08-5547-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Roy Den Hollander,

Plaintiff-Appellant,

--against--

Copacabana Nightclub, China Club, Lotus, Sol, Jane Doe Promoters and A.E.R. Lounge,

Defendants-Appellees.

Guest House and A.E.R. Nightclub,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

It is important to point out that Lotus' Brief, either mistakenly or intentionally, relies on the allegations in the original complaint and not those in the plenary First Amended Complaint, App. 15-61. For example, Lotus' Brief at p. 4 reproduces verbatim most of ¶ 4 of the original complaint, which is not ¶ 4 of the First Amended Complaint ("Amended Complaint"). Actually, Lotus' entire quote of the part of ¶ 4 of the original complaint does not appear in the Amended Complaint. Throughout its Brief, Lotus cites and refers to only the original complaint. Such a fundamental error seems of too great a significance to be accidental, especially considering that the Amended Complaint undercuts Lotus's arguments.

An amended complaint supersedes the original and renders the original of no legal effect. International Controls Corp. v. Vesco, 556 F.2d 665, 668-69 (2d Cir. 1977). The "earlier complaint is a dead letter and 'no longer performs any function in the case.'" Connectu LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008)(quoting Kolling v. Am. Power Conversion Corp., 347 F.3d 11, 16 (1st Cir. 2003).[1] Applying the law of state action to the wrong factual allegations makes Lotus' arguments irrelevant.

[1] Lotus also fails to refer to counsel and representative for the putative class by his correct last name of "Den Hollander."

It is equally important to make clear that this case involves public accommodation nightclubs that serve alcohol to the public at large. This case does not concern private clubs, such as fraternal and membership organizations, that only admit their members and not the general public. The New York State Liquor Authority ("SLA") has separate less pervasive rules for these membership, fraternal organizations, Amended Complaint ¶¶ 8-11, App. 16, and the U.S. Supreme Court views them differently for the state action analysis, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972)("Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large").

ARGUMENT

I. Standard of Review

Nightclub Lotus calls for "a modicum of evidence" to "demonstrate" state action, Lotus Brief p. 1, but this is an appeal of a dismissal on the pleadings under Fed. R. Civ. P. 12(b)(6). The Court of Appeals reviews the lower court's decision *de novo*, "accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor." Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008)(quoted citation omitted). "To survive a motion to dismiss, a complaint must plead 'enough facts to state a claim to relief that is

plausible on its face.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

The operative words are "allegations" and "plead," not providing evidence or demonstrating proof of facts. "Allegation" is "a party's formal statement of a factual matter as being true or provable, without it having yet been proved." Black's Law Dictionary, 8th ed. "Plead" means "to assert or allege in a pleading." Id. Decisions under Fed. R. Civ. P. 12(b)(6), unless converted into a summary judgment motion, do not involve evidence, which "tends to prove or disprove the existence of an alleged fact," Black's Law Dictionary, 8th ed., or require a demonstration as to the existence of facts, which also means to prove, Webster's New World Thesaurus (1999). All the Amended Complaint need do is adequately allege that state action exists, which it does at ¶¶ 7-52, App. 16-21.

Nightclub Lotus manipulates authority for its evidentiary requirement at the pleading stage by misrepresenting DM Research, Inc. v. College of Amer. Pathologists, 170 F.3d 53 (1st Cir. 1999). Lotus falsely claims DM Research, Inc. holds "a plaintiff must provide concrete facts to establish each and every element of her claim in order to justify dragging a defendant past the pleading threshold." [2] (Lotus Brief p. 3, citing DM Research at 55). What the First Circuit actually said is the plaintiff needs "to allege a *factual* predicate concrete enough to warrant

[2] "Establish" also means to prove. Black's Law Dictionary, 8th ed.

further proceedings," and the plaintiff "need not include evidentiary detail." DM Research at 55 (emphasis in the original). The plaintiff must not be put to the test to prove his allegations at the pleading stage. *See* N.O.W., Inc v. Scheidler, 510 U.S. 249, 256, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994).

Lotus' argument that a complaint must prove facts harkens back to yesteryear when under federal practice, prior to the federal rules, the pretrial functions of notice-giving, issue formulation and fact revelation were performed primarily, and inadequately, by the pleadings. Hickman v. Taylor, 329 U.S. 495, 500, 91 L.Ed. 451, 67 S.Ct. 385 (1947). The federal rules, however, restrict pleadings to the task of general notice giving and invest the deposition-discovery process with the vital role of fact preparation for trial. Id. 501. Lotus' position is simply an example of lawyering words into meaning what one wants them to say.

II. Section 1983 Allegations

Lotus mistakenly claims that state action requires it and the state to operate "jointly in some fashion." (Lotus Brief p. 1). State action, however, can also exist when an ostensibly private organization exercises a public function, the state is responsible for and controls the private entity, or the state provides significant aid to the private entity. Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001); Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); Sybalski v. Ind.

Group Home Living Prog., Inc., 546 F.3d 255, 257 (2d Cir. 2008); Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir. 2005).

Lotus wrongly asserts that the Amended Complaint only alleges state action in the Nightclubs' "selling alcohol on their premises" for consumption. (Lotus Brief p. 2). The Amended Complaint also alleges state action in the SLA prescribing and proscribing the limits and conditions for what takes place within and without the Nightclubs and the circumstances surrounding their business operations. (Amended Complaint ¶¶ 7-52, App. 16-21).

In another error, Lotus states the principle allegation in this case appears in the original complaint at ¶ 4. (Lotus Brief p. 4). Since the Amended Complaint superseded the original complaint, Lotus' statement is legally inapposite. The issue here is whether state action exists, and that is alleged in detail in the Amended Complaint at ¶¶ 7- 52, App. 16-21.

Continuing to rely on the "dead letter" original complaint, Lotus argues that Den Hollander asserts state action "in an entirely conclusory fashion … because of 'the entwinement [of Lotus' operations] with … the New York State Division of Alcoholic and Beverage Control ("ABC") and the New York City Consumer Affairs Department.'" (Lotus Brief pp. 4-5, the internal quote attributed to Den Hollander is from the original complaint ¶ 4). Lotus states, "it is absurd on its face" to allege state action because of the Consumer Affairs Department's

regulations—perhaps not so absurd as relying on the wrong complaint. Nevertheless, the Amended Complaint does not allege state action based on N.Y.C. Consumer Affairs regulations.

Lotus' "conclusory" argument fails because it does not take into account the allegations of state action in the Amended Complaint at ¶¶ 7- 52, App. 16-21. Lotus only cites to one allegation in the dead letter original complaint to assert that Den Hollander made "no other factual allegations that bestowed Section 1983 jurisdiction on the Trial Court." (Lotus Brief p. 6). Once again, it is the Amended Complaint that Lotus should be dealing with—not the original.

III. Lotus operates under color of state law.

Just as Lotus has apparently attempted to obfuscate by focusing on the wrong complaint, it does the same in characterizing the issue as "whether there is state action involved in private Nightclubs having Ladies Nights at their establishments." (Lotus Brief p. 6). The issue is whether state action is involved when retailers of alcohol for on-premise consumption discriminate, based on sex, against men in their admission policies.

Lotus also wrongly attributes to Den Hollander's Brief the argument that state action exists "based solely upon the existence of extensive regulation…." (Lotus Brief p. 7). Given Lotus' track record when it comes to misrepresenting the allegations that are before this Court, it is not surprising that it also misrepresents

Den Hollander's arguments and the law. The Brief actually argues that the actions of a nominally private entity, such as Lotus, are attributable to the state when:

> "(1) the private entity has been delegated a public function by the state; (2) the state is responsible for and controls the private entity; or (3) the state's involvement with the entity (a) entwines the entity with state policies or entwines the state with the management and control of the entity, (b) the entity is a willful participant in joint activity with the state, or (c) the state provides significant encouragement, and in all these situations, (a)-(c), the private entity's action is fairly attributable to the state, which can mean the entity obtained significant aid from the state." (Den Hollander's Brief p. 6).

Lotus even tries to fashion a precise formula for state action by asserting it is "only where a private party is heavily regulated by the State and has some other close relationship" with the ostensibly private entity.[3] (Lotus Brief p. 7). On the contrary, state action is found in numerous situations. Lotus' statement that "[o]nly under those circumstance," id., of its formula can state action exist contradicts the U.S Supreme Court's warning:

> "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which '[t]his Court has never attempted.' Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556, 67 S. Ct. 910; 91 L. Ed. 1093 (1947). Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

[3] Lotus fails to provide legal authority for its self-serving rule.

In addition, Lotus glibly states that "[s]urely it cannot credibly be argued that the State… is 'responsible'" for discrimination against men at Lotus. (Lotus Brief p. 7). But "responsible" includes providing "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)(emphasis added). Had Lotus not ignored the Amended Complaint, it would not have concluded that Den Hollander did not plead any facts that the SLA "significantly encouraged" Lotus to discriminate against men. (Lotus Brief p. 8). The allegations are in the Amended Complaint at ¶¶ 47-52, App. 20-21, and the encouragement argument is in Den Hollander's Brief at pp. 26-30. If the SLA did not overtly encourage the discrimination, then it surely did covertly by stamping its imprimatur on the practice.

Lotus wrongly tries to place the blame for Lotus' discrimination on the nightclub's promoters. (Lotus Brief p. 7 n. 2). The Amended Complaint at ¶¶ 53-54, App. 21, specifically alleges that the Nightclubs, not the promoters, have the ultimate authority to determine admission practices, since the promoters are the Nightclubs' agents. In the case of Lotus, it has one employee who determines the nightclub's admission practices.

Again relying on the legally defunct original complaint, Lotus argues there are no factual allegations that the SLA has "so far insinuated itself into the position

of interdependence" so as to be a "joint participant" with Lotus. (Lotus Brief p. 8, citing Jackson v. Metro. Ed. Co., 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)). However, the legally operational complaint, the Amended Complaint, alleges interdependence at ¶¶ 15-16, 18-19, 25, 43-46, 50-52, App. 16-17, 20-21, and argues such in Den Hollander's Brief at pp. 21-26. One of the factors in determining interdependence under joint activity is the state benefiting from the discrimination. Burton, 365 U.S. 715, 724. Lotus admits generating significant tax revenue for New York, some of which comes from charging men more for admission. (Lotus Brief p. 13).

IV. Lotus inappropriately asks the Court of Appeals to assume the alcohol regulatory schemes of other states, their administrations, and impacts are identical to New York's.

Lotus asks this Court of Appeals to accept as true that for which there is no evidence or allegations in the record, and was never fully addressed in the lower court. Lotus asserts that Moose Lodge, 407 U.S. 163 (1972), which deals with Pennsylvania's alcohol regulatory regime, administration, and impact and a district court case from the District of Columbia dealing with the District of Columbia's alcohol regulation, administration, and impact, Lyles v. Executive Club, Ltd., 670 F. Supp. 34 (D.D.C. 1987), are legally and factually indistinguishable from this case, which depends on New York's alcohol control regime. Nowhere in the lower court did Lotus make a comparison of the three alcohol regimes, their

administrations, and their impacts, which it could have done with affidavits on a summary judgment motion or by way of allegations in an answer.[4] Not unlike its reliance on the wrong complaint, Lotus relies on cases applying the wrong regulatory regime.

Den Hollander, however, relies, in part, on two decisions from the Southern District Court of New York that found state action where the New York State Liquor Authority controlled public accommodation premises offering alcohol for on-premise consumption. Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593 (1970)(Mansfield, J. granted plaintiff's motion for summary judgment); Seidenberg v. McSorleys' Old Ale House, Inc., 308 F. Supp. 1253 (1969)(Tenney, J. denied defendant's motion for a Rule 12(b)(6) dismissal).

Lotus misleadingly states Den Hollander does "not dispute[] that Lotus is a private business …." (Lotus Brief p. 9). The term "private" has two meanings in this case. One meaning is that Lotus is a "closed corporation" or private business.[5] The other, used in Moose Lodge, means a membership or fraternal organization as opposed to a public accommodation selling alcohol for on-premise consumption to

[4] Lotus also did not request judicial notice, which would not have worked anyway because it requires the absence of a reasonable dispute. Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001); Lozano v. Ashcroft, 258 F.3d 1160, 1165-66 (10th Cir. 2001).

[5] Privately owned and operated is not the determining factor for state action purposes: "the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001)(citation omitted).

the general public. Moose Lodge, 407 U.S. at 175; Schultz v. Wilson & Fraternal Order of Eagles 1562, 2007 U.S. Lexis 88994 *27 (M.D. Penn. 2007). Moose Lodge was issued a "private club license" because it was a membership or fraternal organization not a public accommodation. Moose Lodge at 165, 175. Lotus is a public accommodation in New York, not a "private club" like Moose Lodge in Pennsylvania. *See* U.S. Power Squadrons v. State Human Rights Appeal Bd., 59 N.Y.2d 401, 412, 452 N.E.2d 1199, 1204 (N.Y. 1983).

The Supreme Court explicitly distinguished Moose Lodge from Burton—which McSorley I & II rely on—by stating,

> "[u]nlike Burton, the Moose Lodge building is located on land owned by it, not by any public authority. Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large… In short, while [in Burton there] was a public restaurant in a public building, Moose Lodge is a private social club in a private building."

Moose Lodge, 407 U.S. at 175. The Supreme Court found in Moose Lodge that the amount of contacts were not as pervasive as for a public accommodation, such as the restaurant in Burton. The fewer the contacts, the more closely associated those contacts must be with the discriminatory conduct, and in Moose Lodge, because of the private nature of the club, there weren't enough.

Lotus tries to circumvent the factual distinction that Moose Lodge dealt with a private club and not a public accommodation. The Moose Lodge decision,

however, can be construed as resting on that sole distinction: that the Supreme Court held private property and associational constitutional rights as outweighing any individual's right to be served dinner and a drink at a private club. The 14th Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Lotus in deciding to discriminate against males is hardly exercising an individual choice in the use of private property as did Moose Lodge.

The fundamental difference in New York State between a private club and a public accommodation is reflected in the ABC Law and SLA Rules that regulate private club licensees less strictly than Lotus whose premises are open to the public. McSorley II, 317 F.Supp. at 604 n. 20; Amended Complaint ¶ 11, App. A-16. New York State's "private club" licenses are actually for applicants that wish to restrict admission to certain classes or groups of people. (SLA website License Classes, http://abc.state.ny.us/definition-of-license-classes, re: Club Beer, Club Wine, Club Liquor). New York law specifically allows for the exclusion of groups of persons regardless of the reason, so long as the private club requirements are maintained.

It is no surprise, therefore, that Moose Lodge is not applicable to this case, since the very purpose of a private club liquor license in New York is to allow individuals to associate with whom they wish as though they were in their own

home. The proverbial right of a homeowner to choose whom he shall invite to dinner is in no sense bound up in Lotus' discrimination. McSorley II, 317 F.Supp. at 604. Public accommodations in New York are not permitted to treat different groups differently—they are required to treat all their customers similarly.

Lotus also attempts to make much of Lyles v. Executive Club, Ltd., 670 F. Supp. 34 (D.D.C. 1987). In Lyles, which does not deal with New York's control over retailers of alcohol, the Court stated, "[t]he only state action alleged by the plaintiffs is that Archibald's [a nightclub] operates pursuant to a liquor license issued by the District of Columbia." Id. at 36. It was on this allegation alone that the Lyles plaintiffs argued there existed state action. The Lyles Court dismissed because "the mere issuance of a liquor license by the District of Columbia to Archibald's does not, without more, suffice to establish that Archibald's action is state action." Id. at 36 (emphases added).

In this case, however, the Amended Complaint alleges much more than one conclusory allegation. (Amended Complaint ¶¶ 7-52, App. 16-21). Apparently Lotus' reliance on Lyles is a result of it using the dead letter original complaint that Lotus asserted only made one conculsory allegation of state action because of entwinement. (Lotus Brief pp. 4-5).

Lyles found that Burton did not apply because Burton "founded its conclusion that state action existed on more than the existence of a liquor

license." Lyles at 37. Burton "relied on a myriad of factors" that the government had "insinuated itself into a position of interdependence" with the restaurant. Lyles at 38. The Amended Complaint at ¶¶ 15-16, 18-19, 25, 43-46, 50-52, App. 16-17, 20-21, alleges and Den Hollander's Brief at pp. 21-26 argues such interdependence.

Lyles also found no distinction between Pennsylvania's control over alcohol in private membership organizations and public accommodation because "[t]he plaintiffs have provided neither authority nor any reason why the distinction between a private club and a place of public accommodation warrants a different result from the one reached in Moose Lodge." Id. at 37. Once again, this case differs in that as argued, *supra* pp. 10-13, Den Hollander has provides such reasons.

V. Lotus uses off-point cases in the Second Circuit and ignores the Supreme Court's approval of McSorleys' finding of state action.

Lotus relies on Leeds v. Meltz, 85 F.3d 51 (2d Cir. 1996) and the dead letter complaint to mistakenly claim that Den Hollander "has not asserted a single fact … that New York has … significantly encouraged Lotus…" to discriminate against men. (Lotus Brief p. 12). Once again, the Amended Complaint, which is the one legally operative in this case, alleges encouragement at ¶¶ 47-52, App. 20-21, and the encouragement argument is in Den Hollander's Brief at pp. 26-30.

Lotus' use of Leeds is glaringly misplaced. Leeds involved the editorial decisions of a newspaper at C.U.N.Y. The Second Circuit quoted from Potter Stewart's Or Of The Press, 26 Hastings L.J., 631, 634 (1974), "The primary purpose of the constitutional guarantee of a free press was … to create a fourth institution outside the Government as an additional check on the three official branches." The Second Circuit went on to state "[t]his does not imply that all newspaper decisions are shielded from constitutional scrutiny. Rather, it indicates that when a paper's editorial decision is being challenged the burden of proving state action or state coercion will be a stringent one." Leeds, 85 F.3d at 54. Lotus is not the press, and it does not exist independent of the State, but at the State's discretion. Furthermore, in Leeds, the State, via C.U.N.Y., did not have control over the newspaper's editorial decisions, Leeds, 85 F.3d at 55. The SLA, however, has the ultimate power of economic life or death over Lotus. (Amended Complaint ¶¶ 12-17, 25, 27-30, 32-34, 36-37, 43-46, 50, App. 16-18, 20-21).

Lotus also relies on an extremely irrelevant case in Hadges v. Yonkers Racing Corp., 918 F.2d 1079 (2d Cir. 1990). (Lotus Brief p. 12). Hadges is not a sex discrimination case under the Equal Protection Clause of the 14th Amendment, which requires an "exceedingly persuasive justification" for disparate treatment. United States v. Va., 518 U.S. 515, 531, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). When the level of scrutiny is high, the requirement of

state action may be mitigated. As Judge Friendly said in his concurring opinion in Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970), "It is arguable—indeed, I have argued—that racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts…." The McSorley II Court found there was no logical reason for applying different principles to a case involving sex discrimination than one involving race. McSorley II, 317 F.Supp. at 598 n. 7.

Hadges is a due process action dealing with horse-racing, not alcohol retailing. Lotus illogically asserts that state action concerning the SLA be determined by a case dealing with a racetrack that falls under the purview of a completely different authority, the New York State Racing and Wagering Board, different law, and deals with a racetrack's refusal to hire a criminal found guilty of fixing races. (Lotus Brief pp. 12-14).

To try to argue that Hadges controls the determination of the state action issue for a fact situation involving the control of alcohol would at least require Lotus to compare, not just the law and rules governing racetracks in New York State to the ABC Law and SLA Rules, but also the administration of racetrack regulation to that of the SLA's operations. Lotus did not do so in the lower court or even try. Since the determination of the state action issue is peculiarly fact

driven, Burton, 365 U.S. at 722, without remand to the lower court for a determination, Hadges should not control.

Lotus is simply trying to have the facts in Hadges apply to this case because Hadges is a case from the Second Circuit, and Lotus needs to counter the precedential value of McSorley I & II. But to do so, Lotus must make the irrational argument that McSorley I &II, which deal with on-premise retailers of alcohol, is somehow different from this action; whereas, horse-racing is somehow identical enough to justify using Hadges to find no state action.

Lotus' strained analogy overlooks the fundamental differences between the regulation of horse-racing and alcohol control in New York. The New York Court of Appeals held that a license for horse-racing did not implicate a public function. Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 254-55, 72 N.E.2d 697, 699 (1947). "Horse racing does not become a function of government merely because, in sanctioning it, the Legislature anticipated a consequent … advantage to the public in 'improving the breed of horses'." Madden, 296 N.Y. at 254, 72 N.E.2d at 699. Compare "improving the breed of horses" to the purposes for the ABC Law and the SLA of "fostering and promoting temperance … and respect for and obedience to law." ABC Law § 2.

The Court of Appeals also ruled that a license to conduct horse-racing was not a franchise. Id. 296 N.Y. at 255, 72 N.E.2d at 699. In New York, a horse-

racing license is no more than permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare. Madden, 296 N.Y. at 255, 72 N.E.2d at 699. Under the common law, horse racing existed, but the State subsequently decided to regulate it. Madden, 296 N.Y. at 256, 72 N.E.2d at 699-700.

Compare that to statements by the Moreland Commission about permission to participate in the alcohol industry as being a valuable franchise right. N.Y. State Moreland Commission on the Alcoholic Beverage Control Law, Report and Recommendations, January 3, 1964, p. 27. Under New York law, a franchise is a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right. Madden 296 N.Y. at 255, 72 N.E.2d at 699. A franchise creates a privilege where none existed before primarily to promote the public welfare. Id. The alcohol industry in New York has been controlled by government since Colonial times, Seagram & Sons, Inc. v. Hostetter, 16 N.Y.2d 47, 56, 262 N.Y.S.2d. 75, 79, 201 N.E.2d 701, 704 (1965), and there was no inherent right in New York State under the common law to engage in the sale of intoxicating beverages, Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 599. Lotus, therefore, possess a state franchise; whereas, the racetrack in Hadges had a mere license.

Lotus again goes too far when it tries to compare the U.S. Government's regulation of cable communications, Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*, and New York's requirement for public access programming to the SLA's plenary control of alcohol. (Lotus Brief p. 14, citing Glendora v. Cablevision Sys. Corp., 893 F. Supp. 264 (S.D.N.Y. 1995)). Lotus continues to ignore the Supreme Court's requirement of not comparing apples and oranges, since "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton, 365 U.S. at 722.

Lotus even relies on the Cable Act's definition for franchise to assert Lotus does not have a state franchise. (Lotus Brief p. 14). The Cable Act does not apply to Lotus, and its attorneys know that. The purpose of the Cable Act and New York's public access requirement is to further a wide array of cable programs—not the financial success of a nightclub.[6]

Another kink in Lotus' Brief is that McSorley I & II hail back to a time two years before Moose Lodge; therefore, according to Lotus, McSorley I & II have been disavowed by the Supreme Court. (Lotus Brief p. 15). Yet in the landmark

[6] Glendora did not dismiss the plaintiff's complaint for failure to allege state action but permitted discovery so that the plaintiff could find facts supporting joint activity as to the involvement of government officials. Glendora at 270. The Court did, however, state there was no state action because cable broadcasting is not a traditional power exclusive to the state, which makes sense since cable television broadcasts were never historically the domain of government. Glendora at 269.

sex discrimination case four years after Moose Lodge, the Supreme Court in Craig v. Boren cited to McSorley II for the proposition that "federal and state courts uniformly have declared the unconstitutionality of gender lines that restrain the activities of customers of state-regulated liquor establishments…." Craig v. Boren, 429 U.S. 190, 208, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). Perhaps Lotus' concept of time is more along the lines of Doctor Who.

VI. Lotus wrongly relies on cases from Louisiana and Missouri.

Lotus relies on one case out of Louisiana and one from Missouri to argue there is no entwinement of New York's alcohol control regime with Lotus, which is a New York nightclub—not a Louisiana or Missouri club. (Lotus Brief pp. 15-18).

Once again, since the determination of state action allows for no formulaic test but requires fact specific determinations, Burton, 365 U.S. at 722, Lotus should have shown or at least alleged in detail in the court below the similarities and differences between the regulation, control, administration, and impact on the alcohol industry in Louisiana and Missouri as compared to New York. But Lotus did not. Instead it makes the conclusory statement that "[t]he same is true when the relevant factors are applied to liquor licensing and regulation in New York." (Lotus Brief p. 18).

Lotus is again asking this Court to make a finding without any evidence in the record or to assume as true without detailed allegations that the alcohol regimes in those two states are identical to New York's. Lotus could have submitted evidence in the court below through a motion for summary judgment or have made detailed allegations by submitting an answer. It chose not to, but rather to try to short circuit the Federal Rules with conclusory statements of fact on an appeal of a motion to dismiss.

The Louisiana case Millenson v. New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir. 1973), was decided nearly 30 years before the Supreme Court case Brentwood, 531 U.S. 288 (2001), established the "entwinement" standard. The state action issue in Millenson, therefore, could not have been decided based on the "entwinement" standard as Lotus wrongly claims. (Lotus Brief p. 16). Further, it is the "public entwinement in the management and control of … corporations," Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir. 2005), that "support[s] a conclusion that an ostensibly private organization ought to be charged with a public character …," Brentwood, 531 U.S. at 302. Lotus wrongly requires "entwinement" only in the discriminatory practice. (Lotus Brief p. 16).

Millenson was also decided three years before the Supreme Court's approval of McSorley II, Craig, 429 U.S. at 208, but Lotus does not mention that.

The Court in Millenson rested its finding of no state action on the only two allegations in the plaintiff's complaint that addressed the issue. Millenson, 475 F.2d at 737 n. 4 ("It is apparent that Millenson's state action argument must stand or fall under these allegations"). The allegations asserted state action merely because Louisiana had issued the hotel grill a liquor license and the hotel collected sales taxes for the State. Id. Here, however, the Amended Complaint ignored by Lotus makes detailed factual allegations of state action. (Amended Complaint ¶¶ 7-52, App. 16-21).

In addition, the Millenson Court only made "[a] cursory examination" of the two statutes cited in the plaintiff's complaint. Millenson at 737. Lotus, however, makes it sound as though the Court reviewed in depth all of Louisiana's statutes concerning alcohol regulation. By the Court's own words, it did not.

The other case, also decided before Brentwood, is Comiskey v. JFTI Corp., 989 F.2d 1007 (8th Cir. 1993). Lotus dissembles when it states that Comiskey concluded all previous courts that considered the issue of state action when "liquor licensing" was involved found no state action. (Lotus Brief p.17). Comiskey did not say that because it would have been false, since a prior case, Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972), found state action in the liquor retail setting. What Comiskey, 989 F.2d at 1011, did was refer to a number of cases that found no state action because of the rule that "a private or public

establishment [was] not a state actor merely because a State has issued it a liquor license." The operative words are "merely" and "issued," which applied to those cases in other states.

Here, as alleged under the New York regime, there is more than the mere issuance of a license to Lotus. Lotus receives public funds in the form of its franchise rights, Amended Complaint ¶¶ 15-16, 43-46, App. 16, 20, and entwinement results when the State provides valuable franchise rights, a form of subsidy, to a private actor. *Cf.* Horvath v. Westport Library Ass'n, 362 F.3d 147, 154 (2d Cir. 2004). Horvath was decided after Brentwood, which established the more lenient standard of entwinement.[7] Comiskey did not have the benefit of Brentwood.

Moreover, as alleged in the Amended Complaint at ¶¶ 47-52, App. 20-21, and argued in Den Hollander's Brief at pp. 26-30, the SLA satisfies Comiskey's legal requirement that it "overtly or covertly … encourage[s] discrimination," which given the SLA's plenary power involves it in Lotus' discriminatory admission polices. Comiskey, 989 F.2d at 1011. Also, the case before this Court, Den Hollander v. Copacabana, makes allegations and arguments, Den Hollander

[7] Lotus' Brief at p. 16 again wrongly tries to require proof of facts on a Rule 12(b)(6) motion to dismiss. Lotus asserts Den Hollander "cannot make any showing of 'entwinement' between New York's liquor licensing and regulatory provisions and Lotus's" discrimination against men. (Lotus Brief p. 16). "Show" means to make clear by evidence or to prove. Black's Law Dictionary, 8th ed. Pleadings are not required to provide proof. Hickman v. Taylor, 329 U.S. 495, 500-01, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Brief pp. 21-26, of interdependence between the SLA and Lotus in a joint activity or "symbiotic relationship," which were lacking in Comiskey." Comiskey at 1011.

Neither Millenson nor Comiskey rely on factual similarities with Moose Lodge, but rather on Moose Lodge's test for determining state action. Lotus, however, argues factual similarities of those cases with Moose Lodge. Moreover, neither Millenson nor Comiskey cited to McSorley I & II, either questioningly or with disapproval, most likely because McSorley I & II were correct on the law but McSorley I & II's application differed because of the factual dissimilarities in alcohol regimes. Millenson and Comiskey simply used the state action test from 1972 as stated in Moose Lodge. They did not create a formula.

Despite Lotus' efforts to write McSorley I & II out of the law, it is important to remember that neither of the two McSorleys' decisions have been overruled or even questioned by any federal court. On the contrary, other federal courts, including the Supreme Court and the Southern District of New York, have cited with approval to the McSorleys' decisions on state action.[8] Moreover, only the McSoreley I & II decisions deal with a similar fact situation as before this Court and with the same alcohol control regime of New York—not the regulatory regimes of Louisiana, Missouri or some other state.

[8] Craig v. Boren, 429 U.S. 190 (1976), Male v. Crossroads Associates, 337 F. Supp. 1190 (S.D.N.Y. 1971), Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972), *see* Bright v. Isenbarger, 445 F.2d 412 (7th Cir. 1971).

CONCLUSION

Throughout its Brief, Lotus applies its interpretation of the law of state action to the wrong factual allegations. Lotus, either mistakenly or intentionally, used the original complaint that had been legally superseded by the more detailed Amended Complaint with its different allegations. As such, Lotus' application of the law to this case is a legal nullity.

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CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) by containing 5,732 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) by using Microsoft Word Times New Roman in font size 14.