

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

-against-

SMART APARTMENTS LLC, ROBERT K.Y.
CHAN, TOSHI INC., and "JOHN DOE" and
"JANE DOE," numbers 1 through 10,
fictitiously named parties, true
names unknown, the parties intended
being the managers or operators of
the business being carried on by
defendants SMART APARTMENTS LLC,
ROBERT K.Y. CHAN, or TOSHI INC.,

Defendants.

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AFFIRMATION IN SUPPORT
OF PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION AND
TEMPORARY RESTRAINING
ORDER

Index No. 402255/12

RICHARD HARTZMAN, an attorney admitted to practice before
the courts of the State of New York, makes this affirmation upon
information and belief, based upon my review of records
maintained by, and information and statements obtained from
various departments of the city government, and from statements
made by officers or agents of the City of New York, under the
penalties of perjury pursuant to Rule 2106 of the Civil Practice
Law and Rules:

I. INTRODUCTORY STATEMENT

1. I am Assistant Counsel to the Mayor's Office of
Special Enforcement and of counsel to Michael A. Cardozo,
Corporation Counsel of the City of New York.

2. I make this affirmation in support of plaintiffs' motion seeking an order, pursuant to Section 20-703(d) of the New York City Administrative Code (the Consumer Protection Law), and Sections 6301 and 6311 of the Civil Practice Law and Rules, for an order preliminarily enjoining the defendants, their agents, employees and/or representatives, and all persons acting individually or in concert with them, during the pendency of this action:

- a) From the transient use or occupancy, or permitting the transient use or occupancy, of any apartment units which they are managing, operating, leasing or otherwise renting or licensing, in all buildings located in New York City which are Class A Multiple Dwellings or other buildings for which the legally permissible occupancy precludes transient occupancy; and
- b) From booking, accepting reservations, or advertising any such apartment units for transient occupancy, whether managed, operated, leased or otherwise rented or licensed by defendants or by any other persons or entities;
- c) To remove or have removed all advertising of such apartment units managed, operated, leased or otherwise rented or licensed by defendants from any

and all internet websites and other media, whether or not directly maintained by defendants; and

- d) From disposing of, modifying, or in any other manner interfering with any and all digital or paper documents, photographs, media, and records maintained in connection with the renting, leasing, licensing, management, operation, use and occupancy of such units.

3. In addition, this affirmation is submitted in support of plaintiffs' motion, pursuant to Section 20-703(d) of the New York City Administrative Code (the Consumer Protection Law), and Section 6313 of the Civil Practice Law and Rules, for a temporary restraining order pending the hearing and determination of this motion, enjoining the defendants, their agents, employees and/or representatives, and any and all persons acting individually or in concert with them:

- a) From booking, accepting reservations, or advertising for transient use any and all apartment units, whether managed, operated, leased or otherwise rented or licensed by defendants or by any other persons or entities, in all buildings located in New York City which are Class A Multiple Dwellings or other buildings for which the legally permissible occupancy precludes transient occupancy;

- b) To remove and have removed all advertising of such apartment units from any and all internet websites and other media, whether or not directly maintained by defendant; and
- c) From disposing of, modifying, or in any other manner interfering with any and all digital or paper documents, photographs, media, and records maintained in connection with the renting, leasing, licensing, management, operation, use and occupancy of such units.

4. This application is predicated upon the fact that the defendants are engaged in deceptive trade practices in violation of the New York City Consumer Protection Law, operating a business which is per se illegal - advertising, booking, and operating apartment units in as many as 50 or more buildings in New York City for transient use and occupancy, permitting and promoting stays of less than 30 days, despite laws which make such transient use and occupancy illegal and criminal. In addition, these illegal occupancies violate stringent fire safety standards applicable to transient occupancies, putting many persons at risk and creating a public nuisance.

5. Defendants' deceptive advertising and promotion of these accommodations are misleading as to their character and

quality insofar as the consuming public is given no indication that the accommodations are illegal and unsafe.

6. Defendants continue to do so despite the repeated issuance of notices of violations by the Department of Buildings and the Fire Department directing the discontinuance of such illegal use and occupancy in many of the buildings in which they operate.

7. In addition, the practice poses security risks and inconvenience and other nuisances to the permanent residents residing in the buildings in which these illegal occupancies occur, and eliminates and reduces the stock of affordable housing for the City's residents, exacerbating the public nuisance defendants are causing.

8. Defendants' deceptive trade practices, and the public nuisance created by the illegal and unsafe manner in which they operate and maintain their business in multiple buildings causes irreparable harm to the City of New York, having a deleterious effect on the welfare, health and safety of the citizens of the City and its visitors. The public health, safety and welfare therefore require the issuance of a temporary restraining order and preliminary injunction pursuant to NYC Admin. Code §20-703(d) (Consumer Protection Law), and CPLR §§ 6311 and 6313.

II. PARTIES

9. Defendant SMART APARTMENTS LLC is a limited liability company organized under the laws of the State of New York, and upon information and belief is the lessee and/or manager or operator of numerous apartments in New York City which are being advertised, operated and made available for short-term, transient occupancies of less than thirty (30) days.

10. Defendant TOSHI INC., a business corporation organized under the laws of the State of New York, upon information and belief has been the lessee and/or manager or operator of numerous apartments in New York City which are being advertised, operated and made available for short-term, transient occupancies of less than thirty (30) days.

11. Defendant ROBERT K.Y. CHAN is upon information and belief a principal member of Defendant SMART APARTMENTS LLC and actively engaged in the management and operation of SMART APARTMENTS LLC; and a shareholder and chairman or chief executive officer of Defendant TOSHI INC. and actively engaged in the management and operation of TOSHI INC.

12. Defendants "JOHN DOE" and "JANE DOE," numbers 1 through 10, fictitiously named parties, true names unknown, the parties intended being the managers or operators of the business being carried on by defendants SMART APARTMENTS LLC, ROBERT K.Y. CHAN, or TOSHI INC.

III. BACKGROUND

13. Units in residential apartment buildings in New York City are increasingly being utilized as transient, short-term occupancy units for tourists and other short-term occupants rather than occupied by tenants who intend to establish a permanent residence, notwithstanding occupancy and fire safety rules which prohibit such use.¹

14. The spread of illegal transient occupancies, which some elected officials from New York City have termed an "epidemic," creates a number of serious problems for the City:

- a) a growing number of complaints from tourists who book accommodations over the internet, in most cases responding to advertisements unaware that rooms are being offered in violation of the law, only to find that the accommodations are in apartment buildings parading as "hotels" which often lack the barest essentials that short-term guests would normally expect;
- b) serious safety hazards, in particular with regard to fire protection, as code requirements for permanent residency buildings are not nearly as stringent as those for units and buildings geared to transient occupancy, but also with regard to severe overcrowding;

¹ This problem is not unique to New York City. Officials in Paris, France, another prime world tourist destination, have begun enforcing local rules similar to those in New York. The Paris municipality, which estimates that 20,000 permanent residence apartments are being used illegally as tourist accommodations, recently fined an owner 15,000 Euros for such illegal use. Illegal conversions of apartments to tourist accommodations have also emerged as a problem in San Francisco. See, articles attached as Exhibit "1" (those regarding Paris are in French and with Google translations).

- c) a burgeoning number of transient occupants inter-mixed with permanent residents whose presence poses significant security risks in buildings not equipped to handle the security problems associated with transient occupancy, as well as a degradation of quality of life for residents;
- d) harassment of permanent tenants by owners who seek to evict those tenants illegally in order to pursue a more lucrative transient market; and
- e) an illegal siphoning off of a significant portion of the city's housing stock, occurring most acutely in the affordable housing stock sector.

Further information about the problem is contained in (1) the Affidavits of Kathleen McGee, Director of the Mayor's Office of Special Enforcement, attached as Exhibit "2", concerning the general nature of the problem, (2) the Affidavit of James Colgate, DOB Assistant Commissioner of Technical Affairs and Code Development for the New York City Department of Buildings, attached as Exhibit "7", concerning fire safety requirements for transient occupancies and the illegal occupancy of defendants' apartment accommodations for short-term stays of less than 30 days, and (3) the Affidavit of Thomas Jensen, Chief of Fire Prevention for the New York City Fire Department, attached as Exhibit "5", also concerning fire safety requirements for transient occupancies.

15. The practice has been abetted by the phenomenal growth of the internet travel industry, and comes at a time when available housing accommodations for the residents of New York City remain at historically low levels.²

16. These "illegal hotel"³ accommodations, provided in buildings designed for permanent residency, are advertised on numerous web sites without any indication that they are illegal or that they fail to have the fire safety protections mandated for transient occupancies in New York City. The typical tourist is thus unwittingly led to book accommodations which are not only illegal, but also pose a heightened risk to his or her health and safety.

² For Manhattan, the August 2012 Rental Market Analysis prepared by CitiHabitats reports a vacancy rate of only 1.19 percent, after having dipped as low as 0.89 percent in May 2012 (analysis attached as Exhibit "13"). In the Initial findings of the *2011 Housing and Vacancy Survey* prepared by New York City Department of Housing Preservation and Development ("HPD") www.nyc.gov/html/hpd/html/pr/vacancy.shtml, the reported vacancy rate in Manhattan was 2.80 percent, compared to 2.70 percent in the 2008 Survey. The city-wide vacancy rate reported by HPD for rental housing units between February and May, 2011, was 3.12 percent, similar to that found in the 2008 Housing and Vacancy Survey – 2.88 percent between February and June of 2008 – and about the same as the 3.09 percent rate found in the 2005 Survey. A private industry report issued in July, 2012 by Reis, Inc., a real estate research firm, found a city-wide vacancy rate of only 2.2 percent in the second quarter of 2012. See, Reuters News Report, "*US apartment rents rise at highest rate since '07 -Reis*", July 5, 2012, at <http://www.reuters.com/article/2012/07/05/usa-apartmentmarket-idUSL2E8I376920120705>, viewed on August 14, 2012.

³ A phrase used colloquially and for convenience to refer to illegal transient occupancies – those for stays of less than 30 days in permanent residence buildings.

17. The proliferation of illegal transient accommodations is a matter of concern not only for tourists, but also for the citizens of New York City. The City government continually receives complaints from many sources; over 2,500 complaints to "311", letters and emails from the public, communications from elected officials and community groups - regarding excessive noise from tourists, late night partying, overflowing trash, vomit in hallways, fires, loud fighting, drugs, elevators damaged by constant suitcase traffic, a constant flow of unknown persons coming in and out of buildings, lack of building personnel to provide security, and the like. See, Exhibit "2", Affidavit of Kathleen McGee, Paragraphs 11-13.

LEGAL FRAMEWORK

A. TRANSIENT OCCUPANCIES PROHIBITED IN CLASS A MULTIPLE DWELLINGS - NEW YORK MULTIPLE DWELLING LAW, AND NYC HOUSING MAINTENANCE AND BUILDING CODES

18. In order to address the problem of short-term transient occupancies, the New York State Legislature enacted Chapter 225 of the Laws of New York State of 2010 ("Chapter 225"). Chapter 225, which went into effect on May 1, 2011, prohibits renting for less than 30 days any unit in "Class A" multiple dwellings, as defined under the New York Multiple Dwelling Law ("MDL") and the New York City Housing Maintenance Code ("HMC").

19. Before the enactment of Chapter 225, New York's MDL and HMC provided that Class A multiple dwellings were to be "occupied, as a rule, for permanent residence purposes." MDL § 4.a.8(a), HMC § 27-2004.a.8.(a). In January 2009, in contrast to long-term understanding by City agencies, the Appellate Division, First Department interpreted "as a rule" to mean that owners of Class A buildings could rent up to half of their rooms for "nonpermanent or transient occupancy," so long as the majority of the rooms were rented for longer than 30 days. See, City of N.Y. v. 330 Continental LLC, 60 A.D.3d 226, 230-31, 873 N.Y.S.2d 9, 12-13 (1st Dept. 2009).⁴

20. The State Legislature enacted Chapter 225 in response to the court's decision, amending MDL § 4.a.8(a), HMC § 27-2004.a.8.(a), the New York City Building Code § 310.1.2, and other related laws to make clear that the law prohibits, among other things, the rental of any unit in a Class A building for less than 30 days. Chapter 225 became effective May 1, 2011. The stated purposes of Chapter 225 were to (1) prevent building owners from circumventing the strict fire safety standards applicable to hotels; (2) prevent "unfair competition to legitimate hotels that have made substantial investments to

⁴ This case was recently settled, with the defendants agreeing to a permanent injunction against utilizing units in their properties for short-term stays of less than 30 days, and to pay the City of New York \$600,000.

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

21. Both Section 4.a.8(a) of the MDL, and Section 27-2004.a.8(a) of the HMC, as amended by Chapter 225, in identical language expressly prohibit short-term occupancies in Class A 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. (quotes in original, emphasis added)

22. Section 304 of the MDL provides (except for situations not applicable to the case at bar) that "... every person who shall violate or assist in the violation of any provision of this chapter [the MDL] shall be guilty of a misdemeanor ..."

23. The prohibition against using Class A multiple dwellings for short-term occupancies was incorporated into the occupancy group classifications of the Administrative Code

(Section 27-265) and New York City Building Code (BC 310.1.2), by Sections 5 and 6 of Chapter 225 of the Laws of 2010.

24. Section 8 of the Chapter 225, as amended by Chapter 566 of the Laws of 2010, made the prohibition applicable to "all buildings in existence" on May 1, 2011, and to all buildings constructed after May 1, 2011.

25. NYC Admin. Code § 28-118.3.1 prohibits an alteration or change in the use or occupancy of any building unless and until a written permit has been issued by DOB in accordance with the requirements of the Building Code, and a certificate of occupancy issued for the new use or occupancy.

26. NYC Admin. Code § 28-105.1 defines "alteration" to be "Any construction, addition, change of use or occupancy, or renovation to a building or structure in existence." (emphasis added)

27. The Environmental Control Board has ruled in an appeal decision that short-term transient occupancy in only one apartment in a Class A residential building is a violation of Section 28-118.3.2 of the Building Code, NYC v. 364 West 51st Street Associates LP, ECB Appeal No. 1200294, July 26, 2012. (A copy of the decision is attached as Exhibit "4" to the Order to Show Cause.)

28. Thus a change from permanent to transient use or occupancy without first having obtained a certificate of occupancy for that changed use or occupancy is unlawful.

B. DECEPTIVE TRADE PRACTICES - NEW YORK
CITY CONSUMER PROTECTION LAW

29. The New York City Consumer Protection Law ("CPL"), Administrative Code § 20-700, prohibits unfair trade practices:

No person shall engage in any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts.

30. CPL § 20-701(a) defines deceptive trade practices to be:

Any false, falsely disparaging, or misleading oral or written statement, visual description or other representation of any kind made in connection with the sale, lease, rental or loan or in connection with the offering for sale, lease, rental, or loan of consumer goods or services ... which has the capacity, tendency or effect of deceiving or misleading consumers. Deceptive trade practices include but are not limited to: (1) representations that goods or services have sponsorship, approval, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have ... goods or services are of a particular standard, quality, grade, style or model, if they are of another; (2) the use, in any oral or written representation, of exaggeration, innuendo or ambiguity as to a material fact or failure to state a material fact if such use deceives or tends to deceive... (4) offering goods or services with intent not to sell them as offered...

31. CPL § 20-703(d) authorizes the CITY to bring an action seeking temporary and permanent injunctive relief to halt deceptive trade practices:

Whenever any person has engaged in any acts or practices which constitute violations of any provision of this subchapter or of any rule or regulation promulgated thereunder, the city may make application to the supreme court for an order enjoining such acts or practices and for an order granting a temporary or permanent injunction, restraining order, or other order enjoining such acts or practices.

32. Section 20-703(e) further provides that actual injury to consumers need not be shown to establish a cause of action.

33. As a guide to interpretation, Section 20-706 provides that the CPL is to be "construed so as to supplement the rules, regulations, and decisions of the federal trade commission and the courts interpreting 15 U.S.C. Sec 45(a)(1)," but not in an inconsistent manner.

i. The offering, booking and rental of transient accommodations is a "good" or "service" within the purview of the Consumer Protection Law

34. "Consumer goods or services" are defined in CPL § 20-701(c) as those "which are primarily for personal, household or family purposes." The statute, § 20-701(d), further defines a "consumer" to be "A purchaser or lessee or prospective

purchaser or lessee of the consumer goods or services or consumer credit, including a co-obligor or surety."

35. Two New York court decisions make abundantly clear that the rental of transient accommodations is a "good" or "service", as those terms are used in the CPL.

36. In Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001), the Court of Appeals held that the sale of houses bundled with a package of services falls within the scope of the CPL.

37. In 23 Realty Associates v. Teigman, 213 A.D.2d 306 (1st Dept. 1995), a brokerage service advertised leasehold space as rent-stabilized apartments in a converted hotel, when in fact the hotel designation had never been changed. The Court, in concluding that the circumstances fell within the scope of the CPL, held that "[a] residential lease is, after all, a purchase of services from the landlord (and, by extension, his agent) (Park W. Mgt. Corp. v Mitchell, 47 N.Y.2d 316, 324, cert. denied, 444 U.S. 992)", and further noted that "[a]n apartment dweller is today viewed, functionally, as a consumer of housing services--as much a consumer as the purchaser of any other goods or services (Commonwealth v Monumental Props., 459 Pa 450, 467-468, 329 A.2d 812, 820-821)".

38. If advertising of long-term apartment rentals, and selling of homes with a package of services constitute "consumer

services and goods" under the CPL, a fortiori, the advertising, booking and rental of accommodations for transient use and occupancy, with a package of services including the booking of reservations, and providing furniture, linens, towels, kitchen utensils, internet service, heating and air conditioning, TVs, etc., likewise constitute "consumer services and goods" under the CPL.

ii. The offering of a service or product prohibited by law, such as illegal accommodations, is a deceptive trade practice

39. A merchant impliedly represents that its products and services may lawfully be sold and that it is authorized and legally entitled to sell and receive payment for them. See, e.g., Benik v. Hatcher, 750 A.2d 10, 25 (Md. 2000) ("Implicit in any advertisement is a representation that the transaction is lawful"). Where that is not the case, the merchant has engaged in a deceptive practice. See, e.g., FTC v. World Media Brokers, 415 F.3d 758 (2005) (deceptive to fail to inform consumers that it is illegal to buy and sell foreign lottery tickets); Karst v. Goldberg, 88 Ohio App. 3d 413 (1993) (deceptive to fail to inform consumer that a satellite television system was sold with an illegal unscrambler chip); Kugler v. Haitian Tours, Inc., 293 A.2d 706 (Sup. Ct. N.J. 1972) (selling consumers a divorce package for a Haitian divorce not recognized as lawful in the consumer's state of residence deemed a deceptive practice);

Walts v. First Union Mortgage Corp., 259 A.D.2d 322 (1st Dept. 1999) (charging prohibited insurance premiums deceptive), appeal dismissed, 94 N.Y.2d 795 (1999); Sterling v. Ackerman, 244 A.D.2d 170 (1st Dept. 1997) (charging unlawful Medicare fees deceptive); State v. E.F.G. Baby Prods., 40 A.D.2d 340 (3rd Dept. 1973) (charging legally prohibited cancellation fees deceptive as well as illegal).

40. As in these cited cases, it is a deceptive trade practice to advertise, book and provide short-term accommodations in apartments where such accommodations are illegal.

iii. The offering of a service or product which is unfit for its intended use, such as accommodations which do not meet fire safety requirements, is a deceptive trade practice

41. A merchant impliedly represents that the products it is selling are effective for the purposes for which they are sold. As the FTC has observed, "[w]hen a product is sold, there is an implied representation that the product is fit for the purposes which it is sold. When it is not, deception occurs." FTC Policy Statement on Deception, appended to Matter of Cliffdale Associates, 103 F.T.C. 110, 1984 FTC LEXIS 71, at *176 (1984), viewable at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>. See also, Matter of Int'l Harvester Co., 104 F.T.C. 949, 1984 FTC LEXIS 2 at 241-242 (1984) ("by the very act of offering goods for sale the seller impliedly represents that

they are reasonably fit for their intended uses", and "[t]he concept of reasonable fitness includes a further implied representation that the products are free of gross safety hazards, although not necessarily of all or relatively improbable dangers").

42. FTC v. Figgie International, Inc., 994 F.2d 595 (9th Cir. 1993), cert. den., 510 U.S. 1110 (1994), involved the marketing of heat detectors as fire safety devices. Despite a change in standards by the National Fire Prevention Association, recommending the use of smoke detectors in addition to heat detectors, the company's promotional materials continued to advise consumers that heat detectors were all that was necessary. The Court based its remunerative remedies on the previously affirmed FTC's cease and desist order which had found that the way in which the heat detectors were marketed was a deceptive trade practice. Matter of Figgie International, Inc., 107 F.T.C. 313 (1986), aff'd., 817 F.2d 102 (4th Cir. 1987).

43. In New York an innkeeper (or hotelier) has a common law "duty to exercise reasonable care for guests' safety". Taieb v. Hilton Hotels Corp., 131 A.D.2d 257 at 260 (1st Dept. 1987) (hotel liable to guest injured while exiting during fire caused by hotel's negligence). See also, Friedman v. Shindler's Prairie House, 224 A.D. 232 (3rd Dept. 1928) (hotel liable under

common law duty for death of guest who jumped from window during fire).

44. Innkeepers are also required to comply with fire protection statutes and other public regulations. 66 N.Y.Jur. 2d Hotels, Motels, and Restaurants § 98; Bernucci v. Marfre Holding Corporation, 171 Misc. 997 (Sup.Ct., NY Co., 1939).

45. The Environmental Control Board has ruled in an appeal decision that even partial illegal transient occupancy (in the case then before ECB, two apartments) requires building-wide compliance with the enhanced fire safety requirements for transient occupancies. NYC v. Mige Associates II, L.P., ECB Appeal No. 1200383, August 30, 2012. A copy of the decision is attached to the Order to Show Cause as Exhibit "4".

46. A merchant offering transient accommodations to consumers implicitly represents that those accommodations are of a certain quality - that they are reasonably safe, having met local safety standards and requirements. When they are not, the consumer has been misled as to a material fact and the merchant has engaged in a deceptive trade practice.

**C. HEIGHTENED FIRE SAFETY REQUIREMENTS
FOR TRANSIENT OCCUPANCIES - NEW YORK
CITY FIRE AND BUILDING CODES**

47. Transient residential occupancies in New York City (classified by the New York City Building Code, Section 310.1.1, as Group R-1 occupancies) are required to be designed,

constructed and operated at a significantly higher standard of safety than non-transient occupancies (classified by the New York City Building Code, Section 310.1.2, as Group R-2 occupancies). This is the case under both the Fire and Building Codes, as detailed in the Affidavits of James Colgate, DOB Assistant Commissioner of Technical Affairs and Code Development for the New York City Department of Buildings, attached as Exhibit "7", and Thomas Jensen, Chief of Fire Prevention for the New York City Fire Department, attached as Exhibit "5".

48. Reasons for the more stringent requirements include the fact that transient occupants do not have the familiarity with their surroundings that long-term occupants have, nor are they aware of the layouts and configuration of exits and/or fire escapes. They are not familiar with local fire-safety and evacuation procedures such as elevator evacuation, fire alarm notifications, exit signs, and do not know what telephone number to call to reach the fire department in case of emergency. Nor have transient occupants received the fire safety notices required in residential buildings that describe their building's combustible or noncombustible construction, whether or not they should remain in place or evacuate during a smoke condition. See, Colgate Affidavit.

49. Several notable fires, including hotel fires such as the MGM Grand Hotel fire in Las Vegas in 1980, which left 85

dead and hundreds injured,⁵ resulted in remedial legislation in New York and other States, including New York City's Local Law 16 of 1984. That legislation required retroactive upgrades to many classes of buildings including hotels.

50. For instance, under the Building Code, beginning in 1984, all hotels were required to retroactively install exit signs at the entrance to every exit stair as well as emergency lighting in case of power failure.⁶ Existing apartment houses classified as R-2 were never required to install exit signs or emergency lights. Therefore, these older apartment houses, without these important upgrades, are not deemed safe for transient occupants. Other retroactive upgrades required of existing R-1 transient occupancies, but never required of existing R-2 permanent residential occupancies, include the 1984 requirement for sprinklers or other fire protection measures to protect elevator lobbies on each story.⁷ See Colgate Affidavit.

51. The current Fire Code, enacted in 2008, imposes a series of requirements on transient residential occupancies beyond those which are applicable to permanent occupancies:

⁵ See, "Investigation Report on the MGM Grand Hotel Fire, NFPA (rev. 1982), retrieved at www.nfpa.org/assets/files/Press%20Room/LasVegasMGMGrand.pdf.

⁶ See Sections 27-382(b), 27-384(b) of the 1968 New York City Building Code, Sections 45, 46 of Local Law 16/1984.

⁷ See Section 27-353.1 of the 1968 Building Code, Section 33 of Local Law 16/1984.

- (a) Installation of portable fire extinguishers (FC 906.1);
- (b) Installation of automatic sprinkler systems (FC 903.2, as required by BC 907.2 and Admin. Code 27-954);
- (c) Provision of manual, automatic, or manual and automatic fire alarm systems (FC 907.2);
- (d) A fire safety and evacuation plan, which sets forth the evacuation and other procedures must be implemented in the event of a fire, and which designates the fire safety director, deputy fire safety directors and fire brigade members⁸ (FC 404.2.1);
- (e) Provision of a fire safety director, who is responsible for implementing the fire safety and evacuation plan, notifying the Fire Department, and communicating all instructions and directions to building occupants in the event of a fire, and who must possess a FDNY certificate of fitness and be present in the hotel or motel at all times (FC 401.6.5);
- (f) Provision of a lobby fire command center, equipped with a control panel that displays the status of alarm devices in the building, and that is used by the fire safety director and FDNY emergency response personnel to implement the fire safety and evacuation plan (FC 509.1);
- (g) Provision of a fire brigade, consisting of building staff trained in fire safety, who assist the fire safety director and FDNY

⁸ New York City Fire Code Section 402.4.1(8) requires this plan for "Group R-1 occupancies, occupied by more than 30 lodgers, or more than 15 lodgers above street level, for a period of 90 days or less; and/or operated to accommodate such numbers of lodgers for such period of occupancy; and/or designed to contain a total of more than 30 sleeping rooms, or more than 15 sleeping rooms above the street level, for such period of occupancy; and/or occupied by one or more lodgers on a floor more than 75 feet (22,860 mm) above the street level, for such period of occupancy, or operated or designed for such lodging.

personnel with the implementation of the fire safety and evacuation plan (FC 401.6.5); and

- (h) Diagrams posted on every guest room entrance door showing the route to two stairwells or other means of egress (FC 408.8).

52. The life-saving value of these fire safety requirements has been well proven over time. A summary by the National Fire Protection Association of hotel fires resulting in ten or more fatalities in the United States from 1934 through 2006 shows that, with the exception of the Dupont Plaza fire in San Juan, Puerto Rico in 1986 - a fire which occurred in a jurisdiction that at the time did not have the fire safety standards which had earlier been enacted in New York and other states - there have been no major hotel fire tragedies since the institution of the more stringent fire safety standards for transient occupancies.⁹

53. The importance of these fire safety requirements was also highlighted in a hotel fire which occurred in 2007 in the United Kingdom and left three persons dead. As reported by the BBC, the owners of the hotel, who admitted to criminal charges that they had failed to provide proper fire detection and alarm systems and failed to make a proper risk assessment, were fined £80,000 plus £62,000 in costs. The brother of two of the

⁹ The summary is attached as Exhibit "8" to the Colgate Affidavit. For information on the Dupont Plaza fire see, e.g., http://www.lrc.fema.gov/disasters_firesum_dupont.html.

victims opined that "The best thing that could come out of this is that the tourism agencies and hotels sit up and take note. There are still premises and hotels around the country that are not complying with fire regulations." See, Exhibit "9", attached to Colgate Affidavit.

54. The concern for safety in apartments being used for illegal transient occupancies has been emphasized in the just enacted Local Law 45 of 2012 (Intro. 404-A), which has added a new section to the New York City Administrative Code making it unlawful to use or occupy permanent residence dwellings for purposes other than permanent residence, and increased the penalties for repeated violations of the prohibition against such occupancies. Foremost among the City Council's legislative findings is the reference to the "significant health and safety concerns for occupants of illegal converted apartments within residential buildings." A copy of the new law is attached to the Affidavit of Kathleen McGee as Exhibit "10" to the Order to Show Cause.

D. COMMON LAW PUBLIC NUISANCE

55. Under common law principles in New York, a public nuisance is an offense against the State:

It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all (New York Trap Rock Corp. v. Town of Clarkston, 299 NY 77, 80), in a manner such as to offend public morals, interfere with

the use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons (Melher v. City of New York, 190 NY 481, 488; Restatement, Torts, notes preceding § 822, p. 217).

Copart Industries v. Consolidated Edison, 41 N.Y.2d 564, 568 (1977); City of New York v. Smokes-Spirits.Com, 12 N.Y.3d 616, 626 (2009) (quoting Copart Industries v. Consolidated Edison, Co., 41 N.Y.2d 564, 568 [1977]).

56. Similarly the Restatement of Torts 2d, §821B, defines a public nuisance to be "an unreasonable interference with a right common to the general public," and further describes circumstances which can constitute a public nuisance to include significant interference with "public safety," "public peace," and "conduct proscribed by a statute, ordinance or administrative regulation."

57. It is well settled that a governmental entity such as plaintiff CITY may bring an action to abate a public nuisance. New York Trap Rock Corp. v. Town of Clarkstown, 299 N.Y. 77, 83, (1949); City of New York v. Smokes-Spirits.Com, 12 N.Y.3d 616, 626 (2009).

58. Preliminary injunctive relief, including temporary restraining orders, are available remedies against common law public nuisances. See, Hoover v. Durkee, 212 A.D.2d 839 (3rd Dept. 1995); City of Rochester, Petitioner, v. Premises Located

at 10-12 South Washington Street, 180 Misc. 2d 17 (Sup.Ct., Monroe Co., 1998); State v. Joint Board, Nursing Home & Hospital Employees Div., 56 A.D.2d 310 (2nd Dept. 1977); United Steelworkers of America v. United States, 361 U.S. 39 at 60-61 (1959).

IV. STATEMENT OF FACTS

A. The Scope of Defendants' Business Operation

59. Defendants operate a multi-tiered business, advertising, booking, operating and maintaining transient accommodations for short-term stays of less than 30-days in as many as 50 or more Class A multiple dwellings in New York City, as well as in other buildings for which the legally permissible occupancy prohibits transient occupancy. In at least one instance an entire building is so being used; in others only a few units.

60. Defendants' have had offices at three locations: 174 Fifth Avenue and 274 Madison Avenue in Manhattan, and at 808 Driggs Avenue in Brooklyn. These offices are used to operate a number of the elements of their business, including their reservation and booking system, storing of supplies, and the laundering of linens brought to and from their various locations around the City.

61. Defendants maintain a web site, smartapartments.com, on which they directly advertise their short-term apartment

accommodations in New York City to tourists and visitors. The web site openly offers and provides for booking of accommodations for less than 30 days. Defendants also offer hosting services - booking services and apparently advertising - on their web site to "property owners". Copies of (1) the home page, with and without a drop-down menu for selection of the number of nights accommodations are sought, (2) the first page of a property search listing 50 of 220 accommodations with the "nightly" rate, (3) a page for an individual offering showing available dates, and (4) the "Services" page describing services offered to "property owners", are attached as Exhibit "14". Defendants also have an internet blog at toshiapartments.blogspot.com, which promotes their accommodations.

62. In addition, defendants maintain an extensive portfolio of photographs of their accommodations on flickr.com,¹⁰ (Copies of the home pages of their "photosets", captured on June 18, 2012, and again on September 19, 2012, are attached as Exhibit "15"), and have also advertised and conducted their business under the name Toshi Hotels, using web site addresses of hoteltoshi.com and/or hoteltoshinyc.com.

¹⁰ <http://www.flickr.com/photos/smartapartments/sets/>.

63. At another level are a multitude of other internet travel web sites which host defendants' illegal offerings, targeting different national markets in Europe and the United States. Those currently identified by OSE are www.airbnb.com, www.apartime.com, www.backpage.com, www.feelnyc.com, www.flipkey.com, www.holidaylettings.co.uk (British), www.homelidays.com (French), www.istopover.com, www.livingmanhattan.com (Italian), www.only-apartments.fr (French), www.roomorama.com, www.rootstravel.com (French), www.vacationrentals.com, www.vrbo.com, and www.9flats.com. See, Paragraph "6" of the Affidavit of John Bigolski, attached as Exhibit "16", and the copies of internet advertisements attached thereto as Exhibit "17".

i. The Buildings in Which Defendants Operate, and Their Classification

64. The CITY has identified no less than 44 Class A multiple dwellings as being or having been offered by defendants as accommodations for transient occupants for stays of less than 30 days.

65. In addition, the CITY has identified 3 other buildings used by defendants to provide accommodations for transient occupants for stays of less than 30 days, which have building classifications other than Class A multiple dwelling, but nonetheless preclude transient occupancies. These are 204

West 14th Street and 1068 Second Avenue in Manhattan, and 465 Grand Street in Brooklyn.

66. The grounds for determining their classification as Class A Multiple Dwellings or otherwise are described in detail in the Affidavit of James Colgate, DOB Assistant Commissioner of Technical Affairs and Code Development, attached as Exhibit "7".

67. All of these properties are listed in Table I, at Paragraph 72 below, indicating the bases for their identification as properties being used by defendants for illegal transient occupancies.

68. The use and occupancy of apartments in these buildings by defendants for illegal short-term stays has been confirmed in a number of ways.

69. First are inspections conducted by the Mayor's Inspection Task Force ("ITF") of the Mayor's Office of Special Enforcement ("OSE") which have confirmed use by defendants of apartments in 34 Class A buildings, and 3 buildings with other classifications precluding short-term transient occupancies. This is based on observations by the ITF, interviews of guests in those apartments, their presentation to the ITF of reservation documents, and other identifying information posted at building locations. Copies of the OSE "stop sheets", photographs of reservation documents, and ECB violations finding illegal transient occupancies, concerning the 37 buildings, are

included, building by building, as part of Exhibit "23". Those buildings which were the subject of OSE inspections are listed in Table I, at paragraph 72 below.

70. The second way in which defendants' use and occupancy of Class A and other categories of buildings for illegal short-term stays has been confirmed is through the observation by the ITF team of a series of addresses listed on a whiteboard mounted on the wall of defendants' business office located at 808 Driggs Avenue, Brooklyn, New York. Attached to the Affidavit of Kathleen McGee as Exhibit "12" to the Order to Show Cause, are two photographs taken of the whiteboard at the time of an ITF inspection on November 2, 2011. Ms. McGee accompanied the ITF team during that inspection and personally observed the whiteboard. The 19 buildings listed on the whiteboard for which there is corroborating evidence of short-term occupancies (as fully summarized in Table I, at paragraph 72 below) are as follows:

1. 19 W. 46th St.	11. 171 Mulberry St.
2. 22 E. 36th St.	12. 205 W. 14th St.
3. 30 Carmine St.	13. 224 E. 48th St.
4. 45 Carmine St.	14. 240 E. 27th St.
5. 65 Bank St.	15. 313 W. 47th St.
6. 79 Clinton St.	16. 317 Second Ave
7. 89 MacDougal St.	17. 356 W. 39th St.
8. 102 Charlton St.	18. 406 W. 49th St.
9. 144 Bleecker St.	19. 454 W. 57th St.
10. 157 Suffolk St.	

The photographs of the Toshi whiteboard are also reproduced as part of Exhibit "23" with respect the material relevant to each particular building, a red arrow pointing to the specific address on the whiteboard.

71. A third method of confirming defendants' use of apartments for illegal short-term use and occupancy has been to match photographs of apartment offerings posted on the Smart Apartments flickr.com "Photostream" collection and on defendants' SmartApartments.com website, with those posted on Livingapartments.com, which do have exact addresses, thus identifying the specific buildings in which defendants operate. The matching photographs from these web sites for each such location are contained in Exhibit "23", organized by building address.¹¹

72. The evidence culled from all three methods is summarized in the following table [see following page]:

¹¹ The smartapartments.com web site was extensively modified, upon information and belief, in late summer, 2012. The information from the smartapartments.com web site included in Exhibit "23" was captured prior to those modifications. The revised web site typically has addresses listed for individual accommodations, addresses which conform to the information derived through OSE's investigation.

Table I
Summary of Evidence of Defendants' Transient Operations - by Building

Building Address	OSE Inspections	Toshi Whiteboard	Living Manhattan. com	Smart Apart- ments.com	Flickr.com
1. 8 Centre Market Pl.	✓			✓	✓
2. 19 Bleecker St.			✓		✓
3. 19 W. 46 St.	✓	✓	✓	✓	✓
4. 22 E. 36 St.	✓	✓	✓		✓
5. 30 Carmine St.		✓	✓		✓
6. 41 W. 46 St.	✓		✓	✓	✓
7. 44 W. 37 St.	✓		✓	✓	✓
8. 45 Carmine St.	✓	✓			
9. 65 Bank St.	✓	✓			
10. 79 Clinton St.	✓	✓	✓	✓	✓
11. 82 Kenmare St.			✓	✓	✓
12. 89 MacDougal St.		✓	✓	✓	✓
13. 100 Charlton St.	✓		✓		✓
14. 102 Charlton St.	✓	✓	✓	✓	✓
15. 107 E. 60 St.	✓		✓	✓	✓
16. 115 W. 23 St.	✓		✓		✓
17. 117 E. 77 St.			✓	✓	✓
18. 135 Metropolitan Ave. - Bklyn			✓	✓	✓
19. 144 Bleecker St.		✓	✓		
20. 153 E. 26 St.	✓		✓		✓
21. 157 Suffolk St.	✓	✓	✓	✓	✓
22. 171 Mulberry St.	✓	✓	✓		✓
23. 174 Broadway - Bklyn			✓	✓	✓
24. 174 Hester St.	✓		✓	✓	✓
25. 186 S. 8th St. - Bklyn	✓		✓	✓	✓
26. 188 S. 8th St. - Bklyn			✓	✓	✓
27. 203 E. 14 St.	✓		✓	✓	✓
28. 205 W. 14 St.	✓	✓	✓		✓
29. 224 E. 48th St.	✓	✓	✓	✓	✓
30. 230 E. 27 St.			✓		✓
31. 240 E. 27 St.	✓	✓	✓		✓
32. 261 W. 21 St.	✓		✓	✓	
33. 313 W. 47 St.	✓	✓			✓
34. 317 2nd Ave.	✓	✓	✓	✓	✓
35. 325 E. 10 St.	✓		✓	✓	✓
36. 338 E. 55 St.	✓		✓		✓
37. 350 W. 37 St.	✓			✓	✓
38. 356 W. 39 St.	✓	✓	✓		✓
39. 406 W. 49 St.	✓	✓	✓	✓	✓
40. 408 W. 49 St.	✓		✓		✓
41. 450 Amsterdam Ave.	✓		✓	✓	✓
42. 454 W. 57 St.	✓	✓	✓	✓	✓
43. 465 Grand St. - Bklyn	✓		✓	✓	✓
44. 536 Madison Ave.	✓		✓	✓	✓
45. 663 Lexington Ave.	✓		✓	✓	✓
46. 808 Driggs Ave. - Bklyn	✓		✓	✓	✓
47. 1068 2nd Ave.	✓	✓	✓	✓	✓

73. Every advertisement from Livingmanhattan.com contained in Exhibit "23" specifies a minimum stay of 4 or 5 nights, far less than the statutory 30-day period. A consumer is also able to book accommodations for less than 30 days on smartapartments.com, and on other websites being used for advertising by defendants. See, e.g., Exhibit "14" and Exhibit "17", attached to the Affidavit of John Bigolski. With respect to buildings for which advertisements have not been observed on livingmanhattan.com, smartapartments.com, or elsewhere, the booking for short-term stays was confirmed during the inspections conducted by OSE through examination of reservation documents and interviews of guests.

74. The status of the 47 buildings listed in Table I as being Class A multiple dwellings, or as having other classifications precluding short-term transient occupancies of less than 30 days, is confirmed through research conducted by James Colgate, Assistant Commissioner of Technical Affairs and Code Development for the New York City Department of Buildings, as detailed in his Affidavit attached hereto as Exhibit "7".

75. The CITY has reason to believe that apartments in other class A multiple dwellings are being operated and maintained by defendants for illegal short-term transient use. This is based, among other things, upon (1) complaints received by the City with respect to certain locations indicating use of

apartments by defendants for short-term stay, but which could not be verified because of lack of access at the time of inspections; (2) additional apartment listings posted by defendants in their flickr.com Photostream collection and on smartapartment.com for which specific information is currently unavailable to plaintiff; (3) listings on livingmanhattan.com which upon information and belief are for accommodations being offered by defendants, and not other parties, for short-term stays, but which have not been so confirmed.

76. Upon full discovery and disclosure of defendants' operations in this litigation, the City is confident that it will find that apartments in more than 50 Class A buildings have been advertised and operated by defendants for illegal short-term accommodations of less than 30 days.

77. Whatever the exact number may be, it is beyond question that defendants' offerings are widespread and illegal.

ii. Defendants' Internet Advertising

78. The home page of smartapartments.com (copy attached as Exhibit "14") advertises defendants' accommodations as follows:

New York Short Term Vacation Rentals

Smart Apartments for Smart People

Planning on visiting New York City? Come stay in one of our fully furnished vacation rental apartments designed especially for smart people. We represent holiday rental apartments located in **all areas & neighborhoods of NYC** -

Park Avenue, Madison Avenue, Clinton Street, East Village, West Village, Times Square, and so much more. Each of these hand-picked apartments features studio to 5 bedrooms, private bathrooms, a fully equipped kitchen, 42" plasma TV and broadband internet access.

We represent a wide range of prices and apartments **to suit everyone's needs and budgets**. Some flats are penthouse lofts with private rooftops and jacuzzis while others can be considered contenders for NYC's smallest apartment award. These self-catered flats are **perfect for families and friends looking to experience New York as true New Yorkers**. Our "bookers" are experts in our apartment inventory, New York City culture and neighborhoods and would love to help plan your trip to NYC. [emphasis in original]

On the 'About Us' page on www.smartapartments.com, defendants openly admit to using New York City apartments for their short-term accommodations:

Smart Apartments is a short-term housing rental Start-Up Company committed to helping you find the right spot in New York City. Our young and dynamic team is dedicated to offering you a chic and temporary home in one of our 200+ new and restored smart apartments. Whether you're a business traveler or a tourist, why not stay in an actual apartment and feel like a true New Yorker? Our goal is to make sure you have a unique and exciting NYC experience. Our apartments are fully furnished. We include towels, bedding, television, and high-speed Internet connection. We'll keep you comfortable indoors, so you can be adventurous outdoors. Like us on Facebook and follow us on Twitter for more company news and special offers.

79. Photographs and descriptions of the apartment accommodations which defendants offer are found on the pages for specific accommodations, as well as available dates. For example, a search for available accommodations for a five-day period in November to December, 2012, conducted prior to the

revision of the web site, returned a list of 75 apartments, with photographs, a paragraph description, and the cost per night. A print-out of this list showing the selected dates is attached as Exhibit "18". An example captured after the web site revision showing availability for stays of only a few days is attached as part of Exhibit "14".

80. What defendants' advertising on smartapartments.com does not indicate is that the accommodations are illegal and fail to meet required fire safety requirements.

81. Defendants' advertising on other web sites (see list of 15 such sites in Paragraph 63 above) is of a similar nature, containing descriptions of the accommodations, a means of selecting the number of days for which the accommodations are desired, and the cost per night. Many of the web advertisements are explicit in indicating that accommodations are available for fewer than 30 days, such as those on livingmanhattan.com. See, Exhibit "17" attached to the Affidavit of John Bigolski.

82. A more generic advertisement by defendants for "short-term apartments" posted the host "Hub Pages" is also explicit in offering accommodations for less than 30 days:

Toshi Apartments - NYC furnished short-term apartments

Are you currently moving between vacations, houses, and cities? Do you need a furnished New York apartment for the short term? Are you looking for an actual luxury apartment as opposed to a damp suite in a hotel or an extremely

cramped hostel for a change? Do you want nightly rates that are much cheaper compared to the majority of traditional hotels out there?

Well, Toshi Apartments is here to help! We have furnished New York apartments available for the short term, each of which comes with a private shower, a complete kitchen, dining and living room chairs and tables, dishes, futons and sofas, linens, beds, cable TV and wireless Internet!

You can choose to stay by night, by week, or by month as we have around 150 furnished New York rentals for the short term, which are all readily made for your sleeping, working, studying, and playing needs. Just let us know the amount of bedrooms you require and which location you would prefer to stay in. Our talented booking specialists will work hard and do their best to find the perfect apartment - just for you!

<http://toshiapartments.hubpages.com/hub/toshiapartments>, visited on June 19 and September 19, 2012 (copy from June 19 attached as Exhibit "19").

83. Defendants have also offered promotional discounts for three and four-day short-term stays, and commissions to real estate brokers and travel agents, such as in the following instance posted in early 2012 on a website for travel agents:

New York-based vacation rental business **Smart Apartments** is now offering travel agents 10 percent commission on all bookings.

Additionally, agents can check out their offerings during a special fam program that runs January, February and March. FAMs last for either three or four days and are available on all properties in **Manhattan** and **Williamsburg, Brooklyn**. Apartments range from studios to six-bedroom and are fully furnished with Wi-Fi, large-screen TVs, modern kitchens and baths.

Rates range from \$125 to \$600 plus tax per night. FAM rates during January, February and March are 50 percent off.

For more information and to reserve call **Jeff Fried** at 205-999-2058 or email jfried@smartapartments.com. (emphasis in original)

<http://www.travelagentcentral.com/mid-atlantic/smart-apartments-fam-new-york-city> (last viewed on September 19, 2012, copy attached as Exhibit "20").

B. Complaints Concerning Illegal Transient Occupancy by Defendants

84. The Department of Buildings has received over 150 citizen complaints of illegal transient use in 42 of the 47 buildings in which defendants have been confirmed to be providing illegal transient occupancies. See, Paragraph 8 of the Affidavit of John Bigolski, attached as Exhibit "16". Although the details of those complaints are not available, other than the report of the illegal occupancies, the number and continuing flow attest to those occupancies being problematic to permanent residents having to deal with them on a daily basis.

85. With respect to tourists, there are a number of comment threads on Trip Advisor which attest to the concerns and issues which they have had with the defendants in particular.¹² A few examples of these comments are:

¹² http://www.tripadvisor.com/ShowTopic-g60763-i5-k3228229-Hotel_Toshi_New_York-New_York_City_New_York.html; http://www.tripadvisor.com/Hotel_Review-g60827-d2388259-Reviews-Smart_Apartments-Brooklyn_New_York.html; http://www.tripadvisor.com/ShowTopic-g60763-i5-k1563270-Renting_a_vacation_apartment_a_collection_of_posts-New_York_City_New_York.html, both last visited on Sept. 28, 2012.

20. Re: Smartapartments.com Toshi Apartments - Any reviews?

23 May 2011, 18:57

Destination Expert for New York City

Do you care to address the fact that most of these apartments are flagrantly breaking the new rule forbidding apartment rentals for under 30 days? Some of these apartments may very well be seized or padlocked by the city before the visitor even arrives.

Any business that has caused such grief for so many people and then comes on TripAdvisor to flagrantly break their rules of "no advertising and solicitation" by stating that all the negative reviews are an exaggeration further reinforces - in my mind - what kind of business this really is.

Buyer be very aware.

21. Re: Smartapartments.com Toshi Apartments - Any reviews?

11 June 2011, 0:18

we booked back in February--in a nutshell:

--pictures look great right? Apartment was filthy, hadn't been cleaned in months and had a bad smell

--black grout in the bathroom shower, shower head didn't work, toilet didn't flush properly

--we arrived to used sheets on beds, used towels in bathroom, furniture in complete disarray, and nail clippings on the floor in the bathroom

--wireless never worked

--mouse infestation

--turned the oven on and set the smoke detector off because of filthy oven

--they never truly cleaned the apartment for us--we had to do it

We complained almost every day for 2 weeks, they tried to fix some things but ended up doing more damage. they said they couldn't move us to other location. Completely

incompetent and they deny that they ever have problems with their customers!!!

We left, they kept our 1 month damage deposit. We tried to mediate, they refused to talk to us. We took them to small claims court. They tried to delay until we left. Finally settled last night. We didn't get all our Deposit back but got most. For the headache & stress, don't stay here. Plus we found out these are mostly illegal rentals--not allowed to rent for less than 1 month but Toshi does it anyway.

23. Re: Smartapartments.com Toshi Apartments - Any reviews?

17 August 2011, 14:11

Destination Expert for Washington DC

Louna---Please read the second "Top Question" that appears on the right hand side of this page --- "Why are Vacation Rentals a Bad Idea in NYC?". If you stayed in this apartment for less than a month, then it was an illegal rental.¹³

C. Lack of Fire Safety in Defendants' Accommodations

86. Of the buildings inspected by OSE in which defendants are offering, and in which OSE has confirmed illegal transient occupancies upon inspection, in thirty-six of thirty-seven, the inspections have resulted in FDNY and DOB notices for fire safety violations related to those illegal transient occupancies. Copies of fire safety violation notices and fire safety related Criminal Court complaints for the thirty-six buildings are attached as Exhibit "24".

¹³ These numbered comments are posted at http://www.tripadvisor.in/ShowTopic-g60763-i5-k4498227-Smartapartments_com_Toshi_Apartments_Any_reviews-New_York_City_New_York.html, last visited on Sept. 28, 2012. A copy of the full thread is attached as Exhibit "21".

87. The violations related to the illegal transient occupancies cover a range of fire safety issues:

- a. Failure to provide a type of fire alarm system as required for transient occupancies, with in-line smoke detectors: FC 907.2, BC 907.2.8.
- b. Failure to provide an automatic sprinkler system as required for transient occupancies: BC 903.2.7.
- c. Failure to have installed portable fire extinguishers as required for transient occupancies: FC 906.1, NFPA 10 of 2007, Sec. 504.2.2.
- d. Failure to have the external street exit doors from the building swing in the direction of egress travel, as required to transient occupancies: FC 904.10.6, BC 1008.1.2.2.
- e. Failure to provide the minimum number of exits required for transient occupancies: BC 1018.1, AC 27-366.
- f. Failure to post an evacuation diagram depicting 2 evacuation routes and other information on the external door of each unit being used for transient occupancies: FC 408.8.1.
- g. Failure to have a fire safety and evacuation plan as required for transient occupancies: FC 404.2.1(8).
- h. Failure to have a fire safety director with a certificate of fitness, as required for transient occupancies: FC 401.6.6.2.

88. For those locations at which the ITF was not able to directly verify illegal transient use at the time of inspection because of lack of access to individual apartments (but which have been confirmed through the other methods described above), Fire Protection Inspector Santiago nevertheless observed an absence of fire safety protection measures in the public spaces

of those buildings which are required for the protection of transient occupants. In those spaces he observed that there were no fire alarm systems, nor any sprinklers in 5 of the 9 locations. (See Paragraphs 4 and 9 of the Affidavit of Inspector Santiago, attached as Exhibit "22")

89. Serious fire safety violations, other than those relating directly to requirements for transient occupancies, have also been observed during the inspections conducted by OSE in the thirty-six buildings noted in Paragraph 86 above. These violations (copies of violation notices are attached as part of Exhibit "24") include:

- a. Where there is a fire alarm system installed, it is not only not of the type required for transient occupancies, but defective: FC 907.20.5.
- b. Failure to provide emergency lighting with an emergency power source, in public areas of the building: FC 904.10.6, BC 1006.3.
- c. Failure to provide exit signs where required: BC 1011.1.
- d. Failure to provide smoke detectors: FC 907.20.5, 907.20.6.
- e. Blocking of exit signs: FC 801.6, 1006.1.
- f. Obstructed exit passageways and fire escapes: FC 801.6.
- g. Failure to flameproof wood paneling in corridors: FC 801.3, 801.4.
- h. Failure to meet maintenance requirements for standpipes: FC 901.6.2.1, 903.5.

- i. Failure to provide automatic sprinkler system in basement laundry room: BC 903.2.10.6.
- j. Failure to provide proper fire stopping in cellar electrical and boiler rooms: BC 712.3, AC 27-345.

90. In buildings where there are fire safety issues not directly related to the illegal transient occupancies, the lack of fire safety measures required for transient occupancies exacerbates the risk to transient guests. This is the case with respect to 28 of the buildings used by defendants for illegal transient occupancies, as a search of the Department of Buildings on-line Building Information System ("BIS"), indicates that there are 90 ECB violations issued by the Fire Department for Fire Code violations in those 28 buildings. These are listed by building in Paragraph 10 of the Affidavit of John Bigolski, attached as Exhibit "16".

91. With respect to 45 of the buildings in which OSE has determined that defendants are operating apartments for illegal transient purposes, a search of FDNY records, specifically the Fire Prevention Information Management System, indicates not even one instance in which a fire alarm system required for transient use occupancy or hotel is acknowledged or registered, and not one instance in which such a system has been on-site

tested with the department for transient use.¹⁴ The appropriate fire alarm system account for transient use occupancy/hotel did not exist for any of the buildings in question. See, Paragraphs "10" through "13" of the Affidavit of Fire Inspector Ervin Santiago, attached as Exhibit "22".

92. Upon information and belief, in the buildings in which illegal transient accommodations are operated and maintained by defendants, none have the fire safety features required for transient accommodations.

**V. VIOLATION OF THE CONSUMER PROTECTION LAW -
DECEPTIVE TRADE PRACTICES**

93. A merchant offering products and services to consumers, implicitly represents that those products and services are legal and safe. When they are not legal and safe, the merchant is misleading consumers, thus committing a deceptive trade practice in violation of the City's Consumer Protection Law, Admin. Code Sec. 20-700. For the City to establish the existence of a deceptive trade practice, it is not necessary to show that consumers are being or were actually injured. Admin. Code Sec. 20-703(e).

94. Class A multiple dwellings, pursuant to Section 4.8.a of the Multiple Dwelling Law, may not be used for

¹⁴ The other two were not included in the search, as they were not identified as being operated by defendants until after the search was conducted.

occupancies of less than 30 days. Violation of the prohibition is a misdemeanor under Section 304 of the Multiple Dwelling Law.

95. The Environmental Control Board has ruled in an appeal decision that short-term transient occupancy in only one apartment in a Class A residential building is a violation of Section 28-118.3.2 of the Building Code, NYC v. 364 West 51st Street Associates LP, ECB Appeal No. 1200294, July 26, 2012. (A copy of the decision is attached as Exhibit "4" to the Order to Show Cause.)

96. This prohibition applies likewise to buildings which are not multiple dwellings but have a certificate of occupancy for commercial occupancy or for a building which specifies residential units in that building to be class A apartments.

97. The evidence in support of this motion clearly establishes that defendants are illegally booking and maintaining accommodations for stays of less than 30 days in at least 44 Class A multiple dwellings, and 3 other buildings in which such transient occupancies of less than 30 days are prohibited.

98. Moreover, the evidence demonstrates that accommodations in those buildings fail in fundamental ways to meet the fire safety requirements established in New York City for the protection of transient occupants.

99. The Environmental Control Board has ruled in an appeal decision that even partial illegal transient occupancy (in the case then before ECB, two apartments) requires building-wide compliance with the enhanced fire safety requirements for transient occupancies. NYC v. Mige Associates II, L.P., ECB Appeal No. 1200383, August 30, 2012. A copy of the decision is attached to the Order to Show Cause as Exhibit "4".

100. The evidence of defendants' deceptive trade practices is abundant and compelling.

101. Section 20-703(d) of the Consumer Protection Law authorizes this court to issue a temporary restraining order and preliminary injunction against defendants' deceptive trade practices.

VI. Common Law Public Nuisance

102. The defendants have advertised, operated, and maintained apartments for short-term stays of less than 30 days in numerous class A multiple dwellings which legally are only available for permanent residency, as well as other buildings in which transient occupancies are prohibited. This creates serious safety risks for the transient occupants of those apartments, particularly fire safety risks. It also creates significant security risks in buildings not staffed to handle the security issues associated with transient occupancy, and degradation of the quiet enjoyment, safety, and comfort of the surrounding

residents, created by noise, filth, and the excessive traffic of unknown and constantly changing individuals entering their places of abode.

103. The Building, Fire, and Housing Maintenance Codes establish minimum standards and requirements for public safety, health, welfare, and the protection of property. See, Building Code Section 28-101.2; Fire Code Section 101.3; Housing Maintenance Code Section 27-2002. When those minimum standards and requirements are ignored or not met, as in the case at bar, public safety, health, and welfare is endangered.

104. The unlawful activities promoted, maintained and allowed by the defendants through their illegal practices, and the unsafe building conditions allowed by defendants are detrimental to the welfare, property, and safety of the visitors to and citizens of the City of New York.

105. They offend, interfere with and cause damage to the public in the exercise of rights common to all, in a manner such as to endanger or injure the property, safety and well-being of a considerable number of persons.

106. The defendants are therefore maintaining a public nuisance as known at common law and in equity jurisprudence.

107. Unless restrained by order of this court, the defendants will continue their illegal activities and will absorb the costs of any fines and penalties imposed upon them as

routine operating expenses. In addition, the plaintiff CITY will be forced to continue expending its limited resources in continued attempts to abate this harmful nuisance through administrative inspections, criminal complaints, and violation orders.

108. The plaintiff therefore, has no adequate remedy at law.

109. The evidentiary record constitutes clear and convincing evidence that the defendants are actively and presently engaged in knowingly and recklessly creating and maintaining conditions which endanger the safety, welfare, or health of a considerable number of persons. This constitutes a public nuisance under common law and equity jurisprudence.

110. As such, the court is authorized to issue a temporary restraining order and preliminary injunction to abate this public nuisance forthwith.

**VII. IN SUPPORT OF A PRELIMINARY INJUNCTION
AND TEMPORARY RESTRAINING ORDER**

111. Authority for the issuance of a preliminary injunction and temporary restraining order stems from the specific provisions of the Consumer Protection Law, NYC Admin. Code §20-703(d), and CPLR §§ 6311 and 6313. Under those provisions, this court has the authority to issue preliminary injunctive relief and an ex parte temporary restraining order.

112. The courts traditionally have employed a three-pronged test in determining whether a preliminary injunction is indicated, requiring that the moving party demonstrate the following: (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of a preliminary injunction; and (3) the balancing of equities favors its position. City of New York v. 330 Continental LLC, 60 A.D.3d 226, 873 N.Y.S.2d 9 (1st Dept. 2009); W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761, 771 (1981); Paine & Chriscott v. Blair House Assoc., 70 A.D.2d 571, 572, 417 N.Y.S.2d 86, 69 (1st Dept. 1979).

113. Temporary restraining orders have been granted by the courts both with respect to deceptive trade practices in violation of the City's Consumer Protection Law, Aponte v. Raychuck, 140 Misc. 2d 864 (Sup.Ct., N.Y.Co. 1988), and with respect to common law public nuisances, State v. Joint Board, Nursing Home & Hospital Employees Div., 56 A.D.2d 310 (2nd Dept. 1977).

A. Likelihood of Success on the Merits

114. The evidence demonstrates a clear likelihood of success on the merits. Defendants advertising, booking and operating of illegal and unsafe short-term transient accommodations to consumers is clearly a deceptive trade practice in violation of the City's Consumer Protection Law.

The risks to tourists and other visitors to the City caused by the defendants' violations of fire safety standards; and the insecurity, disturbance, and inconvenience caused to permanent residents of the buildings in which defendants operate their illegal business, all constitute a criminal nuisance and hence a public nuisance.

115. Though the grant of preliminary relief does not require a final determination on the merits, the evidence at this stage is nevertheless clear and convincing - indeed overwhelming.

B. Irreparable harm

i. Deceptive Trade Practices

116. In Aponte v. Raychuck, supra at 869, a case involving advertising by a lawyer found to constitute a deceptive trade practices, the court granted and continued a temporary restraining order, holding that "plaintiffs need not establish actual injury to obtain a temporary injunction." The court's ruling was in turn based on the holding by the Court of Appeals in Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 272-273 (1977): "To establish such a cause of action [a deceptive trade practice], it need not be shown that consumers are being or were actually injured".

117. Although actual injury need not be shown to obtain a temporary restraining order against deceptive trade practices,

the City submits that deceptive trade practices which involve an illegal, indeed criminal business - a business which puts consumers at risk in unsafe accommodations - does constitute irreparable harm to the consuming public.

ii. Public Nuisance

118. In applying the three-prong test to municipalities seeking to enjoin public nuisances, the courts have held that irreparable harm is presumed from an unremedied public nuisance:

To be entitled to a preliminary injunction, the City [is] required to demonstrate a likelihood of ultimate success on the merits, irreparable injury in the absence of provisional relief, and a balancing of the equities in its favor (see *City of New York v Love Shack*, 286 AD2d 240, 242, 729 N.Y.S.2d 37 [2001], citing *W.T. Grant Co. v Srogi*, 52 NY2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761 [1981]). . . . [I]rreparable injury is presumed from the continuing existence of an unremedied public nuisance (see *Love Shack*, 286 AD2d at 242 ["the irreparable injury is based upon the harm to the general public if the nuisance is not immediately abated"]; see also *Bilynn Realty*, 118 AD2d at 512-513).

City of New York v. 330 Continental LLC, 60 A.D.3d 226, 873 N.Y.S.2d 9 (1st Dept. 2009).

119. The First Department, in an earlier decision, City of New York v. Bilynn Realty Corp., 118 A.D.2d 511 513, 499 N.Y.S.2d 1011, 1013 (1986), forcefully and similarly held as follows:

Special Term improvidently exercised its discretion in denying the City's motions for preliminary injunctions. A municipality has authority to obtain temporary restraining orders strictly enforcing its zoning ordinances. The three-pronged test for injunctive relief does not apply; no special damage or injury to the public need be alleged; and commission of the prohibited act is sufficient to sustain the injunction. Plaintiff made a prima facie showing that defendants in each case operated grocery stores which constituted public nuisances in residential districts in violation of the Zoning Resolution and Building Code. (emphasis added)

Accord, City of New York v. Cincotti, 133 A.D.2d 244, 519 N.Y.S.2d 146 (2d Dept. 1987).

120. Although these cases involved statutory nuisances under the City's Nuisance Abatement Law, Admin. Code Sec. 7-701 et seq., there is no reason why the same considerations should not apply equally to common law public nuisances.

121. The 330 Continental case involved circumstances essentially the same as in the case at bar - illegal short-term transient occupancy in Class A multiple dwellings. The trial court in 330 Continental had granted a preliminary injunction to the City. 18 Misc. 3d 381, 396 (Sup.Ct., N.Y. Co, Stallman, J., 2007). The Appellate Division reversed the trial court, based on its ruling that the Multiple Dwelling Law allowed up to fifty percent of the units in a Class A multiple dwelling to be occupied transiently. As the law has now been amended by the

State Legislature, addressing fire safety and other public concerns, to totally preclude transient short-term occupancy in Class A multiple dwellings, the trial court's reasoning in 330 Continental is fully relevant to the case at bar.

122. The trial court in 330 Continental concluded that the City had established irreparable injury "based on the harm to the permanent residents in the subject building, surrounding community and the general public; and that alterations undertaken without proper permits had adversely affected the health, safety and welfare of the inhabitants in the subject buildings." 18 Misc.3d at 393.

123. The City would add that tourists and visitors are endangered and harmed by being allowed to stay in accommodations which lack the requisite fire safety requirements for transient occupancies. The injunctive remedies provided under common law public nuisance doctrine are designed to protect not only residents, but also its visitors.

124. Moreover, the violations of the Fire and Building Codes are prima facie and per se harmful. The irreparable injury is palpable and real.

C. Balance of the Equities

125. The equities are also balanced in favor of the City. Defendants not only have been put on notice by the enactment of Chapter 225 of the Laws of 2010, that their business is illegal;

but they have acted in brazen defiance of numerous violations issued by FDNY and DOB with respect to the unsafe and illegal transient accommodations in more than a dozen buildings in which they operate, and have misled the consuming public with respect to those accommodations. This in itself weighs heavily against the defendants. The Court should not condone the continued use of the subject premises for purposes of illegal, criminal activity, in open defiance of the law.

126. The trial court in 330 Continental, in discussing the equities, ruled that the City has a right to act "for the benefit of the community and the health, safety and welfare of the permanent residents and the public at large."

127. In Aponte v. Raychuk, supra at 869-870, the court found the equities to lie with the City:

In balancing the equities, this court is not unmindful of defendant's contention that he needs to continue to advertise to remain in business. On the other hand, the consuming public also requires protection which plaintiffs seek to enforce. The equities balance in the public's favor over defendant's private economic interest.

There, the defendant was engaged in a lawful business. It was just his advertising that was found to be deceptive. In the case at bar the deceptive trade practices involve an illegal business. There are no equities that lie in favor of the defendants' economic interest.

128. Moreover the equities favor the City's request for relief in that enjoining defendants' illegal use of the affected buildings for transient occupancies will eliminate the fire safety risks placed on tourists when they occupy defendants' illegal accommodations, will eliminate the illegal use in itself, and will also eliminate the nuisances imposed on the permanent residences of the affected buildings.

WHEREFORE, I respectfully request that the plaintiff's application and motion be granted in all respects.

Dated: New York, New York
October 19, 2012


RICHARD HARTMAN