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

BRIEF OF PLAINTIFF-APPELLANT

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SUBJECT MATTER JURISDISCTION

This putative class action was brought under 42 U.S.C. § 1983 for the deprivation, under the color of state law, of the Plaintiffs-Appellants rights guaranteed by the equal protection clause of the 14th Amendment to the U.S. Constitution. The Southern District Court had jurisdiction pursuant to 28 U.S.C. § 1343(3) & (4). The Second Circuit has jurisdiction under 28 U.S.C. §1291.

The lower court's final order ("Opinion"), App. 62-74, which dismissed the First Amended Complaint ("Amended Complaint"), App. 15-58, with prejudice under Fed. R. Civ. P. 12(b)(6), was entered on September 29, 2008, App. 75, the Notice of Appeal was filed on October 10, 2008, App. 76, and the Pre-Argument Statement filed on October 14, 2008.

Plaintiff-Appellant and putative class counsel, Roy Den Hollander ("Den Hollander"), **requests oral argument**.

ISSUE FOR REVIEW

1. While state action under the 14th Amendment is involved in the serving of alcohol to persons in public-accommodation nightclubs controlled by the New York State Liquor Authority, is state action involved in admitting those same persons to the nightclubs?

CASE STATEMENT

Plaintiff-appellant Den Hollander, individually and on behalf of a putative class of similarly situated men, appeals the Rule 12(b)(6) dismissal of an action brought against five New York City nightclubs ("Nightclubs") for discriminating against men on "Ladies' Nights." During Ladies' Nights, the Nightclubs charge males more for admission than females or give males less time than females to enter the Nightclubs for a reduced price or for free. All the Nightclubs serve alcohol on their premises for consumption, are extensively controlled by the New York State Liquor Authority ("SLA"), and are part of the New York State ("State") regime responsible "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.

The Southern District Court Opinion is reported at 580 F. Supp. 2d 335 (S.D.N.Y. 2008)(Cedarbaum, J.). The Opinion mistakenly states this is a *pro se* case when it is a putative class action. "[A] suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination the class is not proper." *See e.g.* Kahan v. Rosentiel, 424 F.2d 161, 169 (3rd Cir. 1970); Gaddis v. Wyman, 304 F. Supp. 713, 715 (S.D.N.Y. 1969).

The District Court never ruled the putative class was not proper, so this case remains a putative class action with class counsel and not a *pro se* proceeding.

FACTS

The Nightclubs regularly hold Ladies' Nights in which they charge males more for admission than they charge females or give males less time than females to enter the clubs for free or at a reduced price. For example, a gentleman arrives at 11:55 p.m. to enter one of the Nightclubs, but he only has $15—he doesn't get in because the charge to him is $20. A lady standing right behind him also has only $15, but she breezes right in because the admission is free for her, and inside she can spend her $15 on alcoholic drinks of her choice. In this instance, the gentleman could not overcome the obstacle of entry, which put him in the same position as though the bar denied him an alcoholic drink. Where the gentleman has $20, he hands it over for admission while the lady, if she has $20, keeps it in her pocketbook. Here, both have engaged in the same activity, entering a nightclub, but one is poorer for it.[1]

The SLA regulates not just the sale and consumption of alcohol in the Nightclubs but also the attendant conditions or circumstances within and without these public accommodations. The Nightclubs are <u>not</u> "private clubs" over which

[1] The District Court in an Orwellian twist characterized the deprivation to males as females paying reduced cover. (Opinion p. 7, App. 68). The deprivation is males paying more than females or investing more of their time to gain admission.

the SLA exercises less pervasive control. N.Y. Alcoholic and Beverage Control Law ("ABC") § 3(9). The Amended Complaint, App. 15-58, alleges facts that demonstrate the involvement of the State with the Nightclubs.

ARGUMENT SUMMARY

The District Court's Opinion, App. 62-74, decided that state action did not reach the Nightclubs' treating males differently for admission than females because admission does not involve the serving of alcohol. By that reasoning, the Nightclubs could constitutionally have separate restrooms for blacks and whites because the Nightclubs do not serve alcohol in their restrooms.

State action exists in the Nightclubs' discriminatory admission policies because (1) the Nightclubs exercise a public function, (2) the State is responsible for and controls the Nightclubs, or (3) the State and the Nightclubs are entwined, involved in a joint activity, or the State encourages the discrimination.

ARGUMENTS

While state action under the 14th Amendment is involved in the serving of alcohol to persons in public-accommodation nightclubs regulated by the New York State Liquor Authority, is state action involved in admitting those same persons to the nightclubs?

The standard of review on a Rule 12(b)(6) motion to dismiss is *de novo*.

The 14th Amendment is enforced through actions pursuant to 42 U.S.C. 1983.[2] The purpose of civil rights actions under 42 U.S.C. 1983 is to further the public good and to prevent injury and wrong, Will v. Mich. Dep't of State Police, 491 U.S. 58, 73, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)(Brennan, J. dissenting), by constraining governmental action "by whatever instruments or in whatever modes that action may be taken." Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995)(quoting Ex parte Virginia, 100 U.S. 339, 346-47, 25 L.Ed. 676 (1880)). Section 1983 was enacted because state or local causes of action were no substitute for enforcing constitutional rights. *See* Cong. Globe, 42d Cong. 1st Sess. 244 (1871).

The Second Circuit has recognized a less strict state action standard where discrimination is based on color, Taylor v. Con. Ed., 552 F.2d 39, 42 (2d Cir. 1977), since in the area of such discrimination, state inaction or neutrality is often found as affirmative support, Lefcourt v. Legal Aid Society, 445 F.2d 1150, 1155 n. 6 (2d Cir. 1971). Because of similar harms, the constitutional scrutiny for sex discrimination approaches that for color discrimination. Sex based action requires an "exceedingly persuasive justification." U.S. v. Virginia, 518 U.S. 515, 524, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)(citation omitted). Since Virginia found sex discrimination nearly as harmful as color discrimination, id. at 531, it follows that

[2] The state action requirement of the 14th Amendment also constitutes action under color of state law for § 1983. Brentwood Acad. v. Tenn. Sec. Sch. Ath. Ass'n, 531 U.S. 288, 295 n. 2 (2001).

the state action determination in sex cases should also require a lesser degree of government involvement, *Cf.* Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970)(Friendly, J. concurring). In Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 598 n. 7 (1970), the Court found there was no logical reason for applying different state action principles to a case involving sex discrimination than one involving color.

For the purposes of 42 U.S.C. § 1983, the actions of a nominally private entity 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.[3]

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

[3] The Opinion at 5, App. 66, failed to state that a private entity's actions are fairly attributable to the State when it obtains significant aid from state officials.

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).

Two different judges in the Southern District Court of N.Y. found state action in a situation similar to the one here. Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593 (1970)(Mansfield, J. granted plaintiffs' motion for summary judgment)("McSorleys II"); 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)("McSorleys I").[4] The McSorleys' decisions have been approved in other cases[5] and favorably cited by the U.S. Supreme Court in Craig v. Boren 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, 429 U.S. 190, 208, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). The Craig decision came four years after Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), which dealt not with a New York regulatory scheme nor a public accommodation as does this case.

The lower court's Opinion relies on a distinction without a difference between McSorleys I & II and the action before this Court by stating the two females in McSorleys' "were refused alcohol" and the "discrimination alleged

[4] The only significant difference between the McSorleys' cases and the one before this Court is that ladies benefit from the discrimination here.

[5] 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).

refusal to serve [them] alcohol." (Opinion pp. 10, 11, App. 71-72). The Opinion argued that since the discriminatory practice in McSorleys I & II involved alcohol, state action existed. But McSorleys I & II case files do not specifically state the ladies were refused alcoholic drinks. They may have been refused lunch, cokes, boiled eggs or pickles; the McSorleys decisions do not specify, which means the finding of no state action in the Opinion rests on mere speculation.

Further, 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. Both McSorleys I & II held it did.

Under the reasoning of the lower court in this case, McSorleys' bar could have avoided serving females by simply charging them hundreds of dollars to enter. That would have kept most of them out.

1. Public Function

"[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 v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966). 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. Jackson v. Metro. Ed. Co., 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); Horvath v. Westport Library Ass'n, 362 F.3d 147, 151 (2d Cir. 2004).

Since Prohibition, N.Y. State has exercised responsibility for and exclusive control over alcohol, except where State action might conflict with certain provisions of the U.S. Constitution, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 515, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). "[T]he State, in accepting Prohibition, had rejected the old, excise method of liquor control; and then in ratifying the Twenty-First Amendment, had also rejected Prohibition." Report of the N.Y. SLA, p. 6, April 12, 1933 to December 31, 1934. The State established a system of broad control to prevent a recurrence of the conditions on which Prohibition was based. Id. at pp. 6-8. The State can at any time change the arrangement and take unto itself the functions of all its private entity surrogates. McSorleys II, 317 F. Supp. 593, 599-600 (1970); *see* N.Y. State Moreland Commission on the ABC Law, Study Paper No. 4, pp. 33, 39, October 27, 1963. The State could even go dry if it wished as it did on January 16, 1920 with passage of the Mullen-Gage Law to enforce prohibition. Report of the N.Y. SLA, p. 5, April 12, 1933 – December 31, 1934.

The power of the State to control not just the sale and consumption of alcohol but the circumstances in which such occurs is an exercise of the ultimate sovereignty of a state. *See* Crane v. Campbell, 245 U.S. 304, 308, 38 S.Ct. 98, 62 L.Ed. 304 (1917). "[T]he regulation of the liquor traffic is one of the oldest and most untrammeled of [state] legislative powers." 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. N.Y. State has absolute power to prohibit totally the sale of alcohol, broad power to control the times, places and circumstances under which alcohol is sold by the Nightclubs; and even to arrogate to the State the entire business of distributing and selling alcohol to its citizens. 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).

The State has chosen to delegate some of its exclusive functions to the Nightclubs for operating premises where persons can purchase and consume alcohol. The Nightclubs, therefore, exercise a public function by which they are entirely dependent upon State decisions to operate successfully. *See* Flagg Bros., 436 U.S. at 158-59 (public function exists when there exists a history of exclusive government activity).

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, except when a nightclub refuses to serve certain customers alcoholic drinks. *See* Horvath, 362 F.3d at 151.

In Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), a city transferred a park's operations to private persons—the city delegated its public function. While New York hasn't delegated all its public function, since it still maintains comprehensive control over nightclubs, the State can at any time take back its granted privileges and set up a state run monopoly. McSorleys II, 317 F. Supp. 593, 599-600; *see* N.Y. State Moreland Commission on the Alcoholic Beverage Control Law, Study Paper No. 4, pp. 33, 39, October 27, 1963.

The discrimination in Evans was the park's admission policies under the operation of private individuals. 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.

When the State endowed the Nightclubs with the governmental sovereignty of providing alcohol for on-premise consumption, they were granted a public function, and the Nightclubs, just as the State if it provided alcohol for on-premise consumption, cannot discriminate in admission or employee hiring or in supplier contracting or in charging different prices to different customers or in many other activities. 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).

2. State Control and Responsibility

While licensing and regulation by a state does not mean state action, neither does it mean no state action. "[G]overnmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). State action also exists where the deprivation of rights are caused by a person for whom the State is responsible. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937.

Alcohol regulation controls more than the substance itself. Joseph R. Gusfeld, Symbolic Crusade: Status Politics and the American Temperance Movement, 37 (1986). State supervision of alcohol is a form of state control—political, economic and moral—over the activity, lifestyle or expression that alcohol tends to accompany. With the passage of the 21st Amendment, New York acquired the responsibility for handling its liquor problems and the responsibility to "meet the diverse need of the cosmopolitan population of the State," Report of the N.Y. SLA, p. 5, 6, April 12, 1933 to December 31, 1934. In order to fulfill its duty, New York enacted the Alcohol Beverage Control Act and created the SLA to meet its responsibility of forestalling "the return of the evils which flourished in the pre-Prohibition period" and for the purpose of "fostering and promoting temperance" and "respect for and obedience to the law." Id. at 8. New York's "[r]egulatory intervention in the liquor business is designed to promote public rather than private interests." Moreland Commission on ABC Law, No. 4, p. 30.

Whether activities surrounding alcohol consumption are permitted is strictly a matter of state concern, Fenton v. Tedino, 78 Misc. 2d 319, 320, 356 N.Y.S.2d 397 (Sup. Ct. 1974), because the states exercise control over the circumstances under which alcohol is sold, *see* 44 Liquormart, 517 U.S. at 515. N.Y. State's power to control alcohol and its attendant conditions falls under its police power, which the State uses to fulfill its duty to protect the social order, lives, safety and

health of its citizens. ABC Law § 2; Report of the N.Y. SLA, pp. 8, 9; *see* 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).

N.Y. State's control and responsibility reach well beyond the serving of an alcoholic drink to the level of a club's lighting, the view within, advertising, reputation of the owners, citizenship of the employees, moral character of the customers, the interior floor plan, the 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, finances, waitress outfits, noise levels outside a club, parking and traffic congestion, and any 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 SLA even has "the power to alter … the industry's structure … the industry's behavior, by prescribing and proscribing specific dimensions of business conduct." Moreland Commission on the ABC Law, No. 4, p. 6, which logically includes admission policies.

Clearly the SLA doesn't just grant licenses or subject to regulation the serving of alcohol in the Nightclubs, rather it prescribes and proscribes the limits and conditions for what takes place within and without the Nightclubs and the

circumstances surrounding their business operations. Without State approval, the Nightclubs could not sell alcohol, and, as the Amended Complaint at ¶¶ 15, 50, App. 16, 21, alleges, without alcohol the Nightclubs would fail economically.[6] So in order to survive and make their owners money, the Nightclubs voluntarily join New York's pervasive regulatory scheme that dominates the on-premise consumption of alcohol. "Liquor licensing laws are only incidentally revenue measures; they are primarily pervasive regulatory schemes under which the State dictates and continually supervises virtually every detail of the operation of the licensee's business. Very few, if any, other licensed businesses experience such complete state involvement." Moose Lodge, 407 U.S. 163, 184-85 (Brennan, J. dissenting).

The Opinion at pp. 8, 10, App. 69, 71, relies, in part, on the majority opinion in Moose Lodge to find that the SLA's control over the Nightclubs is insufficient to impact the discrimination against men during admission. Moose Lodge, however, was not about a public accommodation as the Nightclubs are in this case. It is no surprise, therefore, that Moose Lodge did not find state action, and that its majority opinion is not applicable to this case, since the very purpose of a private club liquor license is to allow individuals to associate with whom they wish as

[6] The Opinion at p. 6, App. 67, made a finding of fact that this allegation was speculative, but on a Rule 12(b)(6) motion, the allegations are assumed true. Beside, 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.

though they were in their own home. The proverbial right of a homeowner to discriminate in choosing whom he shall invite to dinner has nothing to do with the Nightclubs' discrimination. McSorleys II, 317 F. Supp. at 604, *see* Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Public accommodations for which a state is responsible and over which it exercises pervasive control are not permitted to treat different groups differently—they are required to treat all their customers similarly.

3. Entwinement, Joint Activity and Encouragement

The Nightclubs discriminatory admission policies are fairly attributable to the State because the SLA exercises pervasive control over the Nightclubs, which reaches from the handing over of an alcoholic drink, through the premises to the door, and outside onto the sidewalks and streets by the Nightclubs. The SLA also provides the Nightclubs significant aid.

The SLA's exercise of power reaches the Nightclubs' admission policies. SLA Rule § 48.3 requires the Nightclubs to abide by state regulations, such as N.Y. Civ. Rights Law § 40-c(2): "No person shall, because of … sex … be subject to any discrimination …," and N.Y. Exec. Law § 296(2)(a) that makes it unlawful for public accommodations to deny advantages or privileges based on sex. Both of these statutes would likely prohibit discriminatory admission policies. ABC § 65(4) forbids discrimination on the basis of color, religion, or creed. ABC Law § 2

requires the SLA to promote the "public convenience and advantage"—"a broad administrative standard that confers considerable latitude on the" SLA, Moreland Commission on the ABC Law, Study Paper No. 4, p. 5. Discrimination against either sex is not a public convenience or advantage and falls within the pervasive power of the SLA. McSorleys II, 317 F. Supp. 593, 601. Since different treatment amounts to discrimination, Reed v. Reed, 404 U.S. 71, 75-77**,** 92 S.Ct. 251, 30 L. Ed.2d 225 (1971), admission practices treating males and females differently are discriminatory, and all such practices by the defendants are within the SLA's power to stop.

Other controls over admission policies are ABC Law § 65-b(1)(c) and (2)(b), which require each Nightclub to examine a customer's identification as a precondition for admission to where the sale of alcohol is restricted to persons 21 or older, as with the Nightclubs. SLA Rule § 48.2 holds the Nightclubs responsible for conduct on their premises, including the admission of minors. And the SLA has the power to impose further restrictions, including on admissions, as would in its judgment best serve the public interest. SLA Rule § 48.5.

(a) Entwinement

The entwinement analysis focuses on the number and types of contacts between the government and the ostensibly private wrongdoer's practices that allegedly violate the U.S. Constitution.[7]

A nominally private entity may be a state actor when it is entwined with government policies or when the government is entwined in its management, workings, or control. Brentwood Acad., 531 U.S. 288, 296. 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. Id. at 295 (citing Nat. Col. Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191,109 S.Ct. 454, 102 L.Ed.2d 469 (1988)). The SLA, as shown *supra*, has plenty of control over the Nightclubs.

When the deprivation of constitutional rights occur in the pervasive control settings of alcohol retailing for on-premise consumption, and the Nightclubs engage in discriminatory practices in order to maximize their State franchise value[8], the State has a role, and is obligated to prevent discrimination in violation

[7] The Opinion at p. 8 relied in part on Hadges v. Yonkers Racing Corp., 918 F.2d 1079, 1083 (2d Cir. 1990), to find no close nexus or entwinement of the Nightclubs with the State. Hadges deals with a jockey denied permission to race. It does not involve the higher level of scrutiny given sex discrimination cases. When the level of scrutiny is high, the requirement of state action may be mitigated. *See* Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970)(Friendly, J concur). Yet the Opinion found Hadges more on point than McSorleys I & II that deal with on-premise retailers of alcohol and sex discrimination. Racetracks are not controlled by the SLA. Further, horse racing is not a State franchise, Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 254-55, 72 N.E.2d 697 (1947), as is the on-premise sale and consumption of alcohol.

[8] 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

of N.Y. Civ. Rights § 40-c and N.Y. Exec. § 296(2)(a). The SLA's broad authority to revoke or deny renewal of a franchise for reasons deemed by it to serve the "public convenience and advantage" includes the prevention of unjustified discrimination in the exercise of the privilege granted the Nightclubs.

The scope of New York's regime is comprehensive because the State, if it so chose, could expropriate the Nightclubs activities unto itself. None of the governmental authority over nursing homes in Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), or over utilities in Jackson v. Metro. Ed., 419 U.S. 345, could prevent the discriminatory practices in those cases, but that's not the situation here. New York State so completely controls the Nightclubs as to convert their discrimination into state action. Where a private entity operates its service under the pervasive supervision of the government, its "authority derives in part from the Government's thumb on the scales, and the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." 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 entity remained subject to the Fifth Amendment because of the surveillance which federal agencies had over its affairs)(citation omitted).

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right in New York State under the common law to engage in the sale of intoxicating beverages, McSorleys II, 317 F. Supp. 593, 599.

"The state license enables the [Nightclubs] to engage in discriminatory conduct in the exercise of [their] franchise rights. To put it another way, without the state license to serve [alcohol], defendant[s] here could never have discriminated …. The license … becomes a license to discriminate." McSorleys II, 317 F. Supp. at 598. The Nightclubs' abilities to economically survive and prosper depends on New York State's police power permitting them to retail alcoholic beverages for consumption on their premises. (Amended Complaint ¶ 15, App. 16). Without the privilege to retail alcohol, the Nightclubs would not be in a position to discriminate against men because without alcohol, virtually no one would frequent their establishments. The defendants would soon be out of business. (Amended Complaint ¶ 50, App. 21).

Constitutional standards are invoked "when it can be said that the State is **responsible** for the specific conduct of which the plaintiff complains," Blum , 457 U.S. 991, 1004 (emphasis added). The Second Circuit has cautioned that according to Brentwood the concept of responsibility is not to be read narrowly in the context of the state action inquiry. Horvath, 362 F.3d 147, 154. 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 responsible 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).

In reality, the Nightclubs would not be recognizable entities without the State, *see* Brentwood Acad. at 300, and are acting as the instrumentality of the State. Since the State could not constitutionally discriminate on admission, neither can the defendants.

(b) Joint Activity

When the State has so far insinuated itself into a position of interdependence with a private entity, it must be recognized as a joint participant in the challenged activity.[9] Burton, 365 U.S. 715, 725 (restaurant in public building discriminated on basis of color). Interdependence is found when the state provides benefits to private entities as with the lease to government property in Burton and the lending

[9] The Opinion at pp. 9-10 states joint participation must be in a service that the State would provide if the private Nightclubs did not. "Should all options consistent with a private system [of alcohol vendors] be rejected, a full-fledged state monopoly would remain as a final solution." Moreland Commission on the ABC Law, Study Paper No. 4, p. 39.

of textbooks to private schools in Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973)(private schools discriminated based on color).[10]

The Nightclubs, as the restaurant in Burton and the schools in Norwood, do not receive any direct financial aid from the State. The Nightclubs do not lease their premises from the government, as the restaurant in Burton did, but the State approves or disapproves their locations, the buildings, the buildings' history and the landlords. Further, the Nightclubs do, in effect, lease property from the SLA in the form of a franchise for alcohol sales and consumption. The SLA also provides an economic benefit as real as textbooks by restricting competition through limiting the number of nightclubs and controlling their locations. ABC Law §§ 2, 17(2); Moreland Commission on the ABC Law, Study Paper No. 4, pp. 4, 5.

Restrictions on entry into the market confers on the Nightclubs a significant state-derived benefit that also approximates the state support provided by the lease involved in Burton. Burton, 365 U.S. at 724; McSorleys II, 317 F. Supp. at 602. The State's control over entry give the Nightclubs an extremely valuable franchise. The alcohol industry in New York has the highest degree of economic protection,

[10] In both these cases, the government knew or should have known the private entities engaged in intentional discrimination, so the motives of the private parties were attributed to the government. So too the SLA knows or should know of the Nightclubs intentional discrimination. "[T]hose who engage in the sale of intoxicants do so with the knowledge that their business conduct will be subject to **constant scrutiny**…." 17 Cameron St. Restaurant Corp. v. New York State Liquor Authority, 48 N.Y.2d 509, 512, 423 N.Y.S.2d 876 (1979)(emphasis added). When government deliberately fails to eliminate discrimination, then judicial protection should be extended more broadly.

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 stringent government supervision and protection of New York's alcohol industry arbitrarily creates and maintains high franchise values. Moreland Commission on the ABC Law, Study Paper No. 4, p. 14.

"Franchise value equals the present discounted value of future income expected to be earned by licensees and which is attributable to possession of a license." Id. at p. 16. The fewer number of licensees in the market, the greater will be the expected earnings. Id. In unregulated industries with low entry barriers, the increase in income, population, or demand will cause new firms to enter, but not so with the alcohol industry, id. at p. 21, because State power protects the franchise value of licensees, such as the Nightclubs. Without their franchises from the SLA, next to no one would attend the Nightclubs on Ladies Nights or any other nights. (Amended Complaint ¶¶ 15, 50, App. 16, 21).

There is a tendency by the SLA to protect the economic interests of already licensed premises, such as the Nightclubs, by renewing their licenses while denying applications of new entrants in the general area when establishments have made large investments and local population and usage has not increased. *Cf. e.g.* William H. Van Vleck, Inc. v. Klein, 50 Misc. 2d 622, 271 N.Y.S.2d 64, 67, 69

(Sup. Ct. 1966). In effect, the State is providing the Nightclubs an indirect subsidy of immense economic value.[11]

In Burton, the government could have affirmatively required the restaurant to abide by the 14th Amendment as a consequence of the restaurant's involvement with a government facility. Burton, 365 U.S. 715 at 725. The SLA also has the power under State law and its Rules to put a stop to the defendants' practices. In fact, no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. Burton, 365 U.S. 715 at 725. "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." Id.

The State also benefits from Ladies' Nights discrimination through its interest of a proprietary nature in the Nightclubs. One definition of "proprietary" is possessing dominion over a thing. Black's Law Dictionary, 5th ed. The State can revoke, cancel or suspend the Nightclubs' privilege to sell alcohol, which is the very lifeblood of their business.[12] (Amended Complaint ¶ 15, App. 16). But as long as the State assents to the Nightclubs' operations and their discriminations,

[11] The Nightclubs sell mix drinks at around $12 each, but the actual cost of such drinks are around $1. Thanks to the SLA, the defendants have a privilege to mint julep money. Regardless of whether the Nightclubs have a right to act free of constitutional restraints, it is clear that the State, through the SLA, has no authority to provide valuable privileges to those who infringe the exercise of constitutional rights. *See*, Norwood v. Harrison, 413 U.S. 455, 466.

[12] The State must approve any transfers of ownership, change in principals, and financing. ABC Law §§ 99-d(2)(3).

the State benefits from Ladies' Nights discrimination, which does not substantially serve an important State interest.

Ladies' Nights make the Nightclubs money by increasing the number of customers; otherwise, the clubs would not hold them. 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 taxes because of Ladies' Nights.[13] 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).

In the present case "as in [Burton], 'the State has so far insinuated itself into a position of interdependence … that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so purely private as to fall without the scope of the Fourteenth Amendment.'"

[13] The 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 discrimination actually directly increases tax revenues to the State.

Coleman v. Wagner College, 429 F.2d 1120, 1127 (Friendly, J. concurring)(quoting Burton, 365 U.S. at 725). The Nightclubs operate as willful participants with the SLA in controlling not just the sale and consumption of alcohol but the attendant circumstances in order to fulfill the State's responsibility to promote temperance in consumption and respect for and obedience to the law. ABC Law § 2. The Nightclubs are doing the State's work under the State's control and supervision, and both are benefitting.

(c) Encouragement

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. "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). As argued *supra*

in (a), the State and the Nightclubs are pervasively entwined.

The Opinion at p. 8 finds no State encouragement by ignoring the requirement in Burton, 365 U.S. at 722, "to sift through and weigh the facts" for any state action determination because the issue does not "lend itself to formulaic applications." The Opinion relies on two factually inapposite cases in which the government only performed "routine oversight functions" of the private entities; therefore, the government was not pervasively entwined, so state action required the government to actually order the discriminatory practices, which the states did not.

In 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. Id. at 313.

In 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 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. The government involvement in these two cases does not come near the SLA's involvement with the Nightclubs.

The government did not order the private restaurant in Burton to discriminate against blacks, but it had placed the restaurant in a position in which citizens could reasonably view the restaurant's acts as authorized by the government. The SLA's extensive involvement with the Nightclubs, continuing oversight of their operations, and repeated renewal of their licenses, puts its mark of imprimatur on discrimination during Ladies Nights and thereby actually encourages it and, in effect, authorizes it. *See* McSorleys II, 317 F. Supp. 593, 599, 603.

Also in Burton, the government failed to exercise its responsibilities to prevent discrimination and thereby acquiesced in it. "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." Burton, 365 U.S. at 725. The SLA, by standing on the sidelines and doing nothing to prevent the Nightclubs from violating the N.Y. State Civil Rights and Human Rights Laws, is acting in a non-neutral fashion that encourages discrimination just as some policemen in the deep-south stood by and watched the Ku Klux Khan beat civil rights workers. The SLA most assuredly knows of the preferential treatment females receive on Ladies'

Nights, but has made no effort through the exercise of the broad authority granted it to remedy the discrimination, levy fines, or suspend, revoke, or deny renewal of the licenses that the defendants must have in order to practice their discrimination. The State has not only abdicated its responsibility, but in repeatedly renewing licenses, affirmatively approves the discriminatory practices of the defendants. This directly contravenes the SLA's duty to assure the defendants conform to all applicable government regulations, 9 N.Y.C.R.R. § 48.3, which the SLA has the power to enforce.

In effect, the SLA established a *de facto* standard, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52,[14] that for practical purposes obviates New York's laws against sex discrimination by the Nightclubs when such discrimination in admissions violate the civil rights of men. As a result, the SLA provides not just its stamp of approval for the discrimination, but an impetus for continuation of the practice, which financially benefits both the State and the Nightclubs.

Official encouragement can also result from a practice followed as a matter of course to an extent that it has the force of law. For example, 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. *Cf.*

[14] The Supreme Court in American ruled that the alleged discriminatory practices, like the ones in Blum, "turn[ed] on . . . judgments made by private parties" without "standards . . . established by the State," Blum v. Yaretsky, 457 U.S. 991, 1008, and without state standards, there was no state action.

Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963). Today, after 40 years of lobbying and intimidation, the special interest group called "Feminism" has succeeded in creating a customary practice in governmental institutions at the federal, state and local levels in which the invidious discrimination of men is the accepted and preferred mode of behavior. That customary practice has resulted in the Nightclubs charging males more for admission than females while the SLA stands idly by. If there is any question as to the reality of this customary practice, just switch the sexes. Would the SLA and the courts permit Nightclubs to charge females more for admission than males?

The vast majority of customers to the Nightclubs are 20 to 30 years old. Females in their twenties and working in New York City make 117% that of their male counterparts. Sam Roberts, Women Earning More, N.Y. Times, Aug. 3, 2007. It seems fairer to charge more of those who make more than of those who make less, but that is not what is happening.

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 because nightclubs, even though they are pervasively regulated by a state liquor authority, can constitutionally choose to charge males more than females. Nightclubs would not dare charge females more because of the social climate in modern day America. So nightclubs, and any other public accommodation, can now constitutionally ban males by charging them a steep enough price so that none other than what's left of the Wall Street Moguls could afford to attend.

The Civil Rights and Plessy decisions provided the legal basis for 70 years of ignorance and prejudice that institutionalized itself in every area of society where people interacted with each other. The lower court's Opinion has laid the same foundation for discriminating against males in every area of society that is not directly under the control of government or in which state law does not explicitly prohibit discrimination. [15]

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

[15] 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.

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.

Plaintiff-Appellant Den Hollander requests the dismissal be vacated.

Dated: March 13, 2009

/S/

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) by containing 7,938 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.

ADDENDUM OF CONSTITUIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

14th Amendment to the U.S. Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for the deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N.Y. Civ. Rights Law § 40-c(2)

No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability, as such term is defined in § 292 of the executive law, be subjected to any discrimination in his or her civil rights, or to any harassment, as defined in § 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

N.Y. Exec. Law § 296(2)(a)

It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

ABC Law § 2

It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law. It is hereby declared that such policy will best be carried out by empowering the liquor authority of the state to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby, subject only to the right of judicial review hereinafter provided for. It is the purpose of this chapter to carry out that policy in the public interest. The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the

protection, health, welfare and safety of the people of the state.

ABC Law § 3(9)

"Club" shall mean an organization of persons incorporated pursuant to the provisions of the not-for-profit corporation law or the benevolent orders law, which is the owner, lessee or occupant of a building used exclusively for club purposes, and which does not traffic in alcoholic beverages for profit and is operated solely for a recreational, social, patriotic, political, benevolent or athletic purpose but not for pecuniary gain; except that where such club is located in an office or business building, or state armory, it may be licensed as such provided it otherwise qualifies as a "club" within the meaning of this subdivision.

ABC Law § 17(2)

To limit in its discretion the number of licenses of each class to be issued within the state or any political subdivision thereof, and in connection therewith to prohibit the acceptance of applications for such class or classes of licenses which have been so limited.

ABC Law § 64(6-a)

6-a. The authority may consider any or all of the following in determining whether public convenience and advantage and the public interest will be promoted by the granting of licenses and permits for the sale of alcoholic beverages at a particular unlicensed location:

(a) The number, classes and character of licenses in proximity to the location and in the particular municipality or subdivision thereof.

(b) Evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies.

(c) Effect of the grant of the license on vehicular traffic and parking in proximity to the location.

(d) The existing noise level at the location and any increase in noise level that would be generated by the proposed premises.

(e) The history of liquor violations and reported criminal activity at the proposed premises.

(f) Any other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community.

ABC Law § 65(4)

[S]ale or delivery shall not be refused, withheld from or denied to any person on account of race, creed, color or national origin.

ABC Law § 65-b(1)(c)

“Transaction scan” means the process involving a device capable of deciphering any electronically readable format by which a licensee, or agent or employee of a licensee under this chapter reviews a driver's license or non-driver identification card presented as a precondition for the purchase of an alcoholic beverage as required by subdivision two of this section or as a precondition for admission to an establishment licensed for the on-premises sale of alcoholic beverages where admission is restricted to persons twenty-one years or older.

ABC Law § 65-b(2)(b)

No licensee, or agent or employee of such licensee shall accept as written evidence of age by any such person for the purchase of any alcoholic beverage, any documentation other than: (i) a valid driver's license or non-driver identification card issued by the commissioner of motor vehicles, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government within the United States or a provincial government of the dominion of Canada, or (ii) a valid passport issued by the United States government or any other country, or (iii) an identification card issued by the armed forces of the United States. Upon the presentation of such driver's license or non-driver identification card issued by a governmental entity, such licensee or agent or employee thereof may perform a **transaction scan as a precondition to the sale of any alcoholic beverage**. Nothing in this section shall prohibit a licensee or agent or employee from performing such a transaction scan on any of the other documents listed in this subdivision if such documents include a bar code or magnetic strip that that may be scanned by a device capable of deciphering any electronically readable format. (Emphasis added).

ABC Law § 99-d(2)(3)

2. Before any change in the members of a limited liability company or the transfer or assignment of a membership interest in a limited liability company or any corporate change in stockholders, stockholdings, alcoholic beverage officers, officers or directors, except officers and directors of a premises licensed as a club or a luncheon club under this chapter can be effectuated for the purposes of this chapter, there shall be filed with the liquor authority an application for permission to make such change and there shall be paid to the liquor authority in advance upon filing of the application a fee of one hundred twenty-eight dollars where the license fee is five hundred dollars or more and thirteen dollars in all other instances including changes relating solely to officers and directors of corporations and the alcoholic beverage officer of a club or luncheon club.

The foregoing provisions of this section shall not be applicable where there are ten or more stockholders and such change involves less than ten per centum of the stock of the corporation and the stock holdings of any stockholder are not increased thereby to ten per centum or more of the stock.

Where the same corporation operates two or more premises separately licensed under this chapter a separate corporate change shall be filed for each such licensed premises, except as otherwise provided for by rule of the liquor authority. The corporate change fee provided for herein shall not be applicable to more than one license held by the same corporation.

3. Before any removal of a license to any premises other than the licensed premises or to any other part of the building containing the licensed premises, the licensee shall make an application to the liquor authority for permission to effect such removal and shall pay to the liquor authority in advance upon filing of the application a fee of one hundred ninety-two dollars where the base license fee is five hundred dollars or more and thirty-two dollars in all other instances.

ABC Law § 125

The moneys received for license fees provided for in this chapter shall be turned over by the liquor authority to the state comptroller. It shall be placed by the state comptroller in the fund derived from the proceeds of the taxes on liquor, wine and beer provided for in article eighteen of the tax law and become a part thereof and be subject to all of the provisions of law relating to such fund.

SLA Rules, 9 N.Y.C.R.R. Pt 48

Section 48.2. Conduct of licensed premises

The proper conduct of on-premises licensed establishments is essential to the public interest. Failure of a licensee to exercise adequate supervision over the conduct of such an establishment poses a substantial risk not only to the objectives of alcoholic beverage control but imperils the health, welfare and safety of the people of this State. It shall be the obligation of each person licensed pursuant to this Part to insure that a high degree of supervision is exercised over the conduct of the licensed establishment at all times in order to safeguard against abuses of the license privilege and violations of law. Each such licensee will be held strictly accountable for all violations that occur in the licensed premises and are committed by or suffered and permitted by any manager, agent or employee of such licensee. Persons licensed hereunder shall also have a particular responsibility to conform with those provisions of section 260.20 of the Penal Law and sections 398-c and399-d of the General Business Law which relate to the admission of minors to premises wherein alcoholic beverages are sold.

Section 48.3. Conformance with local and other regulations

The Authority expects all on-premises licensees, regardless of type of premises, to conform with all applicable building codes, fire, health, safety and governmental regulations.

Section 48.4. Physical standards

(a) No on-premises licenses shall be issued except where the premises comply with all statutory requirements. In addition, each such premises, when situated on or about the street level, shall have one or more windows which shall be so constructed as to afford clear visibility from the exterior and throughout the interior of said premises.

(b) No on-premises licenses shall be issued to premises described in subdivisions (b), (d), (e) and (f) of section 48.1 of this Part unless a particular location or locations shall be designated for the sale and service of alcoholic beverages which, if approved by the Authority, shall be deemed the licensed premises.

(1) Each such premises shall be under the exclusive dominion and control of the licensee and the sale and service of alcoholic beverages and the consumption of liquor and wine shall be confined thereto.

(2) In premises described in subdivisions (d), (e) and (f) of section 48.1 of this Part, the licensed premises shall be enclosed by a permanent wall or partition at least eight feet high.

(c) On-premises licenses may be issued to premises described in subdivision (c) of section 48.1 of this Part with due regard for the functional and traditional layouts of such premises. Any stand-up bar shall be in an area where seating at tables is provided for patrons and where such premises is in a bowling establishment, such area shall be enclosed by permanent walls or partitions at least eight feet high.

(d) *General physical standards.* The following standards shall be applicable to all on-premises licenses:

(1) Each premises licensed hereunder shall have seating for patrons at tables, except that the Authority, in its discretion, may permit a bar in any premises described in subdivision (b) of section 48.1 of this Part without requiring seating at tables.

(2) Each premises licensed hereunder shall provide separate sanitary facilities for both sexes. The provision of such facilities may be waived by the Authority provided there is a satisfactory showing that such facilities are in an area adjacent or proximate to the licensed premises and available to the patrons thereof.

(3) Each premises licensed hereunder shall, at all times during the hours such premises is open for business, be illuminated by sufficient lighting such as will permit a person therein to read nine-point print of the kind generally used in the average newspaper. Nothing herein contained shall, however, be construed as prohibiting temporary dimming of lights during a period of regular entertainment or other special occasions and during any performance in any premises described in subdivision (b) of section 48.1 of this Part.

Section 48.5. Special restrictions

The Authority may impose such further restrictions in particular instances as would in its judgment best serve the public interest.

Section 48.6. Hours of sale

(a) The hours of sale in on-premises licensed establishments shall be governed by the provisions of subdivision 5 of § 106 of the Alcoholic Beverage Control Law, except in those counties where pursuant to section 43, the local ABC board further restricts the hours of sale. In addition, the hours of sale in premises described in subdivisions (b), (c), (e) and (f) of section 48.1 of this Part shall be further restricted in that the sale of alcoholic beverages may not commence more than one hour before nor continue more than one hour after the commencement and ending, respectively, of the performance, sailing, event or other recreation or entertainment which is the principal business of said facility, except that in the instance of night clubs the sale of alcoholic beverages may commence at 4 p.m. and continue until the closing hour prescribed by law, unless further restricted by a local ABC board pursuant to subdivision 3 of § 43 of the Alcoholic Beverage Control Law..

(b) The further restrictions on hours of sale set forth in this section with respect to premises described in subdivisions (b), (c), (e) and (f) of section 48.1 of this Part, shall not, however, prohibit the sale of alcoholic beverages during the holding of any special function or event therein which is scheduled and advertised in advance provided such sale is not in violation of subdivision 5 of § 106 or the hours of sale prescribed by the local ABC board having jurisdiction.

Section 48.7. Personal qualifications

In acting upon applications for on-premises licenses, the Authority shall, in addition to inquiring into all other requirements, carefully evaluate the character, fitness, experience, maturity and financial responsibility of each applicant in determining whether public convenience and advantage would be served by approval of the application.

Section 48.8. Miscellaneous provisions

(a) Each license issued hereunder shall be subject to the licensee continuing to

conform with all representations set forth in the application for license and the provisions of this Part and any amendment thereto applicable to the type of premises under which such license was applied for and issued. Such representations shall constitute continuing representations for the life of the license and all renewals thereof. Any change or deviation therefrom in any material respect, without the permission of the Authority, shall be cause for the institution of proceedings to revoke, cancel or suspend such license or refusal to renew the same.

(b) Summer or winter on-premises licenses may, in the exercise of the Authority's discretion, be issued for each of the types of premises specified in section 48.1 of this Part.

(c) Nothing contained in this Part shall be construed as authorizing any alterations to any on-premises establishments except an alteration made pursuant to Part 47 of this Subtitle.

(d) A special on-premises licensee may grant to another person a written concession to prepare, serve and sell food in such licensed premises provided that the written approval of the State Liquor Authority is first obtained. The granting of such food concession without the approval of the Authority, or the failure to comply with the terms, representations and conditions upon which any such approval is granted, constitute cause for the suspension, cancellation, revocation, non-renewal or recall of the special on-premises license.

SLA Handbook Retail Licensees, p. 5

[A] liquor license is a privilege and under the ABC law licensees are obligated to properly supervise their premises. This responsibility extends to the licensee's patrons concerning noise, fights, disorders, and/or other unlawful behavior both inside and outside the premises which may adversely affect the health, safety and repose of the inhabitants in the area of the licensed premises …. Disciplinary charges may be instituted against a licensee for suffering or permitting disorders on or about the licensed premises relating to the operation of the premises and its patrons.