

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Complaint of

**DEPARTMENT OF STATE  
DIVISION OF LICENSING SERVICES,**

Complainant,

**DECISION**

-against-

**BARRY S. FEINSMITH,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on January 24, 2000 at the office of the Department of State located at 123 William Street, New York, New York.

The respondent was represented by Roger H. Madon, Esq., P.C., 125 Park Avenue, Suite 1600, New York, New York 10017.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

**COMPLAINT**

The complaint alleges that the respondent has engaged in the business of Apartment Information Vendor, although not licensed to do so, and continues to do so in violation of a consent order previously executed.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a Real Estate Broker representing Apartment Group Inc., 44 East 29th Street, New York, New York 10016, where he and it maintain an office. He is not, and since at least November 1, 1992 (the earliest date for which records are available) has not been licensed as an Apartment Information Vendor or apartment sharing agent (State's Ex. 1).

3) On January 19, 1999, in settlement of a previous complaint (Resp. Ex. B), the respondent, acting on behalf of himself and Apartment Group Inc., and represented by counsel, consented to immediately cease and desist from engaging in the business of Apartment Information Vendor as defined in Article 12-C of the Real Property Law (RPL) unless and until duly licensed to do so by the Department of State (State's Ex. 1).

4) Commencing no later than early 1999 the respondent operated an Internet website under the name "The Apartment Store." At some point the name of the site was changed to "ApartmentStores.com." On that site he offered, and continues to offer, in return for the payment of a fee (currently \$79.99), to provide individuals with one month of access to listings of apartments available for rent and a credit report prepared by a third party and mailed to subscribers in response to an electronic directive issued from the respondent's office. For a period of time access to the listings for two additional months was provided for an additional fee of \$25.00 per month. Although on February 1, 1999 Mr. Madon, acting as the respondent's attorney, was informed by Mr. Soronen that he considered that method of operation to be unlawful (Resp. Ex. A), the respondent did not cease making such paid extensions available until after he was served with the complaint in this matter (which was mailed on October 5, 1999).

Initially the listings were for properties located only in New York, but, with the change of name, listings became available for other locations in the United States as well. However, any particular user is restricted to listings for the one state which that user chooses upon registration.

5) The listings which the respondent makes available on his website are obtained from landlords and from newspapers such as The New York Times and the Village Voice.

6) The explanation of how ApartmentStores.com operates given on the respondent's web site at [www.nyaptstore.com/about.html](http://www.nyaptstore.com/about.html) states that "The Apartment Store is Manhattan's premier no fee real estate service." It goes on to discuss the fees charged by it and its competition, the services provided with regards to the availability of apartment listings, and states "subscription includes a credit report" (State's Ex. 3).

7) In registering to use the respondent's website customers are required to give their addresses and telephone numbers (including zip codes) (State's Ex. 3).

8) The respondent has an arrangement with Yahoo.com under which the respondent provides Yahoo with his listings (with the addresses deleted), and persons who conduct web searches on the Yahoo site for apartment listings matching those provided by the respondent are referred to ApartmentStores.com.

9) The computer server for the website is located in Bethel, Washington. However, the content of the site is entered electronically from the respondent's New York City office, where its employees are located. The respondent maintains a New York bank account for the deposit of the fees received from subscribers to his website, which fees are eventually routed to that account after initially being paid by credit card through a bank in the State of Washington.

#### OPINION

I- Pursuant to Real Property Law (RPL) §446-b, no person may "act or engage in the business as an Apartment Information Vendor in this state without first having obtained a license from the secretary of state." An "Apartment Information Vendor" is

"any person who engages in the business of claiming, demanding, charging, receiving, collecting, or contracting for the collection of, a fee from a customer for furnishing information concerning the location and availability of real property, including apartment housing, which may be leased, rented, shared or sublet as a private dwelling, abode, or place of residence." RPL §446-a[2].

An "advance fee" is

"any fee claimed, demanded, charged, received or collected from a customer before the customer has leased or rented a private dwelling, abode or place of residence through the information provided by an apartment information vendor." RPL §446-a[3].

Nowhere in the statute is there any limitation of coverage to persons who supply information by a particular means, such as in person or in writing, or an exemption from coverage for persons who supply information by some other means, such as electronic. *Division of Licensing Services v Wang*, 23 DOS 00. Nor, contrary to the respondent's assertions that as a Real Estate Broker he may sell information regarding the availability of rental apartments without a license as an Apartment Information Vendor, is there any exemption for licensed real estate brokers.

"While it is true that prior to the enactment of the apartment information vendor law some courts held that such activities required licensure as a real estate broker (*People v Biss*, 81 Misc2d 449, 365 NYS2d 983 (1975); *People v Sickinger*, 79 Misc2d 572, 360 NYS2d 796 (1974)), it is also true that with the enactment of the statute the law changed.

"When the Legislature enacted the apartment information vendor law, it carved out for special attention an area of the real estate business in which it decided that the public required special protection, and imposed on licensees special requirements above and beyond those placed on real estate brokers. Accordingly, unlike in the practice of real estate brokerage, apartment information vendors must establish special interest bearing trust accounts in the minimum amount of five thousand dollars (RPL §446-b[6], are required to use specially approved contracts (RPL §446-c[1]), may be required to file quarterly reports with the Secretary of State (RPL §446-c[4]), may not retain more than fifteen dollars of any advance fee when a rental has not been effectuated (RPL§446-c[5][a], and are forbidden to charge a fee in excess of one month's rent (RPL §446-c[5][b]))." *Division of Licensing Services v Mc Dermott*, 318 DOS 97.

There can be no question but that during the period of time in which the respondent collected fees for additional access to his listings of apartments after the initial one month period had expired the respondent was acting as an unlicensed Apartment Information Vendor. His argument that the \$25.00 fee was not related to the providing of listings, but rather an additional fee for the credit report, is illogical. The credit report having been paid for with the initial fee, the respondent presented no evidence, and does not argue, that additional costs for the credit fee were incurred at the time of the extension of access to the listings. His claim that the additional fee "rationalizes the deep discounted charge for the credit report" (memorandum, p. 10) ignores the fact that he testified that his charge for the credit report is in the mid-range of that charged by others, and that the evidence establishes that the charge provides him with an ample profit over what is charged by the third party provider.<sup>1</sup> That the respondent ceased making such extensions of access available after being served with the complaint herein in no way excuses the violation.

The respondent contends that in the current operation of ApartmentStores.com the re-sale of credit reports compiled by a third party is the primary function of the business, and that apartment listings are provided free of charge. An examination of the information provided on his website, however, refutes that contention. The clear emphasis of that information is that ApartmentStores.com makes varied apartment listings in New York City available to subscribers for less than the competition charges. Customers are, in fact, referred to the respondent's website by Yahoo.com when they conduct on line searches for apartment listings. The provision of the credit report is incidental and does not exempt the respondent's business from the requirement that it be licensed as an Apartment Information Vendor, as the essence of the service for which his customers are paying is the access to the apartment listings. *Division of Licensing Services v Wang, supra*.

II- The respondent argues that because the server from which Apartments.com operates is located outside of the State of New York, and contact between Apartments.com and its paying customers is all done through that server, he is not doing business in this state. However, his office, employees, and bank account are all located within New York State. From that office his employees input data into the apartment listing data base, which data base is then accessed by paying customers in, *inter alia*, New York State.

As the complainant points out, the respondent has clearly been conducting significant business within the State of New York. In *People v World Interactive Gaming Corporation et al.*, 1999 N.Y. Misc. LEXIS 425 (Sup. Ct. NY County, 7/22/99, Index. No. 404428/98), the defendant, a Delaware Corporation with headquarters in Bohemia, New

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<sup>1</sup> In a letter of February 9, 1999 to Mr. Soronen (Resp. Ex. A) Mr. Madon justified the \$25.00 charge as being needed to cover the cost of advertising, telephone, rent, utilities, insurance, postage and stationary, professional fees, sales cost, miscellaneous (computer upgrades, software, paper, cartridges, accounting), and, significantly, website maintenance, website connection, and website hosting. None of those costs relate to the one time provision of the credit report. They do, however, clearly relate to providing apartment listings.

York, had an Antiguan subsidiary corporation which operated a casino in Antigua. That subsidiary, which the Court found was the alter ego of the parent corporation, developed interactive software and purchased computer servers which were installed in Antigua to allow users around the world to gamble from their home computers. The subsidiary promoted its casino at its website, and advertised on the Internet and in a national gambling magazine. The promotion was targeted nationally and was viewed by New York residents. Users of the gambling opportunities were required to register. If they entered an address in a state which permitted land based gambling they were granted permission to gamble. If not, they were denied permission, but they could then re-register by entering an address in a state such as Nevada, and then were permitted to gamble after first having wired money to open bank accounts in Antigua. The Court found that having purposefully engaged in significant activities the defendant was subject to New York jurisdiction. The situation herein is remarkably similar in that the respondent: Maintains his office in New York and operates his business from that office; maintains his website on an out of state server; in effect advertises on the internet through his arrangement with Yahoo.com; has his employees edit his website from the New York office; and knowingly provides listings of apartments in New York to persons in New York.<sup>2</sup> See, also, *People v Lipsitz*, 174 Misc. 2d 571, 663 NYS2d 468 (Supreme Court, NY County, 1997).

III- The respondent argues that because the Secretary of State has opined, in a letter in response to a State Senator's inquiry on behalf of Lan Lan Wang, a constituent who was engaged in the operation of an unlicensed Apartment Information Vendor business, that the statute is "onerous and should be amended" (Resp. Ex. C), it is improper for the Department of State to seek to enforce the law as it now stands. That argument, which the respondent fails to support with citations to any case law whatsoever, is totally lacking in merit.

IV- The respondent, freely and with the advise of counsel, entered into an agreement with the complainant wherein he agreed to cease and desist for the operation of an unlicensed Apartment Information Vendor business. In spite of that, he continued to operate such a business, albeit in a somewhat altered form. It is clear from his testimony that he never took the agreement seriously because in his opinion he never acted as an apartment information vendor and, in any case, again in his opinion, he is not subject to the Apartment Information Vendor Law (trans. p. 47). His actions and testimony demonstrate an unacceptably cavalier attitude towards his obligations and commitments.

#### **CONCLUSIONS OF LAW**

1) By operating an unlicensed Apartment Information Vendor business the respondent violated Real Property Law §446-b and demonstrated untrustworthiness and incompetency as a Real Estate Broker.

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<sup>2</sup> The respondent denies having knowledge of the location of his subscribers. That information is, however, entered on his servers and is, therefore, available to him, as is demonstrated by the fact that the credit reports are mailed to the subscribers at the direction of the respondent's office.

2) By failing to abide by his agreement to cease and desist from the operation of an unlicensed Apartment Information Business the respondent demonstrated untrustworthiness and incompetency as a Real Estate Broker.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Barry S. Feinsmith has violated Real Property Law §446-b and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$1,000.00 to the Department of State on or before June 30, 2000, and should he fail to pay said fine any and all licenses as a Real Estate Broker issued to him shall be suspended commencing July 1, 2000 until such fine shall have been paid, and upon payment of the fine said licenses shall be further suspended until such time as he has presented proof satisfactory to the Department of State that he, either directly or through any business controlled by him, is no longer engaged in the State of New York in the business of Apartment Information Vendor as defined by General Business Law §446-a[2]. The respondent is directed to send such proof and a certified check or money order for the fine payable to "Secretary of State", or his license certificate(s) and pocket card(s), to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier  
Administrative Law Judge

Dated: May 30, 2000