

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL BRANCH

-----X

In the Matter of the Application of

Index No. 451409/2018

THE CITY OF NEW YORK,

Part 55

Petitioner,

(Hon. James d'Auguste, J.S.C.)

-against-

AIRBNB, INC.,

Respondent.

**MEMORANDUM OF AIRBNB, INC.
IN OPPOSITION TO THE CITY OF
NEW YORK'S VERIFIED
PETITION TO COMPEL
COMPLIANCE WITH SUBPOENA
DUCES TECUM**

-----X

Airbnb, Inc. ("Airbnb") opposes the City of New York's Verified Petition (NYSCEF No.

1) seeking to compel enforcement with the City's subpoena duces tecum served on June 5, 2018 (Petition Ex. 1, NYSCEF No. 3) (the "Subpoena"), as follows:

PRELIMINARY STATEMENT

The Subpoena is an attempt by the City of New York (the "City") to compel Airbnb to turn over personal information about a broad swath of New Yorkers who at some point during the last seven years have rented or stayed at an apartment in one of seven different Manhattan buildings. The City has already filed a lawsuit against the owners and managers of those buildings. But the Subpoena commands the production of information well beyond what the City legitimately needs to pursue that case—and if complied with as written, would result in the disclosure of personal information about scores of hosts and thousands of guests who have nothing to do with the City's pending lawsuit. Rather than address these concerns or make the required showing that these records are relevant to its case, the City sets an appallingly low standard for itself—asserting that it should be entitled to seek any information it wishes without

a factual basis for doing so, as long as it is not “utterly irrelevant” to an investigation (the scope of which the City can conveniently self-define). The Court should not accept the City’s invitation to ignore New York law and leave the City with boundless discretion to request personal information about New Yorkers who happen to live in buildings with individuals or owned by individuals that allegedly violate the MDL. There is no reasonable basis to require Airbnb to produce the broad records the City has demanded, and the City’s Petition should be denied and the Subpoena should be quashed or modified to limit Airbnb’s production to those records which the City can demonstrate are actually relevant to its lawsuit.

The City’s case against the owners and managers of seven buildings located on West 47th Street in Manhattan alleges those owners and managers violated the New York’s Multiple Dwelling Law (“MDL”) by booking and advertising rentals of illegal transient accommodations within those buildings. *City of New York v. Big Apple Mgmt., LLC, et al.*, Index No. 451031/2018 (N.Y. Sup. Ct., N.Y. Cty.) (“Big Apple Mgmt. Litig.”). The complaint identifies individuals and units within the buildings on West 47th Street as violating the MDL. The Subpoena the City served on Airbnb, however, was not limited to those individuals or units. Instead, it demands that Airbnb produce a substantial amount of information about every single listing and host associated with any address in those seven buildings at any point during the past *seven years*. That demand affects *seventy-six* accounts used to list properties on Airbnb, and thousands of guests. Of the 76 accounts that have used Airbnb for listings in one of the subject buildings, only *seven* are related to the City’s pending case—and of the remaining hosts, during the seven-year period, twenty-nine never had a reservation, another six had only one, and fourteen had between two and seven. Requesting “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.

The City’s response to Airbnb’s objections in its Petition only highlights why this Court should step in and quash or modify the Subpoena. The City’s Petition boils down to this: because we are investigating activity by *some* individuals in these buildings or the building owners, we are entitled to all records about *every other person* with an individual unit in those buildings who has ever listed it on Airbnb—regardless of whether they ever accepted a single reservation—and to every detail about every reservation made in any of those buildings, including personal data about every guest, no matter the circumstances. Enforcement of the Subpoena on the basis set forth in the Petition would set a scary precedent by allowing the City, on suspicion of unlawful activity by a few individuals in a handful of specific apartments or a landlord, to issue sprawling subpoenas that target multiple buildings or large buildings with hundreds of units, and require extensive disclosure about hundreds or thousands of other individual unit owners and tenants that happen to share the same street address. New York law does not permit such fishing expeditions. Rather, the City is required to show that the information sought has a reasonable relation to the subject matter under investigation, and that showing must tie the breadth of the Subpoena to the scope of the investigation. The City cannot and does not even attempt to make that showing here.

Finally, the Court should see the City’s Petition for what it is—an excuse to sue Airbnb rather than resolve issues in dispute. Airbnb timely responded to the City’s administrative Subpoena on July 13, 2018, with a proper request to modify or withdraw it—and proactively offered a reasonable alternative approach that would protect user privacy in accordance with the

law while allowing the City to investigate illegal activity. Airbnb discussed these issues with the City on July 20, 2018. Although it claimed to be open to further discussion, the City provided no counter-proposal that addressed the privacy rights of innocent New Yorkers potentially affected by this Subpoena, and filed this Petition mere hours later. Unfortunately, the Court is left holding the bag—having to sift through the City’s voluminous filing before reading this response and discovering that far less is in dispute than the City’s Petition suggests, that the City is seeking a great deal of irrelevant records, and that rather than refusing to comply, Airbnb has tried to propose a workable solution that does not waste the Court’s time.¹

Accordingly, the City’s Petition should be rejected, and the Subpoena should be quashed as overbroad and lacking a sufficient factual basis, or at a minimum modified to narrow Airbnb’s response to the set of records for which the City has set forth an adequate basis through its filings in its related lawsuit.

STATEMENT OF FACTS

1. Airbnb, a Platform for Hosts and Guests to Make Their Own Travel Arrangements, Protects the Privacy of Users’ Information Consistent with Law.

Airbnb provides a platform through which individuals that want to book accommodations (“guests”) and people listing accommodations for rent (“hosts”) can find each other and enter into agreements to reserve and book travel accommodations. Affidavit of Jennifer Monaghan (“Monaghan Aff.”), ¶ 4. In its role as a platform that facilitates travel arrangements, Airbnb possesses information about hosts and guests. *Id.* ¶ 6. Airbnb treats this information as

¹ It is not surprising that the City has likewise demonstrated a fast trigger finger by filing similar petitions against two other services—TripAdvisor and Booking.com—related to the same lawsuit on the same day. *City of New York v. Booking.com (USA), Inc.*, Index No. 451406/2018 (N.Y. Sup. Ct.); *City of New York v. TripAdvisor, LLC*, Index No. 451401/2018 (N.Y. Sup. Ct.). Those filings further demonstrate the City’s desire to amass broad data, rather than targeted requests to support its lawsuit.

confidential and in accordance with its privacy policy. *Id.*; Monaghan Aff. Ex. A.

The privacy policy sets forth Airbnb's responsibilities for responding to legal process, by informing hosts that it may disclose information to government authorities if that disclosure is reasonably necessary to comply with legal process or respond to requests relating to suspected illegal activity. Monaghan Aff. Ex. A, § 3.5. The privacy policy also states that Airbnb will provide hosts with notice of such requests if it is legally able to do so. *Id.*

Airbnb regularly objects to legal process when appropriate and seeks to narrow required productions. Indeed, it has reached agreements with the City on a number of recent occasions that have allowed the City to pursue its investigative aims while still preserving user privacy.

See, e.g., City of New York v. Airbnb, Inc., Index No. 153433/2018, NYSCEF No. 43 (N.Y. Sup. Ct., N.Y. Cty. May 9, 2018) (stipulation regarding negotiations between the City and Airbnb to resolve objections to a subpoena); *City of New York v. NYC Midtown LLC, et al.*, Index No. 450151/2015, NYSCEF No. 635 (N.Y. Sup. Ct., N.Y. Cty. May 7, 2018) (notice of entry of order for production of user data after negotiation between Airbnb and the City to resolve objections).

2. The Subpoena and Records Requested.

On June 5, 2018, the City served an administrative subpoena duces tecum on Airbnb via email. Petition Ex. 2 (NYSCEF No. 4). The Subpoena sought a broad range of Airbnb user, listing, and reservation information from January 1, 2011 through the present, relating to seven different buildings on West 47th Street in Manhattan. Subpoena at 7-8.

Based on Airbnb's preliminary review, the Subpoena seeks records relating to 76 different host accounts. Monaghan Aff. ¶ 10. Seven of those hosts were directly identified in the evidence submitted by the City in its related litigation against the owners and managers of those buildings—and accordingly, Airbnb intends to produce those hosts' records, rendering that

portion of the City's demand moot. *See Affirmation of Nicholas Jackson ("Jackson Aff."), ¶ 4; Petition Ex. 3 at 2 (NYSCEF No. 5) ("Response Ltr.").* As to the 69 other host accounts, **42% have not had a single reservation booked at the subject properties during the entire time period.** Monaghan Aff. ¶ 12. And of the accounts with reservations, **50%** have had seven or fewer reservations during the seven-year time period. *Id.* ¶ 13. Further, if Airbnb responded to the Subpoena as written, it would also result in producing personal information of thousands of guests that have stayed at any unit within the subject buildings at some point during the last seven years. *Id.* ¶ 14. Airbnb expected the City would be willing to agree that Airbnb need not produce guest information, as it has for other subpoenas, but the City was unwilling to agree to even that narrowing before rushing into court.

3. The Instant Case.

On the same day it served the Subpoena on Airbnb, the City filed a lawsuit against a number of entities and one named individual together alleged to "own, manage, advertise, and operate illegal transient (less than 30-day) rentals" in the seven subject buildings. *Big Apple Mgmt. Litig.*, Memo. of Law in Support of City's Mot. for a Temp. Restraining Order and Preliminary Injunction (NYSCEF No. 113) at 1. The City also sought a temporary restraining order and preliminary injunction against those defendants to cease such activity, and filed numerous exhibits in support containing evidence gathered during its investigation—including documents identifying a number of specific Airbnb host accounts, listings, and reservations. *Big Apple Mgmt. Litig.*, Exhibits to Pugach Aff. (NYSCEF Nos. 17-77).

Given the Subpoena's broad scope, Airbnb needed additional time to assess the extent of the information requested. It asked the City for an extension, and the City agreed to extend Airbnb's deadline to July 13, 2018. Jackson Aff. ¶ 5. On July 13, Airbnb sent a letter through counsel providing its response and objections to the Subpoena, in which it requested certain

modifications thereto in hopes of constructively resolving the City's request. Response Ltr. at 1-2. Airbnb objected to the Subpoena as overbroad, noting the disconnection between the specific hosts and listings the City identified in its court filing and the unrestricted request in the Subpoena for all records for any host associated with any of those properties across a seven-year time period. *Id.*

In its letter, Airbnb proposed a specific solution to the City that would resolve the overbreadth objection while allowing the City to obtain information relevant to its case. Airbnb stated that it was willing to produce records relating to the host accounts the City identified in the Big Apple Management 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). *Id.* at 2. Airbnb further stated that after production of those records, it was willing to discuss additional requests for data concerning other hosts/listings where the City believed it has a reasonable basis to seek that information. *Id.*

When sending the response letter, Airbnb's counsel requested a telephone call to discuss the Subpoena and the letter, which the parties scheduled for July 20, 2018. Jackson Aff. ¶ 6. In that conversation, Airbnb further explained the nature of its concern—particularly regarding hosts with zero or few reservations during the multi-year time period—and potential resolutions that would allow the City to investigate while protecting the privacy of innocent users. Jackson Aff. ¶¶ 6-7. Nonetheless, the City was not prepared to meet and confer in good faith, in that it indicated it intended to file a broad motion to compel shortly—despite Airbnb clearly communicating that there are categories of responsive information it is willing to (and intends to) produce, and its request to continue discussing an approach to production that would balance the City's legitimate investigative needs relating to the Big Apple Management Litigation with the

privacy rights of innocent and irrelevant hosts and guests. *See Response Ltr.* at 2; Jackson Aff.

¶¶ 6-7.

The City was unwilling to discuss narrowing the Subpoena with respect to any category of users until *after* involving the Court. Jackson Aff. ¶¶ 7-8 & Ex. A (email from City's counsel misrepresenting Airbnb's position as "becoming more divergent and contentious"). Nor to Airbnb's knowledge has the City attempted to seek any records from the defendants it is suing for their alleged facilitation of illegal rental activity at the subject buildings, despite the availability of discovery in the course of the pending litigation. Jackson Aff. ¶ 10. Instead, a few hours after the parties concluded their first scheduled discussion regarding Airbnb's request to modify the Subpoena, the City filed the instant Petition, in which it repeatedly mischaracterizes Airbnb's response and the parties' discussions to date. *See id.* ¶¶ 8-9 & Exs. A-B (City emailed shortly after call to confirm its intention to file a motion to compel, and filed the Petition less than two hours later).

ARGUMENT

1. The City's Subpoena is Overbroad and Should be Quashed.

Governmental agencies "do not have carte blanche in issuing investigative subpoenas." *Parkhouse v. Stringer*, 12 N.Y.3d 660, 666 (2009). They cannot use subpoenas duces tecum to "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." *A'Hearn v. Comm. on Unlawful Practice of Law of New York Cty. Lawyers' Ass'n*, 23 N.Y.2d 916, 918 (1969).

Accordingly, a recipient of a non-judicial subpoena—like the one the City issued in this case—"may always challenge [it] in court on the ground that it calls for irrelevant or immaterial documents or subjects the witness to harassment." *Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 256 (1973). When such a challenge is asserted, "it is incumbent upon the

issuer to come forward with a ‘factual basis’ which establishes the relevancy of the items sought to the subject matter of the investigation before a witness will be compelled to comply with the subpoena’s mandate.” *Virag v. Hynes*, 54 N.Y.2d 437, 441-2 (1981) (citing *Myerson*, 33 N.Y.2d 250, 258); *see also Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988) (issuing agency must demonstrate materials sought have “a reasonable relation to the subject matter under investigation and to the public purpose to be achieved”).

Crucially, “the showing of basis, or materiality, to be made must be related to the breadth of the inquiry and the extent of the investigation preceding the subpoena.” *Harlem Teams for Self-Help, Inc. v. Dep’t of Investigation of City of New York*, 122 Misc. 2d 1066, 1075 (Sup. Ct., N.Y. Cty. 1984). In other words, the more sweeping the government’s request, the stronger the showing that must be made. This constraint on governmental authority, “while couched in terms of materiality and relevancy,” is “grounded in the Fourth Amendment’s requirement of reasonableness.” *See id.* at 1077 (explaining that as an investigation evolves and its emphasis becomes the collection of evidence for use against a target, “the government must make the strongest requisite showing, that is to say, no less than probable cause itself”); *see also* MDL § 304 (providing criminal penalties for violations of the law at issue in the City’s investigation).

Airbnb has not disputed the City’s authority to investigate legitimate violations of the MDL, including the rental or advertisement of illegal transient occupancies. To the contrary, Airbnb has complied with valid and reasonable legal process from the City on numerous occasions. Similarly, with respect to the present Subpoena, Airbnb has already offered—and presently intends—to produce responsive records concerning hosts and listings whose relevance the City sufficiently established through its filings in the Big Apple Management Litigation. But by insisting on compliance with its Subpoena as written, the City fails to recognize the *vast* gap

between the basis for its investigation and lawsuit set out in the record—evidence concerning specific apartments at issue in the Big Apple Management Litigation (City’s Memo. of Law at 5 (NYSCEF No. 17) (“Memorandum”))—and the scope of its Subpoena to Airbnb, which covers every listing involving *any* unit in *any* of the seven buildings within the last seven years, regardless of how many times (if at all) it was listed or rented.

The City’s Petition makes no real effort to justify this expansive scope, and simply insists that it is entitled to these records so long as they are not “utterly irrelevant” to its investigation. Memo. at 10. But that investigation is premised on alleged misconduct by particular, identified targets whose records Airbnb is already planning to produce. The Court should not permit the City to demand personal information about a large number of *other* New Yorkers without first establishing that there is a substantial connection to the City’s investigation involving *them*—particularly given that investigation’s advanced stage, having already collected evidence and commenced enforcement litigation. *See Harlem Teams for Self-Help*, 122 Misc. 2d at 1077. During the lengthy time period the Subpoena covers, the substantial majority of hosts whose information the City is targeting have either never rented out a unit in any of these buildings or done so only a handful of times. Such hosts are not the target of the City’s pending action involving those properties, and the City makes no attempt to argue that they are. It is unclear how records related to host accounts that *never rented their apartments through Airbnb* are anything other than “utterly irrelevant.” And the City’s Petition likewise does not—and cannot—justify how rarely used Airbnb accounts, with a handful of reservations during a seven-year period by individuals not identified in its lawsuit against Big Apple Management, are at all relevant to that case.

The Petition also does not address the potential disclosure of information about guests at all—which is likewise utterly irrelevant and unnecessary because there is no allegation in the City’s lawsuit that guests violated the MDL.

Given the City’s failure to provide an adequate factual basis supporting its *much* broader demand for information about these hosts and guests, the Court should not permit a “general inquisition” to collect personal information about numerous New Yorkers without showing a meaningful connection to the City’s investigation. Courts have regularly restricted governmental overreach by quashing investigative subpoenas in similar circumstances. *See, e.g., N. v. Novello*, 787 N.Y.S.2d 379 (App. Div. 2d Dep’t 2004) (quashing portions of subpoena not reasonably related to specific complaints under investigation); *New York City Dep’t of Investigation v. Passannante*, 544 N.Y.S.2d 1 (App. Div. 1st Dep’t 1989) (quashing subpoena seeking all documents in recipient’s possession over multi-year period concerning multiple projects, finding City lacked sufficient factual basis establishing relevancy of information sought); *Nicholson v. State Commission on Judicial Conduct*, 412 N.Y.S.2d 602, 604 (App. Div. 1st Dep’t 1979) (quashing sweeping subpoena for documents related to a judicial campaign premised on a complaint about a single fundraiser due to “serious questions” of relevancy).

The few cases cited by the City in support of its relevance arguments merely highlight the severe overbreadth and lack of factual basis for the City’s requests, because each case is limited to specific data relevant to identified targets of an investigation—data about a *single apartment*, an unopposed petition to obtain a 5-hour video recording, and books and records from a target of an investigation.² This Court should reject the City’s sweeping subpoena and limit Airbnb’s

² See *Trump Vill. Sec. 4, Inc. v. Vilensky*, 2017 N.Y. Misc. LEXIS 5198 (Sup. Ct., Kings Cty. Nov. 29, 2017) (reviewing pro se defendant’s motion to quash non-party subpoena to Airbnb seeking records concerning *one apartment*—which was the subject of the lawsuit); *New York City Civilian Complaint*

response to records relevant to the City's pending lawsuit.

2. Airbnb Properly Objected to the City's Subpoena, and the City Failed to Negotiate in Good Faith Before Filing this Petition.

Under the CPLR, the recipient of a non-judicial subpoena must first make "a request to withdraw or modify the subpoena . . . to the person who issued it." CPLR § 2304. If such request cannot be successfully resolved, the recipient may then challenge the subpoena in court via a motion to quash or in response to a motion to compel compliance. *See id.; Friedman v. Hillman Manor Home For Adults*, 42 N.Y.2d 408, 413 (1977) (recipients of office subpoenas may properly raise objections in response to motion to compel compliance); *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 453 (App. Div. 1st Dep't 1997) (same).

Airbnb did exactly what the CPLR directs. It properly responded to the City's administrative subpoena by providing, on the agreed-upon date, a detailed written explanation of its objections, along with a request under CPLR § 2304 to modify the Subpoena to address those concerns. Airbnb then attempted to engage the City in discussions regarding narrowing its requests—and after the City unilaterally decided not to engage in that process and instead filed this premature motion to compel, Airbnb promptly raised its objections with the Court.

The City's complaints regarding Airbnb's response—which appear to primarily concern the fact that it has not yet produced records or provided a privilege log (Memo. at 11)—are not only ill-founded, but also the City's own fault. In its July 13 response letter, Airbnb affirmatively indicated its willingness to produce records for certain accounts and listings the

Rev. Bd. v. Brookdale Univ. Hosp. & Med. Ctr., 2015 NY Slip Op 30221(U), *1 (Sup. Ct., N.Y. Cty. 2015) (one-page order granting unopposed petition seeking 5 hours of video surveillance footage directly related to investigation into alleged excessive use of force by police); *La Belle Creole Int'l, S. A. v. Attorney-Gen.*, 10 N.Y.2d 192, 197 (1961) (allowing subpoena seeking books and records from target of investigation into illegal importation of alcohol).

relevance of which was not in dispute. It then promptly scheduled a call with the City's counsel, naturally expecting that the City would want to address the timing and sequence of user notification and records production as part of the discussion regarding scope—in case, for example, the City was planning to identify other host accounts for which it has a reasonable basis to seek information, which could be included as part of the same notice and production process.³

But to Airbnb's disappointment, the City was not interested in conducting good-faith discussions to resolve or narrow the scope of the parties' disagreement before filing a motion to compel.⁴ See N.Y. Ct. R. 202.7 (motions and orders to show cause relating to disclosure should include "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion"); *Sutherland v. Glennon*, 157 Misc. 2d 547, 549 (Sup. Ct., Hamilton Co. 1993) (noting Uniform Civil Rules apply to special proceedings). Instead of engaging in efforts to narrow the subpoena to protect innocent New Yorkers' privacy rights while still obtaining evidence needed for its investigation, the City decided to file this Petition a few hours after the parties' call—without making any effort to

³ The City's insistence that Airbnb should have provided a privilege log is confusing. See Memo. at 11-12. Setting aside the timing issues precipitated by the City's hasty motion filing, a privilege log is neither necessary nor helpful to resolve the objection at issue, i.e., overbreadth and lack of relevance—which in any event is the City's burden to rebut (as it acknowledges, see id. at 11). Since Airbnb has not asserted any of the privileges at issue in the cases that the City cites, its reason for including them is unclear. See, e.g., *People v. Alvo*, 2010 NY Slip Op 33983(U), *6 (Sup. Ct., N.Y. Cty. 2010) (attorney client, work product, and public interest privileges); *S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152 (S.D.N.Y. 2014) (work-product, attorney-client, investigative, and deliberative process privileges); *Condon v. Inter-Religious Found. for Cmtys. Org., Inc.*, 18 Misc. 3d 874 (Sup. Ct. 2008) (Fifth Amendment privilege against self-incrimination), aff'd, 856 N.Y.S.2d 620 (App. Div. 1st Dep't 2008); *In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 N.Y.2d 434 (2003) (statutory privilege for hospital quality assurance committee records).

⁴ Given that the City did not identify any other specific host accounts during the parties' July 20 call—or raise any questions about or otherwise wish to discuss Airbnb's intended production relating to the seven host accounts at issue in the *Big Apple Management Litigation*—Airbnb is now proceeding with providing notice to those seven users, to produce those particular responsive records to the City.

negotiate and narrow the issues it has presented to the Court. As a result, the City filed a mostly irrelevant twenty-three page memorandum of law in support of its Petition and a multitude of irrelevant exhibits. The City's actions were a transparent ruse to allow it to file suit against Airbnb as soon as possible to garner press attention—leaving this Court to waste its time reading an overlong Petition and supporting papers that do not actually address the issues in dispute between the parties.

CONCLUSION

For the reasons set forth herein, Airbnb respectfully requests that this Court reject the City's Petition and quash the Subpoena as overbroad, or in the alternative modify it to narrow Airbnb's response to the set of records for which the City has set forth an adequate basis through its filings in the Big Apple Management Litigation.

Dated: New York, NY
July 29, 2018

Respectfully Submitted,

ZWILLGEN PLLC

By: _____
Nicholas Jackson (SBN 4937488)
Jacob A. Sommer (*pro hac vice pending*)
232 Madison Avenue, Ste. 500
New York, NY 10016
Tel: (646) 362-5590
nick@zwillgen.com
jake@zwillgen.com

Attorneys for Airbnb, Inc.