SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AIRBNB, INC., Petitioner, v. ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Respondent.	Index No. _____

MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

and

KINDLON SHANKS & ASSOCIATES
74 Chapel Street
Albany, NY 12207
(518) 434-1493

Attorneys for Petitioner
Airbnb, Inc.

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

Founded in 2008, Petitioner Airbnb, Inc. ("Airbnb") provides an Internet platform that connects people offering unique accommodations ("Hosts") with people who want to book accommodations ("Guests"). On October 4, 2013, the New York Attorney General ("NYAG") served a third party subpoena to Airbnb demanding virtually all information about almost all of Airbnb's New York Hosts from 2010 to the present. The NYAG subpoena is invalid on its face and should be quashed for the following reasons:

First, the NYAG has not articulated even a minimal investigatory belief that any specific Airbnb Host—much less the majority of New York Hosts—has violated any law. Governments and law enforcement agencies do not have an unfettered right to subpoena whatever data they want, whenever they want. Their broad powers certainly do not include "arbitrary and unbridled discretion as to the scope of what is investigated" in the hope that they might locate a possible violation. *See Hill* v. *Cuomo*, 2009 N.Y. Misc. LEXIS 2370 at * 7 (N.Y. Sup. Ct. Ulster Cnty. March 10, 2009). The laws that appear to underpin the subpoena—the 2010 law (effective in 2011) restricting short term rentals and the tax scheme for sales tax and hotel room occupancy taxes, which were written to apply to the conventional hotel industry, are vague and fail to apprise ordinary citizens what conduct is or is not unlawful or what conduct is or is not subject to tax in the context of Airbnb.

Second, the subpoena is precisely the type of "fishing expedition" that is not permitted by the courts. The NYAG has not conducted any type of investigation to determine any potential wrongdoing by Airbnb Hosts. The NYAG has not reviewed any of the relevant circumstances—such as type of accommodation, type of use or services

offered by the Hosts—any one of which affects the potential applicability of the laws regarding short term rentals. The NYAG has not tried to apply any of the multiple exceptions that exempt users from sales or occupancy taxes. The NYAG has not shown the existence of any whistleblowers, or any complaints outlining violations of tax or housing laws by specific individuals, or any referrals from the Tax Commission. The NYAG has, in fact, *done nothing at all*, other than attempt to use Airbnb as an arm of its investigatory staff. Because the subpoena wrongly includes Airbnb Hosts that the NYAG should have attempted to exclude, it seeks irrelevant information, is not narrowly tailored, and is burdensome, oppressive and harassing. Moreover, these deficiencies are particularly egregious because Airbnb is a third party and the NYAG is obligated to ensure that the burden to a third party is minimized.

Third, the subpoena wrongly seeks personal and confidential information (including, but not limited to, names, home addresses, email addresses, and other tax-related information) from virtually all of Airbnb's New York Hosts. Such a request has privacy implications, particularly for Hosts who are either not subject to the laws that the NYAG purportedly is investigating, or that are exempt from the tax scheme.

Accordingly, Petitioner's motion to quash the subpoena should be granted.

FACTUAL & PROCEDURAL BACKGROUND

The Airbnb platform provides a virtual marketplace by which Hosts and Guests can locate one another and reach an agreement for the rental of accommodations. Airbnb's Hosts and Guests can directly communicate via Airbnb's internet platform prior to the completion of a booking. If they agree on the price and terms, they can complete their booking transaction.

Airbnb is not a party to these direct agreements between Hosts and Guests for the rental of accommodations. It does not list, own, manage, control, operate, sell or resell any accommodations in New York. It has no ability to control or transfer any interest in property to any party, and it is not a reseller, remarketer, room remarketer or managing agent for any Host. Airbnb's Hosts, and not Airbnb, set the price and terms of their own bookings, including the availability of their accommodations, and Hosts decide with whom they are willing to transact.

On August 19, 2013, the NYAG sent a letter request to Airbnb, which requested that the following documents or information be produced:

> 1. An Excel spreadsheet identifying all Hosts that rent Accommodation(s) in New York State, including: (a) name, physical and email addresses, and any other contact information; (b) their Profiles; (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(s); (e) method of payment to Host including account information; and (f) total gross revenue per Host generated per year for the rental of the Accommodation(s) through Your Website.
>
> 2. For each Host identified in response to Request No. 1, documents sufficient to identify all tax-related communications You had with the Host, including tax inquiries or tax documents sent (including 1099s) whether initiated by the Host or You. Ex. 1, at 2.

On September 17, 2013, counsel for Airbnb met with the NYAG to discuss this letter request. At that meeting, the NYAG made clear that it was not targeting Airbnb, but rather was looking to Airbnb to produce information about its Hosts in order to find out whether the Hosts are paying applicable New York hotel taxes. On September 30, 2013, Airbnb met again with the NYAG. Airbnb offered to cooperate with the NYAG to develop a clear set of tax disclosures that Airbnb would then place on

its website so that its users could know when and how to pay any hotel taxes that might apply. Airbnb urged the NYAG to work together to accomplish this given that the various tax laws are confusing, contradictory and impossible to articulate, especially as applied to the novel ways that users may share their accommodations through Airbnb.

On October 4, 2013, the NYAG issued the instant subpoena duces tecum to Airbnb. Like the August 19 letter request, the NYAG subpoena requests categories of information, but requests it for the three-year period from January 2010 to the present. The subpoena differs substantively from the prior letter only in that it limits the definition of "Accommodation" as follows: "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." Ex. 3, at 3. The NYAG has declined Airbnb's request to withdraw or modify its subpoena.

ARGUMENT

I. There is No Basis to Warrant an Investigation by the NYAG

A. The NYAG Subpoena Constitutes an Unfounded "Fishing Expedition"

As this Court is aware, an investigation by government officials into the private affairs of citizens requires a reasonable, articulable basis. No matter how benevolent their intent, officials in the United States are not empowered to comb through any and all non-public records to root out perceived or suspected wrongdoing. Even under the broad authority granted to the NYAG, the mere "[possibility of] violations of law being discovered" is not sufficient to justify demanding all the internal records of companies or individuals, much less a massive set of data on a large set of users. *A'Hearn* v. *Committee on Unlawful Practice of Law etc.*, 23 N.Y.2d 916, 918 (N.Y.

1969). Accordingly, a proper subpoena *must* establish, at a minimum, that "there is an authentic factual basis to warrant the particular investigation[.]" *National Freelancers, Inc.* v. *State Tax Com., Dep't of Taxation & Finance*, 513 N.Y.S.2d 559, 561 (N.Y. App. Div. 3d Dep't. 1987).

Given these basic parameters, governmental authorities abuse their powers when they employ subpoenas as a means for conducting proverbial "fishing expeditions." Officials may issue a subpoena only *after* establishing a factual foundation for alleged violations. *Hill*, 2009 N.Y. Misc. LEXIS 2370 at *12-13; *see also In re Brodsky* v. *New York Yankees*, 891 N.Y.S.2d 590, 599-600 (N.Y. Sup. Ct. Albany Cnty. 2009) (stating that policies favoring production of information "should not serve as an excuse to permit the subpoena power to be used as a tool of harassment or for the proverbial 'fishing expedition' to ascertain the existence of evidence"); *In re Future Tech. Assoc. LLC* v. *Special Commr. of Investigation for the NY City School Dist.*, 2011 N.Y. Misc. LEXIS 1352, at *12 (N.Y. Sup. Ct. N.Y. Cty. Mar. 17. 2011) ("Subpoenas may not be used as 'fishing expeditions' to obtain evidence."); *A'Hearn*, 23 N.Y.2d at 918 ("no agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely on the prospect of possible violations of law being discovered[.]").

The subpoena directed at Airbnb is precisely the type of governmental overreach that is prohibited. The NYAG has not conducted any type of investigation to determine wrongdoing by any Airbnb users. The NYAG has not reviewed the myriad circumstances—such as type of accommodations, type of use, or services offered by the user—that affect the potential applicability of laws regarding short-term rentals or taxes.

The NYAG has not shown the existence of any whistleblowers, any complaints outlining violations of any tax or housing laws by specific Airbnb Hosts or by Airbnb, or any referrals from the Tax Commission. The NYAG has in fact done *nothing at all*, other than attempt to use Airbnb as an arm of its investigatory staff in order to help it determine what the current hotel tax and occupancy laws mean in the context of Airbnb or to determine how to apply the law. By definition, then, the NYAG does not have the required particularized factual basis to demand the personal, private records of thousands of individual Airbnb users.

Given that Tax Law § 1141(a) provides the Attorney General with the authority to bring an action only "upon the request of the tax commission" where the person has actually failed to collect or pay a tax, the NYAG should not be allowed to engage in a fishing expedition into the private affairs of Airbnb's Hosts, particularly when it has not articulated who should be paying these taxes, when they should be paying them, or how they should be paid. N.Y. Tax Law § 1141(a) (Consol. 1980); *see also In re Brodsky*, 891 N.Y.S.2d at 599-600.[1]

B. The NYAG's Investigation Is Based Upon Laws That Are Unconstitutionally Vague

Even if the NYAG could identify a factual basis for an enforcement action against any of the thousands of individuals whose records it has demanded,[2] the NYAG

---

[1] This issue is exacerbated by the fact that Executive Law § 63(12), pursuant to which the NYAG purported to issue the subpoena, does not itself create a cause of action. *See People ex rel. Spitzer* v. *Frink Am. Inc.*, 770 N.Y.S.2d 225, 226 (N.Y. App. Div. 4th Dep't 2003); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486, 2008 WL 1766763, at *3 (N.D. Cal. Apr. 15, 2008).

[2] There clearly would be no basis for the NYAG to pursue any enforcement action against Airbnb. Airbnb has no obligation to collect or remit either the New York City hotel room occupancy tax or the New York City or New York State sales tax because Airbnb is not a "room

certainly cannot use its subpoena power as a tool for enforcing unconstitutionally vague laws against such individuals. *See, e.g., FCC* v. *Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012) (a law is void for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement.") (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). "Fairness and due process dictate that if a governmental entity seeks to prohibit a certain course of conduct it must reasonably and unequivocally apprise the actor, in advance, of what, conduct is permissible and what conduct is impermissible." *Allegro Oil & Gas* v. *McGranahan*, 559 N.Y.S.2d 92, 94 (N.Y. Sup. Ct. Allegany Cnty. 1990), *aff'd, Allegro Oil & Gas, Inc.* v. *McGranahan*, 579 N.Y.S.2d 922 (N.Y. App. Div. 4th Dep't. 1991). The reason for this principle is that "a law must provide exact standards for those who apply them to prevent arbitrary and discriminatory enforcement." *Cnty. of Nassau* v. *Canavan*, 756 N.Y.S.2d 98, 99-100 (N.Y. App. Div. 2d Dep't 2003) *aff'd on other grounds, Cnty. of Nassau* v. *Canavan*, 1 N.Y.3d 134 (N.Y. 2003).

While it is unclear from the four corners of the subpoena exactly what laws the NYAG thinks are at issue, as discussed above, the two areas of law most likely to be the NYAG's focus—tax laws and occupancy laws—provide little warning or clarity to Airbnb's users.

---

remarketer" – *i.e.*, Airbnb has no authority to reserve, arrange for, convey, or furnish occupancy, directly or indirectly, and has no authority to determine the rent. *See* NYC Admin. Code § 11-2501.12 (2009); N.Y. Tax Law § 1101(c)(8) (Consol. 2013). The New York City Department of Finance reached this precise conclusion in a Named Letter Ruling, dated August 21, 2013. *See* Ex. 4.

1. Tax Laws

The agency that administers the tax code must apprise taxpayers of the standards by which it will be interpreting and enforcing the tax laws. Clearly articulated and implemented standards are required to provide proper notice as to what the tax laws demand. As a result, the Tax Department can only "change established policy or reassess prior statutory interpretations so long as these changes are applied prospectively to taxpayers." *In re Meredith Corp.* v. *Tax Appeals Trib. of Dep't of Taxation & Fin. of State*, 956 N.Y.S.2d 585, 587 (N.Y. App. Div. 3d Dep't 2012). For this reason, the New York courts have found the retroactive application of a newly evolved administrative standard in a tax law void as "arbitrary and capricious." *Id.* (citing *In re Howard Johnson Co.* v. *State Tax Commission*, 65 N.Y.2d 726, 727 (N.Y. 1985)).

The federal courts have similarly recognized that there is a distinction between an Internal Revenue Service ("IRS") subpoena to do "research" or "gather information," and a subpoena to investigate specific tax violations. "Research" subpoenas cannot be used by the IRS to collect taxpayer data. *See U.S.* v. *Humble Oil & Refining Co.*, 518 F.2d 747, 749 (5th Cir. 1975). *Humble Oil* involved a "John Doe" subpoena to a third-party oil company to discover "the identities of all lessors of mineral leases surrendered by Humble Oil in the calendar year 1970" in order to "expedite research on an IRS project concerning compliance with the lease restoration requirements of the Internal Revenue Code." *Id.* at 748. The United States Court of Appeals for the Fifth Circuit affirmed its prior holding that the "Internal Revenue Service is not empowered . . . to issue a summons in aid of its . . . research projects or inquiries, absent an investigation of taxpayers or individuals or corporations from whom information is sought." *U. S.* v. *Humble Oil & Ref. Co.*, 488 F.2d 953, 954 (5th Cir. 1974), *vacated*, 421

U.S. 943 (1975). To hold otherwise, the Fifth Circuit reasoned, would give the IRS "an unrestricted license to enlist the aid of citizens in its data gathering projects" and "would eviscerate judicial constraints upon the summons power and raise serious constitutional questions." *Id.* at 963. *See also In re Oil and Gas Producers*, 500 F.Supp. 440, 443 (W.D. Ok. 1980).

The same principles are at stake here. Airbnb has proposed to add a detailed disclosure on its website to guide users in complying with the law. However, the NYAG has not articulated when and how the various sales and occupancy tax laws apply. As in *Humble,* the NYAG cannot use its subpoena power as a mere "research" or "fact gathering" opportunity to help decide how to construe or enforce the law.

The difficulty in ascertaining which (if any) of Airbnb's Hosts should be collecting or paying hotel taxes is caused in large part because the relevant statutes were drafted long before Airbnb or anything like it ever existed.[3] As a result, the statutes and rules are unclear on whether, and which, Airbnb Hosts or Guests may be subject to taxation. Likewise, the "guidance" that exists from the relevant tax authorities also does not take into account a relatively recent internet platform like Airbnb and is therefore equally vague and ambiguous.

The many difficulties regarding applying "hotel taxes" to Airbnb's listings include, but are not limited to the following:

---

[3] There are at least four different taxes that regulate the hotel industry. For simplicity, we focus on taxes that could potentially apply in New York City. However, each locality has varying sales and occupancy taxes. The New York City Hotel Room Occupancy Tax applies a 5.875% tax. NYC Admin. Code § 11-2502 (2012). The New York City Sales Tax applies a 4.875% tax. NYC Admin. Code § 11-2001 (2012). The New York State Hotel Unit Fee applies a $1.50 per unit per day fee. N.Y. Tax Law § 1104 (2004). Finally, a 4.00% New York State Sales Tax applies. N.Y. Tax Law § 1105(e) (2012).

- The various New York statutes uniformly define a "hotel" as "[a] building or portion of it which is *regularly used and kept open* as such for the lodging of guests." NY Tax Law § 1101(c)(1); NYC Admin. Code § 11-2501.5 (emphasis added). "A Guide to Sales Tax for Hotel and Motel Operators," Publication 848 (N.Y. State Dept. Tax. and Finance, March 2008) ("Publication 848"), Publication 848 lists a number of factors to determine when and if a particular rented space constitutes a "hotel" for these purposes, including whether "the operator provides maid and linen service or other customary hotel services for its occupants," a factor that clearly does not apply to the vast majority of Airbnb's listings since Airbnb's Hosts are renting space in their own homes and are not hiring employees as maids, or providing room service, or laundry services. Publication 848 at 8. The NYAG subpoena does not exclude Airbnb listings on this basis.

- Further, Publication 848 notes that "[i]f a person rents a room in his or her residence to a transient occupant *on a less-than-regular basis*, the room being rented out is *not* considered a room in a hotel, and, therefore, the person is *not* required to collect sales tax on the rental." *Id.* (emphasis added). The NYAG subpoena does not exclude Airbnb listings on this basis.

- Publication 848 goes on to discuss a number of explicit exceptions to the applicability of New York hotel taxes, even when a rented space may technically fall within the definition of a hotel. For example, there is an exception for summer homes: "[r]ental of individual, privately owned, summer homes, camps, beach houses and similar properties, where no services commonly associated with hotel occupancy are provided, constitute the rental of real property. Therefore, the receipts are not subject to sales tax." *Id.* at 24. The NYAG subpoena does not exclude Airbnb listings on this basis.

- There is also a "bungalow exception"—*i.e.*, complete living units with their own kitchen, bathroom and sleeping rooms, that are rented furnished for single-family occupancy are not subject to sales tax, if "house cleaning, maid service, room service, mail service, entertainment, planned activities and other services that are commonly provided by hotels are not provided." *Id.* at 25.[4] The NYAG subpoena does not exclude Airbnb listings on this basis.

- If an occupant stays in a hotel room in New York State for at least ninety (90) or in New York City for at least one hundred and eighty (180) consecutive days, no state sales taxes are due at all. *Id.* at 14. The NYAG subpoena does not exclude Airbnb listings on this basis.

- And if that were not enough, the Rules of the City of New York provide that an accommodation "will be *irrebuttably presumed not to be regularly used and kept open* for the lodging of guests if, during any four consecutive quarterly tax

[4] Although the bungalow exception previously included a minimum one-week requirement, this was abolished in 2012. *See* 20 NYCRR § 527.9(vi)(e)(5) (2012).

> periods, or, beginning on and after September 1, 2004, during any twelve-month tax period, described in subsection a of § 12-07 of these rules, rooms, apartments or living units are rented to guests or occupants *on fewer than three occasions or for not more than 14 days in the aggregate*." 19 RCNY § 12-01 (emphasis added). While this language provides guidance on when a rented space is not *regularly* used and kept open (*i.e.*, for less than three occasions or 14 consecutive days), it provides no guidance on whether someone renting out a space on more than three occasions or for more than 14 days is subject to the tax. The NYAG subpoena does not exclude listings on this basis.

The above web of statutes, rules and guidelines "fail[s] to provide a person of ordinary intelligence fair notice of" whether and when they have to collect taxes. *Fox Television Stations*, 132 S. Ct. at 2317 (internal citations omitted). To give an example, how is an Airbnb Host supposed to know whether their home is "regularly used and kept open" for the lodging of Guests? Does an Airbnb Host who rents their townhouse once for 15 days have to pay a tax? Is there no tax if an Airbnb Host rents out their second, or "beach," home for three weeks? What exactly does the "bungalow exception" mean in the context of Airbnb?

These are all good questions, but unfortunately there have been no good answers for Airbnb or its users. Airbnb users have no guidance from the relevant tax authorities or the NYAG as to when and how these taxes or exemptions apply to them. And if the NYAG cannot articulate which of Airbnb's New York users should pay these taxes and when, and is further unwilling to articulate disclosures on Airbnb's website that would provide fair notice as to who is properly subject to tax liability under these statutes, then the NYAG should not be allowed to determine how it intends to interpret these statutes retroactively. *See Meredith Corp.*, 959 N.Y.S.2d at 587. Nor can the NYAG decide what the law is, and then notify the regulated community through an

enforcement action, instead of through rulemaking or interpretive guidance.[5] *See Humble Oil,* 518 F.2d at 748; *Canavan*, 756 N.Y.S.2d at 100.

2. Occupancy Laws

To the extent that the NYAG's inquiry concerns short-term occupancy laws, those laws suffer from a similar infirmity—statutory history and purpose support the legality of short-term rentals by the vast majority of Airbnb Hosts, but those laws too are far from clear. While Chapter 225 of the Laws of New York of 2010 (codified in N.Y. Mult. Dwell. Law § 4.8.a (Consol. 2011) provides that "class A multiple dwelling shall only be used for permanent residence purposes," it explicitly carves out an exception for permanent occupants of Class A multiple dwellings to book spaces within their apartment to "lawful boarders, roomers or lodgers." N.Y. Mult. Dwell. Law § 4.8.a(1)(A) (Consol. 2011). Under a recent case before the Environmental Control Board, a Host was held to be in compliance with the law if another member of his or her household, such as a roommate, was present for the Guest's stay. *City of N.Y.* v. *Abe Carrey*, 091913V/835 (N.Y. Envtl. Control Bd. September 26, 2013). Despite this, the enforcement of the potentially applicable occupancy laws is sufficiently complicated to baffle the most sophisticated of Airbnb users, creating the same due process infirmities present in any tax enforcement action in these circumstances.

Moreover, as the *Carrey* case makes clear, any issues regarding alleged violations of New York City occupancy laws are already being handled by the appropriate New York City authorities. It is unclear why the NYAG needs to engage in a

[5] In spite of this lack of clarity, on October 3, 2013, Brian Chesky, one of Airbnb's co-founders and its current CEO, made the following statement on Airbnb's blog: "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. We would like to assist New York City in streamlining this process so that it is not onerous." Ex. 2.

review of Airbnb's records to look for violations already being handled by the appropriate city officials, applying a law that was intended for and applies to New York City apartment buildings. Indeed, involvement by the NYAG may lead to inconsistent, arbitrary or conflicting enforcement of these very same laws by different authorities. *See, e.g., Canavan*, 756 N.Y.S.2d at 99.

II. The NYAG's Subpoena Is Overbroad and Burdensome

It is well settled that a non-judicial subpoena may be challenged when it is overbroad, is unduly burdensome or oppressive. *See Myerson* v. *Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 256 (N.Y. 1973); *In re R. J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729, 731-32 (N.Y. Sup. Ct. N.Y. Cnty. 1987); *Reuters Ltd.* v. *Dow Jones Telerate*, 662 N.Y.S.2d 450, 455 (N.Y. App. Div. 1st Dep't. 1997) (holding that even if some relevance could have been shown, the subpoena was unenforceable because it was "patently overbroad, burdensome and oppressive").

The present third-party subpoena is patently overbroad, unduly burdensome and oppressive. The NYAG here is seeking an Excel spreadsheet identifying all Hosts that rent out accommodations in New York while they are not present, 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 [Airbnb's] website. Ex. 3, at 8.

The NYAG's subpoena further seeks, for the Hosts identified in the spreadsheet: "Documents sufficient to Identify all tax-related communications [Airbnb] has had with

the Host, including tax inquiries or tax documents requests whether initiated by the Host or [Airbnb]." *Id.*

One significant, immediate problem with the NYAG's subpoena is that it seeks information that Airbnb simply does not have. The subpoena seeks information from all Hosts who are not present when a Guest occupies their apartment. *Id.* at 3. Airbnb has no reliable method of confirming whether an Airbnb Host is present or not during the Guest's stay. It is therefore impossible for Airbnb to comply with this aspect of the NYAG's subpoena.

More importantly, however, given the various applicable exceptions discussed above, the NYAG must concede that not all of Airbnb's Hosts are subject to New York hotel taxes. Yet the NYAG is requesting information regarding virtually all of Airbnb's New York Hosts since January 1, 2010, without specific investigatory targets, and without a clear articulation of what in fact would constitute a violation of the tax or the housing laws. The NYAG has not crafted the subpoena to focus on Hosts it believes have violated the laws it is purportedly investigating. Instead, the subpoena cuts the widest possible swath, and needlessly and without any basis in law or fact includes people that may reasonably not have violated any law.

The leading New York case concerning the scope of authority to issue a regulatory subpoena, *Myerson* v. *Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250 (N.Y. 1973), is directly on point. In that case, the Court of Appeals (Breitel, J.) described a subpoena issued by the then New York City Commissioner of Consumer Affairs, Bess Myerson, as "of the broadest possible dimensions" because it sought "all books and records concerning [a moving company's] operations[.]" *Myerson*, 33 N.Y.2d at 259.

Judge Breitel explained that since the subpoena had been based only on anonymous complaints of overbilling, it should be quashed since "more [of a showing should be required] for [a subpoena] that might otherwise be causelessly broadened into an unlimited examination of the business affairs of an enterprise." *Id.* at 260. The Third Department has similarly refused to allow the NYAG to enforce an overly broad subpoena seeking all of a company's business records, even in the context of a criminal fraud investigation. *D'Alimonte* v. *Kuriansky*, 535 N.Y.S.2d 151, 152 (N.Y. App. Div. 3d Dep't 1988) ("the subpoena, which requires production of *'(a)ny and all* payment records . . . ,' is overly broad. There is no limitation as to time or client. Such a demand obviously encompasses materials beyond the scope of [the NYAG's] investigation . . . and, as such, is unreasonable and overbroad" (internal citations omitted).); *In re Future Tech.*, 2011 N. Y.Misc. LEXIS 1352 at *14 (quashing subpoena as overbroad that sought "[u]nlimited information . . . concerning any company or person that petitioners have ever been affiliated with"). The subpoena issued here is directly analogous. Here, as in the above cases, the NYAG seeks essentially all of Airbnb's business data for three years, and without any evidence to suggest that any violations of law have actually occurred.

In addition, while Airbnb is not a target of the NYAG's investigation, compliance with its terms would impose enormous burdens on Airbnb as a third party. To produce the Excel spreadsheet requested by the NYAG, Airbnb would have to extract hundreds of thousands of separate records spanning millions of cells. Preparing this data would take a significant amount of dedicated employee time across multiple company departments within Airbnb.

In order to produce the communications requested by the NYAG, Airbnb similarly would have to: (a) manually sift through hundreds of thousands of automated communications stored in Airbnb's system to isolate and extract affected New York users; (b) manually review tens of thousands of paper and e-statement tax forms to isolate and extract affected New York users; and (c) download tens of thousands of separate sets of communication threads stored in the company's customer relationship management system, each of which runs as long as 20 pages, and manually review them for relevance and privilege. Preparing these materials would take weeks of dedicated manual review time from attorneys, paralegals, temporary workers and multiple company departments.

New York courts also do not hesitate to quash disclosure subpoenas that involve the types of burdens listed above. *See Reuters*, 662 N.Y.S.2d at 455; *White Plains Coat & Apron Co.* v. *Lehman*, 448 N.Y.S.2d 232, 233 (N.Y. App. Div. 2d Dep't 1982). Given the fact that Airbnb is essentially a third-party to the NYAG's investigation, the NYAG's overbroad subpoena should be quashed because it is unduly burdensome on Airbnb and the NYAG has failed to establish that this enormous volume of data is relevant to any legitimate investigation.

III. The Subpoena Seeks Confidential, Private Information from Airbnb's Users

"[A] non-judicial subpoena duces tecum may always [be] challenge[d]. . . in court on the ground it. . . subjects the witness to harassment." *Myerson*, 33 N.Y.2d at 256. As discussed above, the NYAG subpoena seeks three years of confidential, private information about Airbnb's Guests and its Hosts, including the Host's: (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 each Accommodation. Ex. 3, at 8. Courts are justifiably wary of enforcing subpoenas that seek this type of private, personal information because they "open the floodgates with respect to issues of client confidentiality and potential harassment[.]" *In re Pavillion Agency Inc.* v. *Spitzer*, 802 N.Y.S.2d 879, 885 (N.Y. Sup. Ct. N.Y. Cnty. 2005).

Here, the NYAG is not only seeking confidential information, but tax-related communications and information as well. "While generally in New York there is a liberal discovery policy, case law recognizes that because of their confidential and private nature, disclosure of tax returns is generally disfavored." *Wonder Works Const. Corp.* v. *Seery*, 2011 N.Y. Misc. LEXIS 4833, at *4 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 12, 2011). Courts regularly quash subpoenas seeking tax records from the Department of Taxation and Finance. *See New York State Dep't Taxation & Fin.* v. *New York State Dep't of Law, etc.*, 44 N.Y.2d 575 (N.Y. 1978) (affirming the quashing of a subpoena by the NYAG to the State Department of Taxation and Finance for personal income tax information based on a tax secrecy provision); *People* v. *Wedelstaedt*, 356 N.Y.S.2d 411 (N.Y. Sup. Ct. Bronx Cnty. 1974) (applying N.Y. Tax Law § 1146(a) to deny a subpoena by the district attorney to State Department of Taxation and Finance for sales tax information).

This same logic applies with equal force to other tax-related communications. Their confidential nature makes them especially sensitive, particularly when they are records related to third parties. By requesting information from Airbnb regarding the collection of these various taxes related to hotel occupancy, the NYAG

overlooks N.Y. Tax Law 1146(a) and NYC Admin. Code § 11-2516 and the protections they provide for the tax records of Airbnb's Hosts. The NYAG may not be able to get the actual records from the Tax Commissioner or the Commissioner of Finance, so the NYAG seeks instead tax-related communications from Airbnb to get the information through the back door. Furthermore, even if the NYAG could subpoena these records from the Tax Commissioner or the Commissioner of Finance, the NYAG cannot determine whose records to subpoena because it has not articulated who may be responsible for collecting these taxes in the first place.

CONCLUSION

For all reasons outlined above, the subpoena should be quashed in its entirety, and Petitioner should be relieved of its obligation to respond.

Dated: October 9, 2013

By: 

Roberta A. Kaplan
Maria T. Vullo

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
(212) 757-3990 (Fax)

- and -

Terence L. Kindlon

KINDLON SHANKS & ASSOCIATES
74 Chapel Street
Albany, NY 12207
(518) 434-1493

Attorneys for Petitioner