Oral Argument August 24, 2009

I'm RDH the appellant-plaintiff and attorney admitted to this Court.

Facts

This case is about nightclubs in NYC charging males more for admission than females—commonly known as Ladies Nights. [Time is money].

The term nightclubs means places that provide alcohol for on-premise consumption, music and dancing. This case is not about places that provide only tea or soda for on-premise consumption. It's not about the corner soda shop. If the nightclubs did not serve alcohol, then they would not be nightclubs.

The nightclubs are open to the public, so they are public accommodations.

The clubs are controlled by the NY State Liquor Authority under the Alcohol, Beverage & Control Law.

NY has complete discretion over its control of alcohol. It can operate the industry itself, or prohibit it completely.

Issue

Whether state action is involved in admitting persons to the nightclubs. If so, then there is discrimination against one sex—males, who are charged more to enter nightclubs on certain nights. That violates the Equal Protection clause of the 14th Amendment.

[Contrary to what the lower court said, Opinion p. 7, the deprivation of rights to males is not free admission for females, but charging males more for admission. A club that charges males $20 and females $0, would make about the same charging both $10. Ladies Nights transfers wealth from males to females—that's a monetary deprivation and violation of the right to equal treatment.]

[Just as in all those civil rights cases in the South, the deprivation to blacks was not whites sitting in the front of the bus, but blacks sitting in the back.]

Lower Court Decision

The SDNY decided that state action did not exist at the doors of nightclubs.

[But once a person reached the bar, state action did exist when being served a drink. The result is that under the 14th Amendment nightclubs can discriminate based on sex by charging one sex more for admission, but when selling an alcoholic drink, they have to charge the same amount to both sexes. So, in effect, there is now a SDNY court case that says it is constitutional for nightclubs to charge females, say $1000 to enter a club but males nothing, or vice versa.]

Why bring action under 14th Amendment

1. There were two decisions from the SDNY that were similar, dealt with on-premise alcohol consumption and found state action and sex discrimination, except the sex discriminated against was female instead of male. McSorleys' I, 308 F. Supp. 1253 (1969)(Tenney, J.) and McSorleys' II, 317 F. Supp. 593 (1970)(Mansfield, J.)

2. The SCt cited to McSorleys' II with approval in Craig v. Boren, 429 U.S. 190, 208, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976): "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 uses McSorleys' II to show that the 21st Amendment did not allow state-regulated liquor establishments to violate the Equal Protection clause by discriminating on the basis of sex. Those establishments could not violate E/P unless state action was involved.

3. There were other cases supporting a finding of state action for establishments serving alcohol: 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).

4. The SDNY court is probably the most prestigious of the district courts and its decision would have some precedential value outside the southern district.

5. State or local causes of action are no substitute for § 1983 suits as a means of enforcing constitutional rights. That's why 42 USC 1983 was enacted in the first place.

[6. What the lower court and the defense attorneys did not realize was that Ladies Nights outside NYC and across the country do not involve charging males more for admission but charging them more for an alcoholic drink. So there now exists a SDNY decision that can be used to challenge nightclubs charging males more for a drink as violating Equal Protection.]

Business Judgment

I'm sure Lester Maddox could argue that he kept blacks out of his restaurant with an ax handle because their admission would reduce his revenues.

Monetary gain is no justification for discrimination. "The existence of a permissible purpose [assuming there is one] cannot sustain an action that has an impermissible effect." Wright v. Council City of Emporia, 407 U.S. 451, 462, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972)(creation new school district would have segregation effect).

Defendant Lotus Brief

Wrong complaint
An Amended Complaint was filed in this action so it replaces the Original Complaint. Defendant's Brief relies on the Original Complaint, so it is pretty much useless.

Allegations of laws
The Amended Complaint alleges the functions the nightclubs provide and the connections between the State and the nightclubs as necessary for a state action analysis. The functions and connections are required by State law. So if the State says a nightclub must do something, then it is a reasonable allegation that the nightclub is doing that. If not, then let the defendant say otherwise.

Nominal private entities
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).

Factual similarity
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 different states. There is nothing in the record that shows the regimes in other states are similar to N.Y.

[Neither Millenson nor Comiskey rely on factual similarities with Moose Lodge. Lotus, however, argues factual similarities of those cases with Moose Lodge, which do not exist because Moose Lodge was a private club under a different alcohol regime. 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 did not create a formula because there is none. Burton v. Wilmington Parking Authority, 365 U.S. 715]

State Action Rule

In determining state action in sex discrimination cases, the standard is a less onerous one than normally used. Weise v. Syracuse Univ., 522 F.2d 397, 405-06 (2d Cir. 1975)(Female teachers allege denial of position and termination based on sex. Court held that as the conduct complained of becomes more offensive, and as the nature of the dispute becomes more amenable to resolution by a court, the more appropriate it is to find state action. Court reversed dismissal and required hearing to disclose more facts on state action issue).

"For the conduct of a nominally private entity to be fairly attributable to the state, there must be such a close [connection] between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." Cranley v. National Life Ins. Co. of Vermont, 318 F.3d 105, 111(2d Cir. 2003)(conversion of insurance co. to stock company in accordance with state law was not state action).

That connection of state action exists between a private entity and the state when the private entity
1. has been delegated a public function by the state, which is the key argument here,

2. is controlled by an agency of the State, or
3. the state exercises coercive power, or
4. is entwined with governmental policies, or
5. is entwined in the management or control of the private actor, or
6. when the private actor operates as a willful participant in joint activity with the State or its agents, or
7. provides the private actor with significant encouragement, either overt or covert.

Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir. 2005)(savings loan assn failure to pay interest on mortgage escrow accounts as allowed by Fed law was not taking because no state action); Brentwood Acad. v. Tenn. Sec. Sch. Ath. Ass'n, 531 U.S. 288, 294-96, 121 S. Ct. 924, 148 L.Ed.2d 807 (2001).

Public function *Key Argument*

Public function analysis examines whether the conduct of the private actor is equivalent to the performing of a traditional state function. Jensen v. Farrell Lines, Inc., 625 F.2d 379, 384 (2d Cir 1980)(Employer that was a US flag merchant shipping line recognized one union instead of another and fired those who did not join that union—no state action).

So the question is whether providing alcohol to the public is a traditional government function.

Think of alcohol as a drug, for that is what it is. Is there any question that the state and only the state, assuming the Federal Government agrees, could create or prohibit an industry in marijuana, cocaine, and heroin under its police power—no. It is a function that only the state can exercise—not private entities, unless the state allows the entities to act as its agents. Legally it is the same with alcohol only because its consumption is permitted do we think of it as similar to selling bicycles or other businesses regulated by the state. The alcohol industry is a creature of state sovereign power not private entrepreneurship.

History

There was no inherent right in New York State under the common law before Prohibition to engage in the sale of intoxicating beverages, Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 599.

The State in accepting Prohibition banned alcohol completely. Before the 1920 Volstead Act, states had power to ban alcohol completely. Crane v. Campbell, 245 U.S. 304, 308, 38 S.Ct. 98, 62 L.Ed. 304 (1917)(person arrested for violating state prohibition law and challenged the state law, which court found state had the power to enact).

Then in ratifying the 21st Amendment, rejected Prohibition, and in doing so it confirmed that the retail sale of alcohol was not a private activity, but one reserved to the State. *See* Report of the State Liquor Authority, April 12, 1933 – December 31, 1934, pp. 5 - 11.

The new regulatory regime aimed to promote a healthy socializing environment for people while preventing the dangers of moral dissolution and a declining social order that existed before

Prohibition. To foster and promote temperance and respect for and obedience to the law. To provide "for the protection, health, welfare and safety of the people" as it pertains to the provision of alcohol, Report of the N.Y. State Liquor Authority: The Modern Liquor Control System of New York State, pp. 8-9, April 12, 1933 to December 31, 1934.

What NY set out to do and did was a lot more than just issuing licenses for a fee, it restructure the State's society as it concerned the use of a drug—alcohol.

The mechanism NY used was the ABC Law and the SLA to establish an alcohol industry of agents strictly overseen and limited by the State. N.Y. State Moreland Commission on the Alcoholic Beverage Control Law, Study Paper No. 5, Preface, October 28, 1963, of which the lower court judge was associate counsel.

State action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158-59, 98 S.Ct. 1729, 56 L.Ed.2d 185; Horvath v. Westport Library Ass'n, 362 F.3d 147, 151 (2d Cir. 2004). When a private party carries out the functions of government, it steps into the shoes of the government and becomes a state actor for all discriminatory activities. *See* Marsh v. Alabama, 326 U.S. 501, 507-08, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

The Nightclubs, therefore, exercise a public function by which they are entirely dependent upon State decisions to operate successfully.

The State could have decided after prohibition to set up and operate on-premise retailers itself. In that situation, the different treatment of customers for admission would clearly constitute state action. There's no logical reason that because the State chose to delegate its public function to corporations operating under the State's control that state action somehow disappears.

Use an analogy with Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966). The city ran a park whose admission policies discriminate against blacks. The City transferred the trusteeship of the park to private individuals. The Supreme Court found the private operators became city agents, and just as the city could not discriminate in admission or in sweeping, manicuring, watering, patrolling, and maintaining the park, neither could the city's agents. Evans, 382 U.S. at 301. "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Evans, 382 U.S. at 299.

It's not the nightclubs that have a monopoly concerning alcohol but the State.

State Control and Responsibility

Even if the providing of alcohol for on-premise consumption is not a public function, state authority may dominate an activity to such an extent that it has control and responsibility for that activity. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)(preemptory jury challenges used to keep blacks off of jury); Lugar v. Edmondson Oil

Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)(attachment of property state action when person involved for whom state responsible).

With the passage of the 21st Amendment, New York acquired the responsibility for handling its liquor problems and the responsibility to protect the social order, lives, safety and health of its citizens. Report of the N.Y. SLA, p. 5, 6, 8, 9 April 12, 1933 to December 31, 1934; ABC Law § 2.

In order to meet its responsibility, the state exercises control over the circumstances under which alcohol is sold. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 515, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). That **control** is not limited to handing over an alcoholic drink. It includes controlling:

the number of retailers and locations,
trade and credit practices,
ownership,
change of shareholders, directors, officers
the amount of lighting in a club,
the view within,
advertising,
reputation of the owners,
citizenship of the employees,
moral character of the customers,
the interior floor plan,
signs inside and outside,
remodeling,
interior style,
containers from which alcohol is served,
display of license in particular location and frame,
whom a nightclub sells to,
whom a nightclub admits,
operating hours,
terms of surety bonds,
form of reports used,
records kept,
from whom alcohol is purchased,
the nightclubs exterior blueprint,
block-plot diagram,
the landlord,
type of building,
history of the building's prior use,
number and positioning of tables and chairs,
manager, principals, principals' spouses, the people with whom the owners associate,
propensities of persons involved to avoid undesirable propensities,
business plan,
finances,

whom can invest in or lend money to, or borrow money from,
waitress outfits,
noise levels outside a club,
parking and traffic congestion,
business conduct,
other circumstances relevant to the "public interest" that "may adversely affect the health, safety and repose" of citizens. ABC Law § 64(6-a); SLA Rules, 9 N.Y.C.R.R. Pt 48; SLA Handbook Retail Licensees, p. 5.

The line between private and state action is drawn, in part, to avoid the imposition of responsibility on a state for conduct it could not control. Brentwood Acad., 531 U.S. 288, 295. Clearly the state controls all the operations of a nightclub, so there is no imposition for responsibility on conduct it cannot control.

Compare NY control over nightclubs to that of a bicycle shop owner who can borrow from or loan to whomever he wishes, can vertically integrate and can sell his business to whomever he desires.

[Opinion p. 7 re Edmonson: "The existence of the ABC Law and SLA rules does not transform all conduct by nightclubs into state action any more than the laws regarding jury trials transform every litigant in a jury trial into a state actor." Distinction - I'm a litigant, I'm before this Court. There is nothing the government can do to keep me from using the court system to resolve disputes. But the State can force nightclubs out of business at any time. Opinion cites *See, e.g.*, *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) ("[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."]

Entwinement, Joint Activity, Encouragement

Regulation does not mean state action but nor does it mean no state action.

For entwinement, joint activity, and encouragement the private entity's action must be fairly attributable to the state, which can mean the entity obtained significant aid from the state, Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

The nightclubs receive a valuable franchise from the state.

Entwinement

Nightclubs are entwined with the State's policies governing alcohol, and the State is entwined with the nightclubs management and operations. Brentwood Acad., 531 U.S. 288, 296.

The entwinement is so extensive that the State can be considered accountable for the specific conduct of which the plaintiff complains, Blum , 457 U.S. 991, 1004, charging males more for admission.

In determining accountability, the Second Circuit has cautioned that according to Brentwood the concept of accountability is not to be read narrowly in the context of the state action inquiry. Horvath, 362 F.3d 147, 154.

The argument then is that since the 21st Amendment gave New York the "responsibility of handling its liquor problems," Report of the N.Y. SLA, p. 5, by not exercising that responsibility through its comprehensive authority to put an end to the defendants' discriminatory practices, the SLA is accountable for the continuing rights violations. *See* McSorleys II, 317 F. Supp. 593, 599 ("the state has continued annually to renew defendant's license over the years despite its open discrimination against women, without making any effort in the exercise of the broad authority granted it, to remedy the discrimination or revoke the license which defendant must have in order to practice it.").

Here, the State "by its inaction … has not only made itself a party" to the discrimination, but has "elected to place its power, property and prestige behind the admitted discrimination." Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).]

Without the privilege to retail alcohol, the defendants would not be in a position to discriminate against men because without alcohol virtually no one, except members of temperance unions, would frequent defendant discos. The defendants would soon be out of business. If the provision of alcohol was not crucial to the economic success of the Nightclubs, then they would not pay the hefty fees to the State and put up with bureaucrats telling them how to run their businesses. This is an allegation which is supposed to be taken as true, but the lower court called it speculation. Opinion p. 6.

Joint Activity

State and private entity are interdependent, involved in joint activity, when state provides benefits to private entity and entity provides state benefits. Burton, 365 U.S. 715, 725 (restaurant with lease in public building discriminated on basis of color).

Nightclubs benefit from State: The State's control over entry gives the Nightclubs an extremely valuable franchise. The alcohol industry in New York has the highest degree of economic protection, which provides its participants with substantial windfalls on their "franchise values." Moreland Commission on the ABC Law, Report and Recommendations, p. 27, January 3, 1964. The State is providing the Nightclubs an indirect subsidy of immense economic value.

[*Franchise:* In New York, 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 v. Queens County Jockey Club, Inc., 296 N.Y. 249, 255, 72 N.E.2d 697 (1947). A franchise creates a privilege where none existed before primarily to promote the public welfare. Id. There was no inherent right in New York State under the common law to engage in the sale of intoxicating beverages, McSorleys II, 317 F. Supp. 593, 599.]

State's benefit from Nightclubs: Ladies' Nights make the Nightclubs money by increasing the number of customers. By attracting more customers on Ladies' Nights, the Nightclubs sell more

alcohol, which means they have to buy more. The State levies excise taxes on those purchases, so the Nightclubs end up paying more alcohol excise taxes because of Ladies' Nights. As long as the State assents to the Nightclubs' discriminations, the State benefits from Ladies' Nights discrimination, which does not substantially serve an important State interest.
[The taxes are commingled with SLA license fees and fines into a common fund held by the State Comptroller. ABC § 125. The fund from alcohol taxes and license fees are distributed to municipalities. 1936 Op. Atty. Gen. 188.]

Where a private party's profits would suffer without discrimination and so too would a state's financial position, it supports the conclusion that a state should be charge with the discriminatory actions. Rendell-Baker v. Kohn, 457 U.S. 830, 843, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

Opinion at p. 9 relies on Hadges v. Yonkers Racing Corp., 918 F.2d 1079, 1082 (2d Cir. 1990) for finding the Nightclubs' license fees do not benefit the State and so no state action. The Opinion, however, did not address the alcohol tax benefits. In Hadges the racetrack's tax credit had no connection whatsoever with not hiring a jockey—the discrimination charged. Here, Ladies' Nights discriminations actually directly increase tax revenues to the State.

Encouragement

Effect: Where the state engages in conduct **having the effect** of encouraging, tolerating or acquiescing in the discrimination, the 14th Amendment may be invoked. *See* Reitman v. Mulkey, 387 U.S. 369, 375, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

The state does not have to expressly or specifically authorize, command or support the discriminatory conduct. McSorleys II, 317 F. Supp. at 596.

The State's power to encourage actions deemed to be in the public interest is necessarily far broader than the imposition of its will by force of law. Maher v. Roe, 432 U.S. 464, 476 (1977)(Conn. limited Medicaid payments for abortions to ones that were medically necessary, so no imposition of state will, just encouragement).

SLA renewal every two years of the nightclubs privilege to retail alcohol for on-premise consumption is *de facto* approval of Ladies Nights that creates a state standard allowing discrimination against men that financially benefits the state and the nightclubs.

Involvement: "Where the state has become sufficiently involved, its inaction, acquiescence or continuation of its involvement under circumstances where it could withdraw, may be sufficient." Id. (citing Burton, 365 U.S. at 725).

The State does not have to coerce or even encourage the discriminatory practice if "the relevant facts show pervasive entwinement to the point of largely overlapping identity" between the State and the entity alleged to be a state actor. Horvath, 362 F.3d at 154 (quoting Brentwood, 531 U.S. at 303).

[Opinion pp. 8-9 relies on two cases in which state only provided routine oversight and was not as involved with the entities as the SLA is with the nightclubs. Tancredi v. Metropolitan Life Ins. Co., 316 F.3d 308, 313 (2d Cir. 2003); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999).]

Admission connection to State

SLA power reaches the nightclubs admission practices:

> SLA Rule § 48.3 requires the Nightclubs to abide by state regulations, such as N.Y. Civ. Rights Law § 40-c(2) and N.Y. Exec. Law § 296(2)(a) that makes it unlawful for public accommodations to deny advantages or privileges based on sex.
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> SLA Rule § 48.5 gives the state power to impose any restrictions it deems in the public interest.
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> ABC Law § 65-b(1)(c) and (2)(b) controls admission via identification.

Standard of Review

"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)).

Plaintiff need not provide evidence. 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).

Conclusion

The lower court's Opinion in effect brings back the political versus social rights theory of the 18th century. In the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883) and Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), the U.S. Supreme Court justified discrimination against people of darker skin complexion on the theory that the Constitution only guarantees political or civic equality, which is the purview of government, but not equality in social rights, the area of private action and choices. The lower court's Opinion parallels this bankrupt theory in the realm of sexual distinctions rather than color.

Today, males can be charged any price to enter the social mingling of a nightclub while females walk in for free. The result is that nightclubs, and any other public accommodation, can now constitutionally ban men by charging them a steep enough price so that none other than what's left of the Wall Street Moguls can afford to attend. Those nightclubs, however, would not dare charge females more because of the current social climate.

The Civil Rights and Plessy decisions provided the legal basis for 70 years of ignorance and prejudice that institutionalized itself into every area of society where people interacted with each other. The lower court's Opinion has laid the same foundation for discriminating against

men in every area of society that is not directly under the control of government or in which state law does not explicitly prohibit discrimination. [1]

Ironically, it was the failure of state laws to provide equal protection to their citizens following the Civil War that resulted in the passage of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983. The lower court's narrow reading of the 1871 Act once again effectively leaves to the states the responsibility of protecting their citizens from discrimination. The lower court has opened the door for states, if they so choose, to stand idly by while nominally private persons deprive the rights and privileges of others—this time men.

Analogy to Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995).

In *Lebron*, the Supreme Court considered the state actor status of the National Railroad Passenger Corporation, commonly known as Amtrak. Amtrak was established by a Congressional statute. The Court concluded that "where … (1) the Government creates a corporation by special law, (2) for the furtherance of government objectives, and (3) retains for itself permanent authority to appoint a majority of the directors of that corporation," the corporation would be considered a state actor. *Id.* at 400.

[This Court followed Lebron in Gorman-Bakos v. Cornell Coop. Extension, 252 F.3d 545, 551 (2d Cir. 2001). Members of 4-H horse club are thrown out for complaining about club's safety program. 2d Cir reversed S/J District granted defendant club.]

[2d Cir. treated club as state actor holding the Cooperative was created pursuant to state law, to carry out county, state and federal educational functions; is funded by federal, state and county governments; is subject to significant oversight by Cornell University as an agent of the state; and is defined in state law as a subordinate governmental agency.]

Horvath v. Westport Library Ass'n, 362 F.3d 147, 152 (2d Cir. 2004)

Local library fired employee without D/P, District granted defendants S/J, 2d Cir. reversed.

Following Lebron, 2d Cir. has utilized the following standard to determine whether or not a corporate entity qualifies as a state actor: (1) the government created the corporate entity by special law, (2) the government created the entity to further governmental objectives, and (3) the government retains 'permanent authority to appoint a majority the directors of the corporation. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 84 (2d Cir. 2000) (quoting *Lebron*, 513 U.S. at 400). In *Hack*, 2d Cir considered whether Yale qualified as a state actor. Although 2d Cir found that the first two elements of the *Lebron* standard were "easily satisfied," the fact that the State of Connecticut retained the right to appoint only two of Yale's nineteen board members meant that the school was "a long way from [being] controlled" **[**17]** by the state. *Id.; see also Hall v. American Nat'l Red Cross*, 86 F.3d 919, 921-22 (9th Cir. 1996) (holding that the Red Cross was not a state actor where only eight of fifty members of its governing board were

[1] Only 28 states have some constitutional or statutory provisions against sex discrimination. 90 A.L.R.3d 158, §1; 14 C.J.S. Civil Rights, § 41.

government appointees).

Here 2d Cir. found that the Lebron standard had been satisfied. It is plain that the first two elements are present; as noted above, the Library was created by a special act of the Connecticut State legislature and there is no doubt that the provision of library services is a legitimate statutory objective.

As to the third element, it is correct that only one-half, and not a majority, of the Library's trustees are appointed by the Town. However, we do not believe that this precludes a finding that the third element of *Lebron* has been satisfied. *See, e.g.* Gorman-Bakos v. Cornell Coop. Extension, 252 F.3d 545, 552-54 (2d Cir. 2001)(stating in dicta that State-created and funded agricultural cooperative was a state actor even though only two of its ten board members were government officials); *Becker v. Gallaudet Univ.*, 66 F. Supp. 2d 16, 21 n.6 (D.D.C. 1999) (failure to fully satisfy third prong of standard should not preclude a finding of state action if the actual degree of public control is substantial). The additional fact that only a little more than a tenth of the Library's funding comes from sources other than the Town convinces us that the Town maintains sufficient control over the Library to qualify it as a state actor for the purposes of Horvath's claim. [Nightclubs have valuable State franchise.] Thus, state action exists.

We also note that none of the trustees appointed by the Town to the Library's board at the time of Horvath's discharge were themselves public officials. But this fact certainly does not preclude a finding of state action because, pursuant to *Lebron*, it is the Town's "authority to appoint" trustees, and not the identity of the trustees appointed, that is relevant to the state action inquiry. Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 400, 130 L. Ed. 2d 902, 115 S. Ct. 961. [1]

1 The district court placed some reliance upon *Gilliard v. New York Public Library System. 597* F. Supp. 1069 (S.D.N.Y. 1984), and the defendants urge that the case is "the only precedent in this Circuit regarding the status of a public library for section 1983 purposes." In *Gilliard*, a Section 1983 claim by a discharged employee of the New York Public Library was dismissed because the library was held not to be a state actor. *id.* at 1075. The plaintiff in that case, however, relied upon nothing but the "bare allegation," pled upon information and belief, that the New York Public Library was supported by public funds. *id.* at 1074. In our case, the defendants themselves have provided evidence of the Town's status as the major source of the Library's funds, and of the Town's power to appoint half of the Library's governing board.

Cases

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40,119 S.Ct. 977, 143 L.Ed.2d 130 (1999)

Pennsylvania's workers compensation program, a state law, allowed private insurers to withhold medical payments pending a review by a private agency of whether the medical care was necessary. The plaintiffs alleged that the insurers' withholding constituted a taking. The Supreme Court found there was no close nexus between the state and private insurers and the state had not ordered the withholding. Id. at 52.

Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972)

Restaurant that served alcohol for on premise consumption excluded females during lunch hours. Ct found state action.

Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)

No state action when nursing homes reduced level of care to patients because decisions were made by private medical personnel and not the state.

Bright v. Isenbarger, 445 F.2d 412, 414 (7th Cir. 1971).

Catholic high school students expelled without D/P after tuition paid. Ct found no state action because unlike McSorleys I, 308 F.Supp. at 1259, the school was not the subject of a "pervasive regulatory scheme" and, therefore, "ubiquitous and pervasive" state action was not present in the Catholic high school.

Brentwood Acad. v. Tenn. Sec. Sch. Ath. Ass'n, 531 U.S. 288, 294-96, 121 S. Ct. 924, 148 L.Ed.2d 807 (2001).

High school sued Tenn state interscholastic athletic association under § 1983, seeking to prevent enforcement of rule prohibiting use of undue influence in recruitment of student-athletes. SCt found state action due to pervasive entwinement of public institutions and public officials—state officials on governing boards, in its composition and workings.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

Restaurant leasing space in city parking garage excluded blacks.

Calvary Presbyterian Church v. SLA, 245 A.D. 176, 178, 281 N.Y.S. 81 (4th Dept. 1935), *aff'd*, 270 N.Y. 297 (1963).

NY Ct found building was used as a church and therefore any nightclub could not be located near the church under ABC law.

Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970)(Friendly, J. concurring) (quoting Burton, 365 U.S. at 725).

Students disciplined by private college but there existed question as to whether state statute required such discipline so case remanded. If statute required disciplining then state action.

Comiskey v. JFTJ Corp., 989 F.2d 1007 (8th Cir. 1993).

Comiskey decided before Brentwood and involved Missouri alcohol law.

Found no state action because "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 the cases it cited from other states.

Here there is alleged 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 required taking into account numerous factors. Comiskey did not have the benefit of Brentwood.

Comiskey omitted Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972) and McSorleys I & II that found state action in Ohio and NY alcohol control regimes.

[The Comiskey complaint against a Missouri nightclub was (1) over the prices for alcoholic drinks being set lower for females—Ladies Night and (2) the plaintiff being denied admission when the club had male dancers for females, which were different than Ladies Nights. Comiskey found no state action involved in the serving of alcohol or excluding the plaintiff when male dancers were performing.]

[The case before this Court involves charging males more to get in the door of a nightclub than females. The SDNY court's decision is in contradiction with Comiskey over the existence of state action when serving drinks. The SDNY specifically distinguishes between charging different prices based on sex when serving alcohol, which involves state action, and charging different prices at the door, which does not. So there is a conflict between the SDNY and the 8th Circuit over the involvement of state action in the serving of alcoholic drinks.]

Craig v. Boren, 429 U.S. 190, 208, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

State law allowed 18 year old females to drink 3.2 beer but males had to be 21—violated E/P.

Opinion p. 11 n. 2 said SCt. Cite had nothing to do with state action. That is wrong, the SCt. used McSorleys' II to show that the 21st Amendment did not allow state-regulated liquor

establishments to violate the Equal Protection clause by discriminating on the basis of sex. Those establishments could not violate E/P unless state action was involved.

Crane v. Campbell, 245 U.S. 304, 308, 38 S.Ct. 98, 62 L.Ed. 304 (1917).

Person arrested for violating state prohibition law and challenged the state law, which court found state had the power to enact.

"We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge. An assured right of possession would necessarily imply some adequate method to obtain alcohol not subject to destruction at the will of the state."

Cranley v. National Life Ins. Co. of Vermont, 318 F.3d 105, 111(2d Cir. 2003).

Conversion of insurance co. to stock company in accordance with state law was not state action.

DM Research, Inc. v. College of Amer. Pathologists, 170 F.3d 53 (1st Cir. 1999).

Sherman Act conspiracy action by manufacturer of water against organization that graded water quality for laboratories.

What the First Circuit actually said is the plaintiff needs "to allege a *factual* predicate concrete enough to warrant further proceedings," and the plaintiff "need not include evidentiary detail." DM Research at 55 (emphasis in the original).

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). (1991).

Preemptory jury challenges used to keep blacks off of jury.

Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).

Private trustee of park substituted for City as trustee. Park was maintained for many years by city, was an integral part of city's activities, and was granted tax exemption, so even without City as trustee, excluding blacks still amounted to state action.

Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158-59, 98 S.Ct. 1729, 56 L.Ed.2d 185

A warehouseman's proposed private sale of goods entrusted to him for storage, as permitted by self-help provision of New York Uniform Commercial Code, was not an action properly attributable to the State of New York and thus was not "state action."

Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir. 2005).

Savings loan assn failure to pay interest on mortgage escrow accounts as allowed by Fed law was not taking because no state action.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 515, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996)

21st Amendment did not allow state to infringe freedom of speech of liquor retailers in advertising prices.

Glendora v. Cablevision Sys. Corp., 893 F. Supp. 264 (S.D.N.Y. 1995)

Not factually similar to this case. State action requires sifting the facts. Burton, 365 U.S. at 722

Lady's program thrown off public access channel. Involved U.S. Government's regulation of cable communications, Cable Communications Policy Act of 1984 and New York's requirement for public access programming.

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, hold there was no state action based on public function because cable broadcasting was 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.

Lotus 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. 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.

Goesaert v. Cleary, 335 U.S. 464, 465, 69 S.Ct. 198, 93 L.Ed. 163 (1948), *overruled on different grounds*, Craig, 429 U.S. 190, 210 n. 23.

Alcohol control one of oldest of state powers. Upheld state ban on female bartenders.

Hadges v. Yonkers Racing Corp., 918 F.2d 1079 (2d Cir. 1990).

Is a due process action dealing with whether an individual with a criminal record has a right to employment at a racetrack. It 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. Weise v. Syracuse Univ., 522 F.2d 397, 405-06 (2d Cir. 1975).

It does not involve NY regime on alcohol, and yet the lower court held a horse racing employment case more on point than McSorelys I & II that deal with the on-premise consumption of alcohol.

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.

The alcohol industry, however, 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.

The New York Court of Appeals has held that a license for horse racing did not implicate a public function, and nor was it a state franchise. Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 254-55, 72 N.E.2d 697 (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 v. Queens County Jockey Club, Inc., 296 N.Y. at 254. 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. at 255. 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. Clearly, horse racing and alcohol retailing are vastly different regimes in New York.

In New York, 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. Id. 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 defendant nightclubs, therefore, possess a state franchise; whereas, the racetrack in Hadges had a mere license.

The lower court failed to do the work of trying to analogize New York's regulations concerning horse racing with its sovereignty over the alcohol industry.

Jackson v. Metro. Ed., 419 U.S. 345

No state action when utility cut off service for lack of payment.

Jensen v. Farrell Lines, Inc., 625 F.2d 379, 384 (2d Cir 1980).

Employer that was a US flag merchant shipping line recognized one union instead of another and fired those who did not join that union—no state action.

Leeds v. Meltz, 85 F.3d 51 (2d Cir. 1996)

Editorial decisions of a newspaper at C.U.N.Y. 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. The State, via C.U.N.Y., also 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 and whether to stop Ladies Nights.

Loce v, Time Warner Entertainment, 191 F.#d 256, 266 (2d Cir. 1999).

The First Amend applies only to state actors. A plaintiff must demonstrate a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Such a nexus may be found, for example, where a private actor has operated as a willful participant in joint activity with the State or its agents. In the absence of such a nexus, a finding of state action may not be premised on the private entity's creation, funding, licensing, or regulation by the government. Nor is a private entity a state actor merely because its conduct is authorized by a state law, where its conduct is not compelled by the state.

Loce was decided before Brentwood and in Gorman-Bakos v. Cornell Coop. Extension, 252 F.3d 545, 551 (2d Cir.) this court pointed out that the Supreme Court said there is no single test but a "host of facts" that can bear on whether an activity may be attributable to the state:
(1) when the state exercises its coercive power or significant encouragement,
(2) when a private actor is a willful participant in joint activity with the state,
(3) when an entity is controlled by the state or an agency thereof,
(4) when an entity has been delegated a public function by the state,
(5) when an actor is entwined with governmental policies,
(6) when the government is entwined in the entity's management or control. Brentwood Acad. v. Tenn. Sec. Sch. Ath. Ass'n, 531 U.S. 288, 294-96, 121 S. Ct. 924, 148 L.Ed.2d 807 (2001).

Also Brentwood cautioned that in requiring the state to be responsible for the specific conduct, responsibility should not be read narrowly. That is, the State need not have coerced or even encouraged the events at issue in the plaintiff's complaint if "the relevant facts show pervasive entwinement to the point of largely overlapping identity" between the State and the entity that the plaintiff contends is a state actor. Brentwood at 303.

Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963).

Where city police chief's official command directed continuance of segregated service in private restaurants and prohibited any conduct directed toward its discontinuance, trespass convictions of black and white students resulting from attempt by blacks to be served in privately owned restaurant involved state action. The accepted custom of government officials in the Deep South during the 1950s and 60s to discriminate against blacks encouraged similar activities by private actors.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

Private party attached another's property. No state action when private party attached another person's property in accordance with a state statute, but state action existed where joint participation of private party and state official.

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).

Lyles also found no distinction between Pennsylvania's control over alcohol in private membership organizations versus 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." Here the Amended Complaint ¶¶ 10-11 and Reply Brief p. 12 makes clear NY's distinction.

McSorleys' I, 308 F. Supp. 1253 (1969)(Tenney, J.) and McSorleys' II, 317 F. Supp. 593 (1970)(Mansfield, J.)

The lower court found that McSorleys' is **inapplicable** to this action because in that case the ladies were denied a drink. Yet, the court incongruously claims that Moose Lodge is **applicable** even though the conduct there also involved denying someone a drink, in that case a black man.

[Opinion pp. 10, 11: The lower court said, "McSorleys was a public bar which only served men. Two women sought service in the bar and sued for discrimination when they were refused alcohol." That is a finding of fact made by the lower court. Nowhere in the two opinions does it say the plaintiffs were refused "alcohol."]

[The McSorleys holdings of state action were not dependent on whether alcoholic drinks were given the ladies, but as Judge Tenny said, "[t]he question presented … is whether by virtue of this pervasive regulatory scheme the licensee may properly be considered an instrumentality of the State whose acts may, for the purposes of the 14th Amendment, be considered the acts of the State itself." McSorleys I, 308 F. Supp. 1253, 1257.]

Millenson v. New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir. 1973)

Louisiana hotel grill excluded ladies. Operated under Louisiana Regime—not NY.

Decided nearly 30 years before the Supreme Court case Brentwood, 531 U.S. 288 (2001), established the "entwinement" factors, so state action issue could not have been decided based on the "entwinement" standard as Lotus wrongly claims.

The Court 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.

The Millenson Court only made "[a] cursory examination" of the two statutes cited in the plaintiff's complaint. Millenson at 737.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

Did not deal with NY regulatory regime or a public accommodation.

Nat. Col. Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191,109 S.Ct. 454, 102 L.Ed.2d 469 (1988)

Coach violated NCAA rules on recruitment, so University, a member of the NCAA, disciplined the coach. NCAA's disciplinary requirements did not involve state action, so coach's D/P rights did not apply to disciplinary action required by the NCAA.

Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973).

State action when government provided textbooks to private schools that discriminated based on color.

Seagram & Sons, Inc. v. Hostetter, 16 N.Y.2d 47, 61, 262 N.Y.S.2d. 75, 201 N.E.2d 701 (1965), *overruled in part on different grounds,* Healy v. Beer Inst., 491 U.S. 324, 342, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

Upheld law creating uniformity of pricing in NY with other states, overruled in Healy. State has near complete power over dealing with alcohol.

Public Utilities Commission of D.C. v. Pollak, 343 U.S. 451, 462 n. 8, 72 S.Ct. 813, 96 L.Ed. 1068 (1952).

Private bus and trolley transportation company installed radios that broadcast to passengers. Company regulated by Federal Public Utilities Commission. Court found that First and Fifth Amendments applied, so by implication govt action was involved, but that neither were violated.

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971)

Idaho statute which provides that as between persons equally qualified to administer estates males must be preferred to females, is based solely on a discrimination prohibited by the equal protection clause of the Fourteenth Amendment.

Reitman v. Mulkey, 387 U.S. 369, 375, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

Cal. Proposition added to Cal Const that gave persons absolute discretion to discriminate in the sale or lease of residential property. Cal Const would involve state in discrimination, so state action existed.

Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

Courts cannot enforce restrictive real estate covenants excluding blacks because such involves state action.

Sybalski v. Ind. Group Home Living Prog, Inc., 546 F.3d 255 (2d Cir. 2008)

Regulation of mentally disabled in group home not public function, so group home's violation of disabled child's rights not state action.

Tancredi v. Metropolitan Life Ins. Co., 316 F.3d 308, 313 (2d Cir. 2003)

The state permitted an insurance company to change its legal entity from a mutual membership to a domestic stock corporation. The deprivation alleged was that the change resulted in the taking of the members' property. The Second Circuit found no state action because the state was not "entwined in MetLife's management" and had not ordered the change.

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).

Nonprofit organization offered boating instruction to the public but excluded females. Court held Human Rights Commission decision that organization violated NY Exec. 296 et seq. law against discrimination by public accommodations.

Weise v. Syracuse Univ., 522 F.2d 397, 405-06 (2d Cir. 1975).

Female teachers allege denial of position and termination based on sex. Court held that as the conduct complained of becomes more offensive, and as the nature of the dispute becomes more amenable to resolution by a court, the more appropriate it is to find state action. Court reversed dismissal and required hearing to disclose more facts on state action issue.

William H. Van Vleck, Inc. v. Klein, 50 Misc. 2d 622, 271 N.Y.S.2d 64, 67, 69 (Sup. Ct. 1966)

Court found no evidentiary basis for SLA to approve application for license.

Bass Disciplinary Complaint, April 30, 2009

In Mr. Bass's position as Staff Counsel for the U.S. Court of Appeals for the Second Circuit, he violated the following sections of the New York Code of Professional Responsibility:

DR 1-102(A)(5), by engaging in conduct that is prejudicial to the administration of justice;

Ethical Canon 8-1, by failing to foster the use of legal remedies to achieve redress of grievances through the legal system; and

Ethical Canon 9-2, by failing to promote public confidence in the integrity of the legal system.

Mr. Bass also breached the American Bar Association's ("ABA") Standards For Imposing Lawyer Sanctions, ABA/BNA Lawyer's Manual of Professional Conduct ("ABA/BNA Manual"). Mr. Bass violated the ABA standard for government attorneys by engaging in conduct prejudicial to the administration of justice. ABA/BNA Manual, Rule 5.2, No. 119 p.01:829.

Facts

As Staff Counsel for the Second Circuit, Mr. Bass occupies a unique and influential position that enables him to decide certain procedural motions and influence appellants and appellees into settling a case on appeal before it is considered by the Court's Judges. *See* Second Circuit Handbook, Staff Counsel's Function, p. 20. Mr. Bass runs Pre-Argument conferences for civil cases that he selects for possible settlement, simplification of the issues, or other matters relating to the handling or disposition of an appeal. Id.

Mr. Bass knowingly abused his position and authority by attempting to intimidate four appellants into withdrawing their appeal to the Second Circuit.

Three of my clients and myself are the plaintiffs-appellants appealing a dismissal under Fed. R. Civ. P. 12(b)(1) from the Southern District of New York. The case is now in the Second Circuit, Den Hollander, Moffett, Cardozo, and Brannon v. U.S.A., 08-6183-cv, and alleges the U.S. Government ("U.S.A.") violated our First Amendment, Equal Protection, and Due Process rights.

Mr. Bass ordered a Pre-Argument conference with the attorneys for both sides. I represent the appellants, including myself, and the U.S. Attorney for the Southern District represents the U.S.A. The February 10, 2009 conference involved an intelligent and courteous discussion of the issues in which Mr. Bass granted additional time for the appellants' to file their brief, and suggested I make a motion for a further extension of time, which was subsequently granted.[2]

The following day on February 11th, a telephone Pre-Argument conference was held in a separate case on appeal to the Second Circuit, Den Hollander v. Copacabana *et al.*, 08-5547-cv.

[2] The motion for an extension of time was necessary because the Staff Counsel's office had inexplicably set identical briefing schedules for two cases in which I was the attorney even though the S.D.N.Y. decisions in the two unrelated cases were two months apart, and the appeals for each were initiated two months apart.

In that civil rights action under 42 U.S.C. § 1983, I am both counsel and class representative for a putative class. During the conference call, Mr. Bass pressed the possibility that the Second Circuit might sanction me for appealing that case. Mr. Bass claimed the basis for such a sanction was that I brought the Copacabana case in Federal Court, where there are two key precedential decisions concerning the issues, rather than in New York State Courts, where there are, to my knowledge, none. As a result, the conference call was contentious and adversarial between Mr. Bass and myself, but only dealt with the Copacabana case.

Two days later, on February 13, 2009, Mr. Bass sent me an email, Exhibit A, concerning the U.S.A. case. In that email, he attempted to intimidate me and the other appellants whom I represent into withdrawing the appeal by communicating that the U.S.A. case would suffer the *fait accompli* of "summary affirmance" of its dismissal in the lower court, and I, as well as my clients, "may be subject to imposition of costs or some other disadvantages action." Mr. Bass mistakenly referred to the U.S.A. case as a "pro se appeal," which it is not because my three clients and I are all represented by an attorney—me.

The full text of Mr. Bass's email follows:

Hollander v. U.S.A., 08-6183-cv

Stanley_Bass@ca2.uscourts.gov <Stanley_Bass@ca2.uscourts.gov> **Fri, Feb 13, 2009 at 5:56 PM**

To: rdhhh@yahoo.com
Cc: natalia.oeltjen@usdoj.gov

To: Den Hollander, Esq.

In thinking further about this pro se appeal, I can see no point in your further wasting the resources of yourself, the Department of Justice, and the judges of this Honorable Court. The idea that a non-party has a legal right to be a spoiler witness in a claimant's administrative hearing seeking immigration benefits seems not only absurd, but also offensive and mean-spirited. It's one thing for you to offer relevant testimony to the agency if they want it. It's quite another to assert a constitutional right to inject yourself into a proceeding where neither the claimant nor the agency welcomes you.

There is no precedent supporting your position. Common sense and fairness warrant its rejection. **Apart from a summary affirmance, you may be subject to imposition of costs or some other disadvantageous action.** And, importantly, by persisting in arguing a meritless case, you risk losing credibility when dealing with an truly arguable subject, such as the meaning of "state action".

I recommend that you promptly submit to me a stipulation withdrawing this groundless appeal.

Argument

"In civil cases, appeals to the circuit court may be taken as of right from all final decisions of the district courts except those that are appealable directly to the Supreme Court." Moore's Fed. Prac. § 303.11(1)(a)(citing 28 U.S.C. § 1291).

This disciplinary complaint only concerns Mr. Bass's professional misconduct of trying to intimidate the four appellants in the U.S.A. case into relinquishing their right to appeal a district court decision or suffer a predetermined decision against them, monetary expenses, and other unspecified harm reminiscent of the threats made by the authorities in Franz Kafka's The Trial.

The threatened preconceived decision of "summary affirmance" calls into question whether the Second Circuit will adequately consider the appellants' arguments or just rubber-stamp the appeal "denied." **"In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 n. 19, 71 S.Ct. 624, 95 L.Ed. 817 (1951)(Frankfurter J., concurring)(quoting 5 The Writings and Speeches of Daniel Webster, 163). "[J]ustice must satisfy the appearance of justice." Offut v. US, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954).** Mr. Bass does the opposite by adopting a page out of history's "show trials" in which the administration of "justice" was decided before a hearing or arguments. Such conduct is prejudicial to the rendering of justice in violation of DR 1-102(A)(5) and the principles of ABA/BNA Manual, Rule 5.2, No. 119 p.01:829.

Tactics that try to push parties out of the judicial system, by a Government attorney acting on behalf of the very court in which those parties seek justice, undermine the very reason for courts in this democracy.

> **"The irreplaceable value of the [judicial] power articulated by Mr. Chief Justice Marshall [Marbury v. Madison, 5 U.S. 137] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role … that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."**

United States v. Richardson, 418 U.S. 166, 192, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974)(Justice Powell concurring). Mr. Bass's efforts to use his position to dictate his view of majoritarian rule undermines the countermajoritarian purpose of the Second Circuit, and, thereby, impairs public confidence in the probity of its operations, which is a violation of Ethical Canon 9-2.

Mr. Bass's conduct sends a clear message to the four appellants: don't bother looking to the Federal judiciary for a redress of grievances regardless of the First Amendment's guarantee.

> **"[H]istory shows that people have a way of not being willing to bear oppressive grievances without protest. Such protests, when bottomed upon facts, lead almost inevitably to an irresistible popular demand for either a redress of those grievances or a change in the Government."**

Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 167, 81 S.Ct. 1357; 6 L.Ed 2d 625; 1961 (Justice Black dissenting). Apparently Mr. Bass would rather the appellants take their grievances to the streets.

The U.S.A. case is presently in the middle of the appeal's process, so it is still unknown whether Mr. Bass will be able to make good on his threats of harm to the appellants with "summary affirmance" of the lower court's dismissal or the "imposition of costs" or "some other disadvantageous action." However, Mr. Bass's inappropriate efforts to push the four appellants out of the Second Circuit Court constitutes an injury, or at least potential injury, to the legal system and the public's confidence in it. ABA/BNA Manual, Definitions at 01:807.

An attorney from the University of Chicago who has worked as Staff Counsel for years should have known the impact or potential impact his conduct would have on the legal system and the public's view of it.

> "Suspension is generally appropriate when a lawyer in an official or government position knowingly fails to follow proper procedures or rules and cause injury or potential injury ... to the integrity of the legal process."

ABA/BNA Manual, Rule 5.22, 01:829.

For the foregoing reasons, I request that Mr. Bass be disciplined for abusing his position of authority as Staff Counsel and representative of the Second Circuit Court of Appeals.

Sincerely,

Roy Den Hollander