to eliminate those portions which request information unrelated to the subject matters under investigation.” *New York State Comm’n on Judicial Conduct v. Doe*, 61 N.Y.2d 56, 62 (1984). This is in accordance with a court’s powers under CPLR 2304 to fix conditions or modify a subpoena. Working within this framework, which favors disclosure of information, the Court must balance the City’s investigative and enforcement needs, with respect to public policy, against individual privacy concerns when imposing any restrictions on the use or disclosure of information obtained by OSE. *See* CPLR 2304, 3103; 22 NYCRR § 216.1.

The Subpoenas seek production of information on *all* users who posted listings for short-term transient use on Airbnb in the Subject Buildings. However, based on the example provided by Airbnb with respect to Subpoena 1, Airbnb’s compliance with the Subpoenas as proposed by the City would likely result in disclosure of records pertaining to listings that never resulted in an illegal use or occupancy. Specifically, in relation to those Subject Buildings, at least twenty-nine (29) of seventy-six (76) host accounts that posted listings in those buildings never resulted in an actual reservation. Although, OSE is empowered to investigate and bring enforcement actions

against individuals that advertise unlawful transient use regardless of whether such advertisement resulted in any actual unlawful use or occupancy, the City has not made a factual showing that such offenses are the target of the Investigation.

As such, rather than quashing the Subpoenas, the Court will modify the Subpoenas to permit OSE to obtain the requested information with respect to hosts who posted listings that resulted in unlawful short-term tenancies.⁷ Specifically, in balancing the City's investigative and enforcement needs with individual privacy rights, the Court finds that Airbnb's applications should be granted to the extent of permitting an *in camera* review of the records of users who posted listings that did not result in any actual reservations. By amending the Subpoenas in this fashion, this Court is not necessarily preventing OSE from obtaining information relating to individuals who have posted listings where those listings have not resulted in a reservation, but is instead limiting Airbnb's obligation to produce this information at this time. If the Court finds this additional information is relevant to the Investigation, then OSE can potentially have access to such information in a second phase of production.

Accordingly, Airbnb will submit records of individuals whose postings did not result in a reservation to the Court for an *in camera* review and the City can submit an *ex parte* submission stating the City's basis for the need and relevancy of said materials for the Court's review. *See, e.g., Hearn v. N.Y.C. Dep't of Investigation*, 2007 WL 9653022 (Sup. Ct. N.Y. County May 9, 2007); *Hearn v. N.Y.C. Dep't of Investigation*, 2007 WL 9653023 (Sup. Ct. N.Y. County May 9,

⁷ Though the Supreme Court ultimately quashed the subpoena on the grounds that it was overbroad with respect to requesting certain tax and other information not at issue here, the court found that it was not unduly burdensome to require Airbnb to provide, *inter alia*, "the host's name, address of accommodation, dates of stay, rates, method of payment and total revenue from the rental." *Airbnb, Inc. v. Schneiderman*, 44 Misc. 3d 351, 359 (Sup. Ct. Albany County 2014).

2007). Additionally, a confidentiality order will be issued in each of the above-captioned actions to address any privacy concerns related to the production of user information raised by the parties.⁸

Non-Disclosure Orders

With respect to the two above-captioned matters that are sealed based upon the issuance of non-disclosure orders by the Criminal Term of this Court, those actions are to remain sealed and Airbnb has to abide by the sealing orders in those actions (Index Nos. 157516/2018 and 157517/2018). The Court lacks jurisdiction to review *ex parte* non-disclosure orders granted by the Criminal Term of this Court, as it is a court of co-ordinate jurisdiction. Even if this Court had the discretion to vacate the sealing orders, the Court declines to disturb the determination of the

⁸ The Court notes that Airbnb's privacy policy puts users on notice that their personal information may be disclosed, consistent with the court's decision in *Airbnb, Inc. v. Schneiderman*, *supra*, where the same information was requested. See 44 Misc. 3d at 361-62 ("Initially, [Airbnb] has failed to demonstrate that the requested information is confidential, particularly where [Airbnb's] privacy policy provides that [it] will disclose any information in its sole discretion that it believes is necessary to respond to, inter alia, subpoenas."). At the time the briefing on the within motions was filed, Airbnb's privacy policy, under Section 3.5 entitled "Compliance with Law, Responding to Legal Requests, Preventing Harm and Protection of our Rights," stated, in relevant part, as follows:

Airbnb and Airbnb Payments may disclose your information, including personal information, to courts, law enforcement or governmental authorities, or authorized third parties, if and to the extent we are required or permitted to do so by law or if such disclosure is reasonably necessary: (i) to comply with our legal obligations, (ii) to comply with legal process and to respond to claims asserted against Airbnb, (iii) to respond to verified requests relating to a criminal investigation or alleged or suspected illegal activity or any other activity that may expose us, you, or any other of our users to legal liability, (iv) to enforce and administer our Terms of Service, the Payment Terms or other agreements with Members, or (v) to protect the rights, property or personal safety of Airbnb, its employees, its Members, or members of the public.

Index No. 451409/2018, NYSCEF Doc. No. 25, Ex. A, at 8. Airbnb's website (https://www.airbnb.com/terms/privacy_policy) states that:

If you signed up for an account prior to January 21, 2019, we'll ask you to agree to the new Terms of Service and Payments Terms of Service when you use Airbnb on or after March 27, 2019; until March 27, 2019 the prior Terms of Service and Payments Terms of Service will continue to apply to you. The updated Privacy Policy will automatically come into effect for all existing users on March 27, 2019.

However, Section 3.5 of Airbnb's privacy policy remains unchanged and would not otherwise affect the subject accounts identified by Airbnb as responsive to the Subpoena.

Criminal Term. Accordingly, Airbnb's applications to review the non-disclosure orders issued by the Criminal Term of this Court are denied without prejudice to Airbnb's right to move for reconsideration of those orders in the Criminal Term or seek an appeal therefrom.

Certificates of Conformity

With respect to issues regarding certificates of conformity, Airbnb has represented, and the City takes no position regarding that representation, that Airbnb has experienced some burden in complying with the statutory need for certificates of conformity in executing business record certifications for records produced to the City. Pursuant to CPLR 2309 and New York Real Property Law Section 299-a(1)(c), the Court may deem attorneys representing or employed by Airbnb as qualified to make such certificate(s) of conformity. Where a certificate of conformity may be required to accompany a business records certification for records produced by Airbnb to the City in connection with these proceedings, the Court hereby grants the above relief.

In accordance with the foregoing, it is hereby

ORDERED that Motion Sequence No. 001 in the above-captioned special proceedings are resolved as follows: the City's order to show cause accompanying its petitions (in Index Nos. 451409/2018 and 451582/2018) and cross-petitions (in Index Nos. 157516/2018 and 157517/2018), pursuant to CPLR 2308(b) and Judiciary Law Section 2-b(3), to compel Airbnb's compliance with the Subpoenas are granted in part, subject to the restrictions ordered below, and Airbnb's petitions (in Index Nos. 157516/2018 and 157517/2018) and cross-motions (in Index Nos. 451409/2018 and 451582/2018), pursuant to CPLR 2304, to quash or modify the Subpoenas are granted in part, and are otherwise denied; and it is further,

ORDERED that, pursuant to CPLR 2308(b) and 3103(a), RPAPL Section 715(5), and Judiciary Law Section 2-b(3), that within thirty (30) days of notice of entry of this order, Airbnb shall produce to OSE certified copies of records responsive to the Subpoenas, in the manner directed in the Subpoenas, to the extent not already produced; and it is further,

ORDERED that, pursuant to CPLR 2304 and 3103(a), and Judiciary Law Section 2-b(3), that prior to offering any Confidential Information (as defined below) produced pursuant to the Subpoenas in connection with an administrative proceeding or other enforcement action under the MDL, Administrative Code, or similar laws and/or regulations for alleged unlawful advertising of transient occupancies of units located in the Subject Buildings against individuals who have not had any reservation activity through Airbnb, despite having posted a listing for an unlawful transient occupancy, the City shall submit, *ex parte* and under seal for the Court's *in camera* review, evidence sufficient for the Court to determine that the City has an adequate legal basis and justification to bring such enforcement action against such individual(s); and it is further,

ORDERED that, pursuant to CPLR 2309(c) and RPAPL Section 299-a(1)(c), that any business record certifications executed outside of the State of New York may be certified as conforming with the laws of the place such business record certification was executed by any attorney representing or employed by Airbnb, and that such record, so certified and with a copy of this order annexed thereto, shall be deemed certified in conformance with CPLR 2309 and RPAPL Section 299-a for use in any action or proceeding in this State as if such business record certification had been executed in this State; and it is further,

ORDERED that Airbnb shall produce any requested records in .xls or .csv formats as applicable, to the extent such records are reasonably available in such formats; and it is further,

ORDERED that, pursuant to CPLR 2304 and 3103(a), good cause having been shown:

1. Airbnb may designate documents produced, or testimony given by or on behalf of Airbnb to the City (hereinafter, “Documents” or “Testimony”), in connection with the above-captioned special proceedings as confidential either by notation on the document, statement on the record of the deposition, written advice to the respective counsel for the City or other parties in any subsequent actions or proceedings, or by other appropriate means.
2. As used herein:
 - (a) “Confidential Information” shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information, the disclosure of which would, in the good faith judgment of Airbnb, be detrimental to the lawful conduct of Airbnb’s business or the lawful business of any of its business partners, customers or clients.
 - (b) “Receiving Party” shall mean the City and/or any individual or entity receiving “Confidential Information” in connection with depositions, investigative hearings or interviews, document production, or otherwise as permitted by this order.
 - (c) “Related Action” shall mean any investigation, enforcement action, or proceeding commenced by the City, any of its agencies, or the People of the State of New York pertaining to the Subject Buildings.

3. The Receiving Party may, at any time, notify Airbnb that the Receiving Party does not concur in the designation of a document or other material as Confidential Information. If Airbnb does not agree to declassify such document or material, the Receiving Party may move before this Court for an order declassifying those documents or materials, provided that counsel for the Receiving Party shall confer with counsel for Airbnb by telephone in an attempt to reach an agreed resolution prior to bringing such motion. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information. If such a motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise.
4. Except with the prior written consent of Airbnb or by court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:
 - (a) personnel of the City or a party in a Related Action actually engaged in assisting in the preparation of said action for trial or other proceeding and who have been advised of their obligations hereunder;
 - (b) counsel for the parties to these proceedings or a Related Action, and their associated attorneys, paralegals, and other professional and law enforcement personnel (including support staff) who are directly assisting such counsel in the preparation of such action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

- (c) expert witnesses or consultants retained by the parties or their counsel to furnish technical or expert services in connection with these proceedings or a Related Action, or to give testimony with respect to the subject matter of such action at the trial of such action or other proceeding therein, provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with Paragraph 6 hereof;
 - (d) the Court and court or tribunal personnel, if filed in accordance with Paragraph 11 hereof;
 - (e) an officer before whom a deposition is taken or an investigative hearing or interview is conducted, including stenographic reporters and any necessary secretarial, clerical, or other personnel of such officer, if furnished, shown or disclosed in accordance with Paragraph 9 hereof; and
 - (f) witnesses, if furnished, shown or disclosed in accordance with Paragraphs 8 and 9, respectively, hereof.
5. Confidential Information shall be utilized by the Receiving Party and its counsel only for purposes of these proceedings or a Related Action and for no other purposes, except that de-identified information obtained from Confidential Information may be used in a public fashion by the City or any of its agencies for purposes of public reports consistent with and as authorized by law.
6. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to Paragraph 4(c) hereof, counsel for the Receiving Party shall obtain the expert or consultant's written agreement, in the form of Exhibit A

attached hereto, to comply with and be bound by its terms. Such executed forms shall be retained in the files of counsel for the City.

7. All testimony by any witness discussing Confidential Information shall presumptively be treated as Confidential Information and subject to this order during the testimony and thereafter unless and until the Receiving Party may submit a transcript of such testimony to Airbnb for classification. Airbnb shall appropriately classify the testimony no later than fifteen (15) days after receiving said transcript, otherwise the testimony shall thereafter not be subject to this order.
8. Should the need arise for any of the parties to disclose Confidential Information during any hearing or trial before a court or tribunal, including through argument or the presentation of evidence, such party may do so only after taking such steps as the court or tribunal, upon motion of the disclosing party, shall deem necessary to preserve the confidentiality of such Confidential Information. Airbnb shall be provided with notice and a reasonable opportunity to be heard with respect to any such motion.
9. This order shall not preclude counsel for the parties from using any documents or information which have been designated as Confidential Information to investigate the use and occupancy of the Subject Buildings and any resulting criminal, civil or administrative prosecutions, or the defense thereof under the terms hereof. Any court reporter and deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this order and shall execute the certificate annexed hereto as Exhibit A. Such executed forms shall be retained in the files of counsel for the City.

10. Airbnb may designate as Confidential Information subject to this order any document, information, or testimony produced or given by any non-party to these proceedings or a Related Case produced or given pursuant to the Subpoenas, or any portions thereof. In the case of Documents, designation shall be made by notifying counsel for the Receiving Party in writing of those documents which are to be stamped and treated as such at the time of production to the Receiving Party. In the case of Testimony, designation shall be made by notifying all parties (by counsel where applicable) in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the party asserting the confidentiality privilege. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time), all such documents shall be treated as Confidential Information.
11. A Receiving Party who seeks to file with a court or tribunal any transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information and have not been declassified by Airbnb or further order of this Court, and any pleading, brief, or memorandum which reproduces, paraphrases, or discloses such Confidential Information, shall file such papers under seal and shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption(s) of this litigation, including the appropriate Index Number(s) thereof, the words "CONFIDENTIAL MATERIAL-SUBJECT TO CONFIDENTIALITY ORDER"

as an indication of the nature of the contents, and a statement in substantially the following form:

“This envelope, containing documents which are filed in this case by [name of party], is not to be opened nor are the contents thereof to be displayed or revealed other than to the receiving court or tribunal, the parties and their counsel of record, except by court order or consent of the parties. Violation hereof may be regarded as contempt of Court.”

Notice of such filing shall be promptly given to the other parties in these proceedings in writing via certified mail, return receipt requested, identifying the Confidential Information contained therein. Said notice(s) shall be retained in counsel’s files.

12. All pleadings, briefs, or memoranda which reproduce, paraphrase, or disclose any documents that have previously been designated by Airbnb as comprising or containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.
13. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof.
14. Any document or information that may contain Confidential Information that has been inadvertently produced by Airbnb without identification as to its confidential nature as provided in Paragraphs 2 and/or 11 hereof, may be so designated by Airbnb by written notice to the Receiving Party identifying the document or information as confidential within a reasonable time following the discovery that the document or information has been produced without such designation.

15. Any document or information that may contain Confidential Information that has been inadvertently produced or filed by a Receiving Party without identification as to its confidential nature as provided in Paragraphs 2 and/or 11 hereof, may be so designated by the Receiving Party identifying the document or information as confidential within a reasonable time following the discovery that the document or information has been produced without such designation, and the Receiving Party shall promptly notify Airbnb in writing of the production or filing.
16. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions hereof.
17. The production or disclosure of Confidential Information shall in no way constitute a waiver of each party's right to object to the production or disclosure of other information in these proceedings or in any other action.
18. Nothing in this order shall affect the right of any party in these proceedings, a Related Action, or Airbnb to seek relief from, or modification of this order, or any provisions thereof by properly noticed motion to this Court, or to challenge any designation of confidentiality as inappropriate under Criminal Procedure Law, the Civil Practice Law and Rules, or other applicable law.
19. This order shall continue in effect after the conclusion of these proceedings except:
 - (a) that there shall be no restriction on documents that are used as exhibits in a court or tribunal (unless such exhibits were filed under seal); and
 - (b) that Airbnb or any party may seek the further order of this Court with respect to dissolution or modification of this order.

20. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.
21. Notwithstanding anything to the contrary, counsel of record for the parties may retain documents constituting work product, pleadings, motion papers, discovery responses, transcripts, and exhibits. These provisions shall not be interpreted in a manner that would violate any applicable canons of ethics, codes of professional responsibility, or governmental document retention regulations. Nothing contained in these provisions shall prohibit or interfere with the ability of counsel for any party, or of experts specially retained for these proceedings, to represent any individual, corporation, or other entity adverse to any party or its affiliate(s) in connection with any other matters.
22. This order may be changed by further court order, and nothing contained in this order shall prejudice the rights of a party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

And it is further,

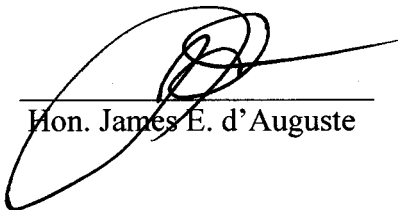
ORDERED that, pursuant to 22 NYCRR Section 216.1, the sealing orders are extended until further order of the Court, except the following orders of the Court are unsealed:

- a. The order entered in Supreme Court, New York County Index No. 157516/2018 on September 21, 2018 and filed in that proceeding as NYSCEF Document No. 35;
- b. The order entered in Supreme Court, New York County Index No. 157516/2018 on October 4, 2018 and filed in that proceeding as NYSCEF Document No. 40;

- c. The order entered in Supreme Court, New York County Index No. 157517/2018 on September 21, 2018 and filed in that proceeding as NYSCEF Document No. 29; and
- d. The order entered in Supreme Court, New York County Index No. 157517/2018 on October 4, 2018 and filed in that proceeding as NYSCEF Document No. 36.

This constitutes the decision and order of this Court.

Dated: May 16, 2019



Hon. James E. d'Auguste

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
In the Matter of the Application of

THE CITY OF NEW YORK,
Petitioner,

Index No. 451409/2018

-against-

AIRBNB, INC.,
Respondent.

-----X
In the Matter of the Application of

THE CITY OF NEW YORK,
Petitioner,

Index No. 451582/2018

-against-

AIRBNB, INC.,
Respondent.

-----X
In the Matter of the Application of

AIRBNB, INC.,
Petitioner,

Index No. 157516/2018
UNDER SEAL

-against-

CITY OF NEW YORK,
Respondent.

-----X
In the Matter of the Application of

AIRBNB, INC.,
Petitioner,

Index No. 157517/2018
UNDER SEAL

-against-

CITY OF NEW YORK,
Respondent.

-----X

CONFIDENTIALITY ACKNOWLEDGEMENT AND AGREEMENT

I, _____, state that:

1. My address is _____.
2. My present employer is _____.
3. My present occupation or job description is _____
_____.
4. I have received a copy of the Confidentiality Order (the "Order") entered in the above-captioned proceedings on _____.
5. I have carefully read and understand the provisions of the Order.
6. I will comply with all of the provisions of the Order.
7. I will hold in confidence, will not disclose to anyone not qualified under the Order, and will use only for purposes specifically permitted by the Order, any Confidential Information that is disclosed to me.
8. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.
9. I hereby submit to the jurisdiction of this Court for the purpose of enforcement of the Order in the above-captioned proceedings.

Dated: _____

Signature