

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**DOBBINS CHANG, LLC
d/b/a FANTASY PLAZA
Plaintiff,**

v.

**THE CITY OF HOUSTON
Defendant.**

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Civil Action No. _____

COMPLAINT

Plaintiff, Dobbins Chang, LLC d/b/a Fantasy Plaza files its Complaint against defendant City of Houston.

Introduction

1. Plaintiff Dobbins Chang, LLC d/b/a Fantasy Plaza (herein as “Fantasy Plaza”) and operator of Fantasy Plaza, a gentlemen’s club located at 8503 North Freeway, Houston, Texas 77057.

2. On or about November 27, 2013, the City of Houston (the “City”) entered into a Settlement Agreement (“Agreement”) with sixteen similar clubs (the “Clubs”) in Houston who did not operate as sexually oriented businesses, but desired to operate as sexually oriented businesses. The Agreement went into effect January 1, 2014.

3. The Agreement with the City halted the enforcement of provisions within Chapter 28 of the Houston Code of Ordinances dealing with sexually oriented businesses against these sixteen clubs. In exchange, the Clubs pay the City a portion of their liquor sales in return for immunity from enforcement of the otherwise

applicable laws. Because the Agreement constitutes payment of money in return for receiving non-enforcement of city law against those paying the money, the Agreement constitutes and commercial bribery scheme that is unlawful under both state law (Texas Penal Code § 36.02(a)) and federal law (the Robinson-Patman Act).

4. The Agreement results in the selective enforcement of city law against non-parties to the Agreement, such as Fantasy Plaza, and non-enforcement of city law against the sixteen Clubs. This is not selective prosecution based on the discretion of law enforcement, but rather exemption from the law granted by the City to a class of businesses. This aspect of the Agreement is anticompetitive and violates the Sherman Act as an anticompetitive restraint on trade.

5. The Agreement, and its enforcement, violates the Constitution by denying due process and equal protection of the laws to non-parties, such as Fantasy Plaza, who wish to operate businesses like the Clubs under the same conditions as the Clubs.

6. Since the Agreement became effective, it has negatively impacted Fantasy Plaza's business. The Clubs who are parties to the Agreement are actual and potential direct competitors of Fantasy Plaza in the relevant markets. Under the Agreement, the Clubs are free to offer topless lap dances that would otherwise be prohibited by city law. Additionally, the entertainers at the Clubs can perform topless dancing without having to adhere to the "no touch" and "three foot" rules required by

city law. Nor do these sixteen Clubs have to pay the \$5 per customer tax that would otherwise be required by City law. Because Fantasy Plaza must abide by city law, Fantasy Plaza cannot compete for customers in the same manner as the Clubs. This has caused—and will continue to cause, Fantasy Plaza to lose business and ultimately fail.

7. In addition, although the Agreement purports to preclude the Clubs from offering certain other amenities to their patrons, such as private (“VIP”) rooms for dances, that aspect of the Agreement is a sham because many of the Clubs have continued to operate such rooms with impunity. The City chooses to ignore these Clubs’ conduct while strictly enforcing ordinances against non-parties to the Agreement, including Fantasy Plaza.

8. Fantasy Plaza seeks injunctive relief to stop the irreparable injury that has been ongoing since the Agreement went into effect, as well as declaratory relief that the Agreement is an illegal restraint on trade and an illegal commercial bribery scheme. Fantasy Plaza also seeks monetary damages, including actual and treble damages, and the cost of the suit, including attorney’s fees for the City’s violations of federal antitrust law.

Parties

9. Dobbins Chang, LLC d/b/a Fantasy Plaza, is a Texas corporation with its principal place of business in Harris County, Texas.

10. Defendant, the City of Houston, is a Texas home rule municipal

corporation and may be served with process by serving the City Secretary, Anna Russell, at 900 Bagby, City Hall Annex, Houston, Texas 77002.

Jurisdiction and Venue

11. This court has federal question jurisdiction under 28 U.S.C. § 1331. This court has jurisdiction for the federal antitrust claims under 15 U.S.C. §§ 1, 15(a). This court has jurisdiction under 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57 to issue declaratory relief, where, as here, it otherwise has jurisdiction over a controversy.

12. This court has original jurisdiction under 28 U.S.C. § 1343(a)(3) because certain causes of action are brought under 42 U.S.C. § 1983 to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United State or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

13. This Court is entitled to exercise supplemental jurisdiction over any state law claims herein pursuant to the provisions of 28 U.S.C. § 1367(a) because all such claims “are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

14. Venue is appropriate in this Court, as the defendant resides in this state and is found in this judicial district, and the events giving rise to the claims occurred

in this judicial district. See U.S.C. § 1391(b).

Factual Background

15. On January 15, 1997, the City enacted Ordinance No. 97-75 (the “Ordinance”), “Relating to Regulation of Sexually Oriented Business and Employees of Sexually Oriented Businesses.”

16. Article III of the Ordinance, § 28-125, modified the zoning provisions of the Houston Code of Ordinances doubling the distancing requirement from 750 to 1,500 feet between a sexually oriented business and a residential area, school, church, park, or day-care center.

17. Article III § 28-122 made it unlawful for any person to own, operate or conduct any business in an enterprise located within the city unless there is a permit for the enterprise and the permit is posted at or near the principal public entrance to the enterprise in such a manner that it will be conspicuous to patrons who enter the premises.

18. Section 4 of the Ordinance enacted a new Article VIII to Chapter 28 of the Houston Code of Ordinances, entitled, “Sexually Oriented Business Employees, Conduct and Operations.” This newly enacted Article regulated the conduct of employees and entertainers.

19. Under Article VIII § 28-253, no person may act as an entertainer or manager of an enterprise without a permit. In order to procure a permit, a person must provide the offices of the vice division with her name, address, date of birth, an

identification card, a list of all criminal charges, convictions and jail time, and two photographs. The applicant must also accede to fingerprinting and authorize the director to request the applicant's criminal history reports from the Texas Department of Public Safety and appropriate federal agencies. No entertainer or manager may receive a permit if the applicant has been convicted of, or spent time in jail for, certain enumerated misdemeanors. An entertainer must display her permit at all times while performing.

20. Under Article VIII § 28-258, it is unlawful for (a) an entertainer to touch a customer or the clothing of a customer while performing; or (b) for an entertainer "to approach closer than three feet to any customer while engaging in entertainment."

21. On June 26, 2012, the City enacted Houston Ordinance No. 2012-597, which amended Houston's Code of Ordinances to add new Article XI, which §§ 28-321 through 28-325, imposing a tax of \$5.00 on all defined "adult establishment" businesses in Houston for each "customer" who enters their premises, including those who do not spend money in the establishment, and imposing quarterly reporting and payment requirements.

The Sexually Oriented Business Litigation

22. As a result of various laws enacted by the City, a string of lawsuits commenced between the City, the Clubs, and other adult-oriented businesses.

23. The City brought suit against certain Clubs and other adult-oriented

businesses in Cause No. 2010-19512; *The City of Houston v. A.H.D. Houston, Inc.*; in the 295th Judicial District Court of Harris County, Texas. In this lawsuit, the City sued some of the Clubs and other adult-oriented businesses seeking a temporary injunction and declaratory relief for violations of Section 29-125.

24. The City sued various members of the Clubs and other adult-oriented businesses in Cause No. 2010-19522; *The City of Houston v. ICE Embassy, Inc.*; in the 152nd Judicial District Court of Harris County, Texas. Again, the City filed suit against certain Clubs and other adult-oriented businesses seeking a temporary injunction and declaratory relief for violations of § 28-125.

25. Several of the Clubs and adult-oriented businesses brought suit, or intervened in the suit, against the City in Cause No. 2012-60353; *Hospitality Executives of Houston, Inc. v. The City of Houston*; in the 269th Judicial District Court of Harris County, Texas. There, the plaintiffs sought a declaration that §§ 28-321 through 28-325 of Houston's Code of Ordinances were unconstitutional.

The Agreement

26. To settle the outstanding litigation between the City and the adult-oriented businesses that were parties to the litigation, the City and the Clubs entered into the Agreement. As part of the Agreement, the Clubs were exempt from the City of Houston ordinances described in paragraphs 17 through 23, herein, in exchange for annual payments to the City to a specifically created account called the "Human Trafficking Abatement Fund."

27. Under the Agreement, the Clubs receive, and will continue to receive, benefits and consideration that are denied to competitors who are not parties to the Agreement, such as Fantasy Plaza. Under the Agreement, the Clubs will receive the following benefits:

- a. they may remain in the same location even if in violation of § 28-125;
- b. they are not obliged to obtain a permit under the City of Houston Code of Ordinances § 28-122, nor are their managers and entertainers obliged to obtain permits under § 28-253 for the labor at the clubs;
- c. the entertainers performing in the clubs may perform topless lap dances, and both the clubs and the entertainers are not required to comply with City of Houston Code of Ordinances § 28-258(a), (b); and
- d. they are not obliged to pay the \$5 fee per customer required under the City of Houston Code of Ordinances § 28-322.

28. As mentioned above, the Agreement purports to preclude the Clubs from offering certain amenities, such as private (“VIP” or “champagne”) rooms for dances. However, this aspect of the Agreement is a sham because many of the Clubs continue to operate private rooms with impunity.

29. All other adult-oriented businesses that are not part of the Agreement

must adhere to sections of the City of Houston Code of Ordinances from which the Clubs are now exempt from. In other words, the City has one set of laws for the Clubs that were selected for the Agreement and pay for inclusion in the Agreement, and another set of law for their competitors.

30. The Agreement puts Fantasy Plaza and other similarly situated non-litigating clubs at a severe competitive disadvantage. By being able to offer topless dances to their patrons, the Clubs who are parties to the Agreement can offer adult entertainment that their competitors, such as Fantasy Plaza, are prohibited from offering due to City ordinances that used to apply to all busiessses, but now do not apply to the sixteen Clubs who are parties to the Agreement.

31. The City initially claimed that the Agreement was “age restricted” in that a club could only be a party if it had been operating for a certain number of years. The City later said it would allow newer Clubs, such as Fantasy Plaza, to become parties to the Agreement on the same terms as the Clubs, but ultimately did not do so. In denying Fantasy Plaza’s request to compete on a level playing field by becoming party to the Agreement, the City provided no evidentiary hearing before an impartial tribunal (or any other form of procedural due process protections).

Purpose of the Agreement

32. The City and the sixteen Clubs that are parties to the Agreement intended to join in a conspiracy to confer exclusive privileges on the sixteen Clubs and to disadvantage competitors of the sixteen Clubs, such as Fantasy Plaza. The

City joined the conspiracy to receive the money paid by the sixteen Clubs, the *quid pro quo* being the City's agreement to exempt the sixteen Clubs from city ordinances and the refusal to extend the exemption to competitors of the sixteen Clubs. The sixteen Clubs joined the conspiracy to gain the exclusion of their competitors and the corresponding ability to raise prices and increase market share in the relevant markets.

33. The City's purpose in creating the Human Trafficking Abatement Fund under the Agreement was to use the money raised from the Clubs to put adult businesses out of business who were not part of the Agreement, thereby leaving only the sixteen Clubs in business.

34. Further, based on information and belief, the Clubs' motivation for entering into the Agreement was to gain a competitive advantage over adult businesses and put their competitors out of business.

35. City officials have characterized the clubs that were not part of the settlement as "rogue clubs" that needed to be shut down.

36. In addition, when David Feldman was City Attorney, he expressly stated that one of the purposes of the Agreement was to give a competitive advantage to the Clubs, which would assist in putting every other club (the so-called "rogue clubs") out of business.

37. The Clubs, eager to offer topless entertainment that their competitors could not, participated in this plan.

Substantial Effect of Interstate Commerce

38. Houston is a major destination for interstate business and tourism.

39. Customers who frequent Fantasy Plaza, the Clubs, and other similarly-situated businesses in Houston often are traveling in interstate commerce, either for business or pleasure.

40. One of the primary sources of revenue for Fantasy Plaza, the Clubs, and other similarly-situated businesses in Houston is the sale of alcohol (much of which is purchased in interstate commerce from wholesale distributors) to customers, including those traveling in interstate commerce.

41. Many entertainers at Fantasy Plaza, the Clubs, and other similarly-situated businesses in Houston travel around the country, working in different clubs at various times of the year.

42. The business of providing live adult entertainment in Houston by Fantasy Plaza and the non-litigating clubs entails the purchase of a substantial amount of out of state supplies and services, including alcohol, insurance, and interstate financing.

43. The unlawful exclusion of Fantasy Plaza and the non-litigating clubs from the relevant markets and the impairment of their ability to compete has reduced and will continue to reduce their purchase of out of state supplies and services.

44. That reduction has and will continue to have a substantial adverse effect on interstate commerce.

Product and Geographic Markets

45. The relevant product market is live adult entertainment, which presents female sexually-oriented dancing.

46. Live adult entertainment is not reasonably interchangeable in use for other types of entertainment services, such as movies, television, ballet, or sporting events.

47. The typical customer is an adult male who seeks sexually-oriented entertainment from watching live female sexually-oriented dancing in bars or clubs offering alcoholic beverages.

48. The customer's principal desire for sexually-oriented entertainment means that non-sexually oriented entertainment is not a reasonable substitute.

49. Likewise, adult entertainment services that do not offer live sexually-oriented dancing, such as adult bookstores, are not reasonably interchangeable for such dancing because they lack the vivid, human quality of live dancing and the intensity in sexual appeal.

50. Within the broader market of live adult entertainment is a relevant product submarket for live adult entertainment which includes topless dancing.

51. Customers perceive topless dancing, including close proximity, as having much higher quality than live adult entertainment that lacks female nudity and/or that is not in close proximity, given the greater sexual content of close topless dancing than dancing when the female is clothed or farther away – more than 3 feet.

52. When offered the choice, customers will routinely select live adult entertainment offering close topless dancing over live adult entertainment that does not, meaning that clubs offering such dancing attract more customers at higher price. Due to the Agreement, only the sixteen Clubs that are parties to the agreement are legally permitted in Houston to offer topless dancing (and in close proximity to the customer) and thus are specialized vendors of the service.

53. The relevant geographic market is Houston. Customers must travel to clubs or bars for the relevant products, which take place in the evenings and over a few hours. Customers are unwilling to drive more than a few miles to and from the clubs from their homes, offices, or hotels, especially in light of Houston's traffic congestion and time required fro travel.

Harm to Fantasy Plaza and Similarly-Situated Clubs

54. Fantasy Plaza's exclusion from the Agreement and the City's subsequent refusal to let Fantasy Plaza join the agreement, including the denial of the right to offer topless dances and raising its costs relative to the sixteen Clubs, has proximately caused losses to Fantasy Plaza and threatens continued loss or injury.

55. Fantasy Plaza's revenues have decreased because Fantasy Plaza's exclusion from the Agreement meant that it could not effectively compete with its competitors.

56. In addition, the Agreement and Fantasy Plaza's exclusion from it has

harmed Fantasy Plaza by reducing its market share, business goodwill. These monetary losses have had a negative effect on Fantasy Plaza and hurt its viability as a going concern. In addition, the Agreement and Fantasy Plaza's exclusion from it has harmed Fantasy Plaza by encouraging Fantasy Plaza's entertainers to move from Fantasy Plaza to the Clubs because the Clubs provide a venue for increasing their income through topless dancing, which is more profitable than live adult entertainment that is not topless or close up.

57. Unless Fantasy Plaza is allowed to offer live adult entertainment services on the same terms as the Clubs, it is threatened with loss or injury from the antitrust violation in the form of continued lost revenues.

58. On information and belief, the same harms are likely to befall multiple other similarly-situated clubs that have not been allowed to be part of the Agreement.

Market Power and Harm to Competition

59. The Agreement conferred market power (*i.e.*, the ability to raise prices above the competitive level) on the sixteen Clubs that were parties to the Agreement. The sixteen Clubs collectively represented 100% of the clubs and bars offering live topless dancing in Houston after entry of the settlement agreement.

60. The City and the sixteen Clubs demonstrated their power by actually excluding the Clubs' rivals from the relevant markets or severely reducing non-litigating clubs' ability to compete. The conduct of the City and sixteen Clubs

proximately caused injury to and had actual detrimental effects on competition in the relevant markets.

61. Because only the sixteen Clubs were legally allowed to provide topless dancing in the relevant markets, the conduct of the City and sixteen Clubs produced an artificial scarcity of live topless dancing – a product highly desired by consumers of live adult entertainment – and gave the sixteen Clubs the ability to control price in the relevant markets.

62. By restricting the ability to offer topless dances to the sixteen Clubs and excluding and severely impairing the non-litigating clubs' ability to compete, the conduct of the City and sixteen Clubs reduced output of the live adult entertainment in the relevant markets.

63. By restricting the ability to offer topless dances to the sixteen Clubs and excluding and severely impairing the non-litigating clubs' ability to compete, the conduct of the City and sixteen Clubs reduced the quantity and quality of the adult entertainment services offered in the relevant market. Customers desiring live adult entertainment offering topless dances were unable to purchase the product at non-litigating clubs in Houston, compromising over half of the adult entertainment clubs in Houston.

64. The settlement agreement raised artificial barriers to entry in the relevant markets, by excluding the non-litigating clubs from the right to offer topless dances and increasing their costs of doing business relative to the sixteen Clubs that

were parties to the settlement agreement.

Causes of Action

Contract/Combination/Conspiracy in Restraint of Trade (15 U.S.C. § 1)

65. Fantasy Plaza re-alleges and incorporates herein the allegations contained in paragraphs 1 through 67 of this Complaint.

66. Under federal law, “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.” 15 U.S.C. § 1.

67. The Agreement is direct evidence of a “contract, combination or conspiracy” between the City and the Clubs. The Agreement exempted sixteen Clubs from the City Ordinance and gave them the exclusive right to provide topless dancing in Houston. This exemption is exclusionary because it confers a competitive advantage upon those competitors (*i.e.* by allowing them to offer services Fantasy Plaza cannot) and raises rivals’ costs over those favored by exempting them from paying the per-customer fee.

68. The City and each Club knew of the City Ordinance and that the exemption granted in the settlement agreement gave a competitive advantage to the Clubs and excluded and competitively disadvantaged Fantasy Plaza and other non-litigating clubs.

69. The Clubs conferred a *quid pro quo* upon the City in exchange for the exemption. The Clubs each agreed to pay the City approximately \$100,000 on an

annual basis, together with a 1.1% cut of each Clubs's alcohol receipts. To ensure that the City received a minimum of \$800,000 each year, the Clubs jointly undertook to pay the minimum required.

70. The sixteen Clubs had a rational motive to conspire among themselves and with the City to exclude the non-litigating clubs, given the financial benefit they would gain from the ability to offer topless dancing to the exclusion of their competitors.

71. The City had a rational motive to conspire with the sixteen Clubs to exclude the non-litigating clubs, given its financial interest and participation in the sixteen Clubs' revenue from alcoholic beverages served in the sixteen Clubs. The Clubs would have been unwilling to share revenues with the City absent exclusivity. Also, exclusivity enabled the Clubs to raise prices in the relevant markets because their competitors were excluded.

72. The scheme created by the City and the Clubs constitutes an express or implied agreement to exclude other clubs from the Agreement and violates federal antitrust laws as an illegal restraint on trade and commercial bribery scheme.

73. The effect and intent of the Agreement/scheme is to substantially lessen competition in the relevant markets by allowing the Clubs to gain a competitive advantage over other similarly situated businesses, with the ultimate goals of raising price, reducing output quality in the relevant markets and putting the Clubs' competitors, such as Fantasy Plaza, out of business.

74. The City has conspired with the Clubs to engage in the course and scope of conduct in combination with a conspiracy that is unlawful and that is intended to substantially diminish, injure, and interfere with competition.

75. The City's purpose in creating the Human Trafficking Abatement Fund was to make money in exchange for an exclusive *de facto* license from the enforcement of city ordinances given to the sixteen Clubs.

76. Through the Agreement, the City's enforcement of the Agreement, and the City's exclusion of Fantasy Plaza and other similarly-situated clubs from the Agreement, the City has enabled the Clubs to obtain a dominant position in the market place and to obtain market power sufficient to maintain that dominant position through the use of the unlawful, contractual restraint on trade.

77. By engaging in the unlawful activities described herein, the City has unreasonably restrained competition, and thereby harmed Houston consumers of live adult entertainment, by precluding through the Agreement other adult businesses like Fantasy Plaza, from providing the entertainment services that the City has licensed the Clubs to provide via the Agreement. The exclusion has injured competition, enabling the sixteen Clubs to raise prices and reduce output and quality in the relevant markets.

78. By engaging in the unlawful activities described herein, the City has burdened and will continue to burden (a) competition by, between, and among adult businesses in interstate commerce within the United States without advancing any

legitimate public purpose and (b) Houston consumers of live adult entertainment.

79 By engaging in the unlawful activities described herein, and as a direct and proximate result of the City's actions, Fantasy Plaza has been irreparably harmed and damaged, and the harm is continuing in nature.

80. Fantasy Plaza is entitled to recovery of treble damages and reasonable attorney's fees pursuant to 15 U.S.C. § 15.

81. As a direct and proximate result of the City's violations of the federal antitrust laws, as described fully herein, Fantasy Plaza has suffered and will continue to suffer irreparable harm to its trade and business for which monetary damages would not be curative; Fantasy Plaza is therefore entitled to injunctive relief, in addition to the costs of suit and reasonable attorney's fees, under 15 U.S.C. § 26.

82. Fantasy Plaza seeks a declaration from this Court that the Agreement is anticompetitive in nature and an illegal restraint on trade under 15 U.S.C. § 1.

Horizontal Group Boycott (15 U.S.C. § 1)

83. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 92 of this Complaint.

84. The Agreement is unlawful under 15 U.S.C. § 1 as a horizontal agreement among the Clubs, who are horizontal competitors of Fantasy Plaza, and with the City.

85. Each Club signed the Agreement and jointly negotiated the agreement with the City, with one lawyer representing six Clubs and another representing ten

Clubs.

86. The Clubs and non-litigating clubs such as Fantasy Plaza are actual or potential competitors in the relevant markets.

87. The City and the Clubs are engaged in a horizontal group boycott that is illegal *per se*, or, in the alternative, violates the rule of reason.

88. The agreements between and among the City and Clubs constitute a joint effort to disadvantage the Clubs' competitors by the City's directly denying—and the Clubs' persuading and/or agreeing with the City to deny—non-litigating clubs access to supply/input they needed to compete: an exemption from the City Ordinance which forbids topless dancing and raised the non-litigating clubs' costs relative to their rivals.

89. The agreements between and among the City and Clubs deprived Fantasy Plaza and other non-litigating clubs of the ability to offer to customers topless dances, an ability that was necessary to enable them to compete in the relevant markets.

90. Customers for live adult entertainment services seek entertainment offering topless dances. Without the ability to offer topless dances, Fantasy Plaza and other non-litigating clubs could not effectively compete and were denied access to the relevant markets.

91. In addition, denial of the exemption raised the non-litigating clubs' costs, including Fantasy Plaza, in relation to the Clubs' costs and further impaired the non-

litigating clubs' ability to compete.

92. The City and the Clubs occupied a dominant position in the relevant markets. Only the City had authority to grant exemptions from the City Ordinance, and only the sixteen Clubs (owned by just six businessmen) were granted the right to provide topless dancing in Houston to the exclusion of their non-litigating club competitors. The City possessed monopoly power and used that power to confer market power on the sixteen Clubs.

93. The City had a different financial interest in the relevant markets, having agreed in the Agreement to participate in the revenues of the sixteen Clubs from alcohol sales.

94. The sixteen Clubs, by virtue of the Agreement, and the City had unique access to an input that the non-litigating clubs needed to compete, an exemption from the City Ordinance.

95. The Agreement was not justified on the ground that it made the relevant markets more efficient or more competitive. To the contrary, the City and Clubs' agreement reduced the ability of non-litigating clubs to compete effectively (inability to offer topless dances and raising the non-litigating clubs' costs relative to the Clubs) and hence reduced output in the relevant markets.

96. Likewise, by preventing the non-litigating clubs from providing topless dances, the quality of the relevant products available in the markets was reduced.

Exclusive Dealing (15 U.S.C. § 1)

97. Fantasy Plaza re-alleges and incorporates as though fully set forth here in the allegations contained in paragraphs 1 through 106 of this Complaint.

98. The agreements between and among the City and the Clubs are also illegal under 15 U.S.C. § 1 as unreasonable exclusive dealing.

99. The Agreement expressly exempted sixteen of Fantasy Plaza's competitors (represented by six individual owners) from the duty to comply with the SOB ordinance.

100. The Agreement was exclusionary because it conferred a competitive advantage upon Fantasy Plaza's sixteen competitors (*i.e.* it allows rivals to offer services in Houston that Fantasy Plaza is barred from offering) and also raised rivals' costs, such as Fantasy Plaza, over the favored Clubs by exempting them from the City's Ordinance's requirement to pay \$5 per customer.

101. There were at least thirty-six clubs and bars that offered live adult entertainment, short of topless dances (*i.e.* "bikini" dancing), in Houston, prior to the Agreement.

102. After the Agreement, only sixteen Clubs could provide live topless adult entertainment in the relevant markets, representing 44% of the total adult entertainment clubs and bars in Houston.

103. A significant fraction of live adult entertainment suppliers (56%) was frozen out of the relevant markets by the deal. These suppliers have no ability to reach purchasers of live topless adult entertainment in Houston and their ability to

compete effectively in the broader market of live adult entertainment was severely reduced.

104. Customers desiring to purchase live topless adult entertainment in Houston were forced to purchase from one or more of sixteen Club and could not choose to patronize the non-litigating clubs for that purpose.

105. The City occupies a dominant position in the relevant markets as it is the only entity able of providing an exemption to clubs from the City Ordinance. The City thus has the power to control price and to exclude competition in the relevant markets. In other words, the City possesses both monopoly power and market power.

106. The City has a direct financial interest in the relevant markets, as the settlement agreement enables it to participate in the revenues of the sixteen Clubs earned in the relevant markets. Given that financial participation, the City has a rational economic motive to confer market power on the sixteen Clubs and disadvantage the non-litigating clubs with which it does not share revenues.

Essential Facilities Claim Under (15 U.S.C. § 1)

107. Fantasy Plazas re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 116 of this Complaint.

108. The Agreement between and among the City and the Clubs are illegal under 15 U.S.C. § 1 under the essential facilities doctrine. The Agreement is illegal *per se*, or, in the alternative violates the rule of reason.

109. Under 15 U.S.C. § 1 it is unlawful to exclude rivals from a joint undertaking that controls an essential facility or input.

110. The Agreement constituted a joint undertaking by the sixteen Clubs to share revenues earned in the relevant markets with the City in exchange for the City's granting the sixteen Clubs the exclusive right to provide topless dancing in the relevant markets. The City was a party to the Agreement and hence a member of the joint arrangement.

111. The ability to offer topless dancing is essential to effective competition in the relevant markets. The non-litigating clubs required access to membership in the joint undertaking to compete. Without access to membership in the joint undertaking, the non-litigating clubs could not provide topless dancing in Houston. The benefits of membership in the joint undertaking could not be duplicated by the non-litigating clubs by means other than joining the undertaking.

112. The City, by virtue of its ability to grant exemptions from the City Ordinance, and the sixteen Clubs, by virtue of their exclusive rights under the settlement agreement, possessed power to determine access to membership in the joint arrangement. The joint arrangement, and its members, thus had market power and exclusive access to an essential element of competition in the relevant markets.

113. The City and the sixteen Clubs excluded the non-litigating clubs from membership in the joint undertaking, both by excluding them from the terms of the settlement agreement and by subsequent refusal to grant Fantasy Plaza's request

to join the agreement. In refusing to grant Fantasy Plaza's subsequent request to join the agreement, the City acted on behalf of the joint undertaking.

114. The joint undertaking, and its members, had no legitimate business justification to exclude Fantasy Plaza and the non-participating clubs from joining the agreement. The City would have earned greater revenues and the sixteen Clubs would have gained additional clubs to share their joint obligation to the City. The City and the sixteen Clubs could have feasibly included Fantasy Plaza in the joint undertaking simply by the City's grant of an exemption to Fantasy Plaza.

115. Fantasy Plaza seeks a declaration from this Court that the Agreement is anticompetitive in nature and an illegal restraint on trade under 15 U.S.C. § 1.

Essential Facilities Claim Under (15 U.S.C. § 2)

116. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 125 of this Complaint.

117. The conduct of the City is illegal under 15 U.S.C. § 2 under the essential facilities doctrine.

118. Under 15 U.S.C. § 2, it is also unlawful for a monopolist to exclude competitors from an essential facility or input. The City possesses monopoly in the relevant markets, given its ability to exclude competition in the markets by denying exemptions from the City Ordinance.

119. The City has a direct financial interest in the relevant markets though the settlement agreement entitling it to share in the sixteen Clubs' annual receipts.

120. The City is a participant in the relevant markets because it earns revenues in them and controls the enforcement of the SOB Ordinances.

121. Access to an exemption from the City Ordinance is an essential facility or input needed by Fantasy Plaza and the non-litigating clubs to compete in the relevant markets.

122. Through its control of exemption authority, the City is able to eliminate and has eliminated competition in the relevant markets.

123. Fantasy Plaza and the non-litigating clubs are unable practically or reasonably to obtain an exemption to the City Ordinance absent the City's granting the exemption and, without an exemption, are unable to offer topless dancing in Houston.

124. Fantasy Plaza and the non-litigating clubs require an exemption from the City Ordinance to compete in the relevant markets. The City has denied access to the essential facility or input by denying Fantasy Plaza's request for an exemption from the City Ordinances to Fantasy Plaza. The City may feasibly provide exemptions from the City Ordinance to Fantasy Plaza and the non-litigating clubs. It has already granted an exemption to the sixteen Clubs and initially stated that it would allow newer clubs, such as Fantasy Plaza, to join the agreement and be exempt from the City Ordinance. No impediment exists to the City's allowing Fantasy Plaza and the non-litigating clubs to join the settlement agreement.

125. Fantasy Plaza seeks a declaration from this Court that the Agreement

is unlawful under 15 U.S.C. § 2.

Violation of Robinson-Patman Act 15 U.S.C. § 13(c)

126. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 135 of this Complaint.

127. The Robinson-Patman Act prohibits commercial bribery in connection with sales of goods. 15 U.S.C. § 13(c).

128. The Clubs are businesses whose primary revenues derive from the sale of alcoholic beverages. Under the Agreement, the Clubs pay a portion of their liquor sales to the City as a bribe in return for immunity from enforcement of otherwise applicable laws (namely certain provisions of Chapter 28 of the Houston Code of Ordinances).

129. The City, including city law enforcement officers and officials are the elected and/or appointed representatives of the people of the City of Houston, including customers of the Clubs. These representatives act on behalf of the people when they enforce city ordinances that regulate adult-oriented clubs and/or establishments where alcoholic beverages are sold.

130. By accepting a portion of the Clubs' revenues from alcohol sales to customers in return for not enforcing applicable city ordinances, the City, as well as its law enforcement officers and officials are violating 15 U.S.C. § 13(c) because they are receiving money not for "services rendered in connection with the sale or purchase of goods" but for not enforcing the law. Indeed, the City sold the Clubs a

license to violate the law, a personal property right that the Clubs see as so valuable that they, collectively, have agreed to pay the City in excess of \$1 million per year for it (the precise amount due every year is a proportion of the Clubs' gross liquor sales).

131. The Agreement has impacted Fantasy Plaza's business negatively since the Agreement became effective. The Clubs are direct competitors of Fantasy Plaza. Under the Agreement, they are free to offer topless lap dances in their clubs without adhering to the "no touch" and "three foot" rules, and without paying the \$5 per customer tax, as otherwise required by city law. Because Fantasy Plaza must abide by city law, it cannot compete for customers in the same manner as these competitors, which has caused and will continue to cause Fantasy Plaza to lose business and, ultimately, to fail, further causing the loss.

132. The commercial bribery scheme has caused antitrust injury bestowing a competitive advantage of the Clubs who are bribing the City for selective enforcement of city law.

133. By engaging in the unlawful activities described herein, and as a direct and proximate result of the City's actions, Fantasy Plaza's business has been irreparably harmed and damaged, and the harm is continuing in nature.

134. Fantasy Plaza is entitled to recovery of reasonable attorney's fees pursuant to 15 U.S.C. § 15.

135. As a direct and proximate result of the City's violations of the Robinson-

Patman Act, as described fully herein, Fantasy Plaza has suffered and will continue to suffer irreparable harm to its trade and business for which monetary damages would not be curative; Fantasy Plaza is therefore entitled to injunctive relief, in addition to the costs of suit and reasonable attorney's fees.

136. Fantasy Plaza seeks a declaration from this Court that the Agreement constitutes an illegal commercial bribery scheme in violation of 15 U.S.C. § 13(c).

Violations of Procedural And Substantive Due Process Rights

137. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 146 of this Complaint.

138. The Agreement, the City's enforcement of the Agreement, and the City's exclusion of Fantasy Plaza and other similarly-situated businesses from the Agreement constitutes a policy or custom of the City of Houston. This policy or custom constitutes an *ad hoc* but *de facto* licensing scheme, whereby certain entities pay to receive exemptions from Chapter 28 of the Code of Houston Ordinances that are unavailable to other similarly-situated entities. Former City Attorney, David Feldman, was the City's policymaker who implemented the policy, with assistance from Charlie Dunn, former head of the Houston Police Department's Vice Division. The policy is currently enforced by the City's current administration and the Houston Police Department's current administration.

139. Through this licensing scheme, the City deprived Fantasy Plaza and other similarly-situated businesses of their constitutional right to procedural due

process under the law in violation of 42. U.S.C. § 1983 and the Fourteenth Amendment to the Constitution of the United States.

140. This licensing scheme violates the procedural protections of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it fails to accord them any due process protections, such as an evidentiary hearing before an impartial tribunal.

141. There is no compelling interest, important interest, or legitimate governmental interest motivating the City's creation of a licensing scheme that allows some businesses to pay a fee to be excused from compliance with city ordinances while denying that right to others through proceedings lacking any due process protections. The resulting restrictions on Fantasy Plaza and other similarly-situated entities, including the absence of due process protections in connection with the City's denial of their request to be treated the same as other Clubs, are not necessary, narrowly tailored, or rationally related to any legitimate governmental interest.

142. The City's licensing scheme also violates the substantive protections of the Due Process Clause.

143. In particular, the City has allowed a limited set of private interests (six Houston businessmen) to pay for the privilege of violating City law, while arbitrarily and capriciously denying that right to other similarly-situated businesses, including Fantasy Plaza, the City has abused its power and flouted the most fundamental legal

principle of this country—equality before the law.

144. The City’s conduct (in relation to Fantasy Plaza and those similarly-situated) was oppressive, inspired by malice, grossly disproportionate to any need for governmental action, and conscience shocking. Specifically, the City’s stated purpose was to put out of business those clubs that the former City Attorney deemed to be “rogue” establishments, absent any standard or administrative or judicial determination.

145. Whether *de jure* or *de facto*, any municipality licensing scheme must operate within the parameters of the law and pursuant to a defined standard to ensure that similarly-situated businesses are treated equally and fairly under the law, not arbitrarily and capriciously, as here.

Violation of Equal Protection Rights

146. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegation in paragraphs 1 through 155 of this Complaint.

147. The Agreement, the City’s enforcement of the Agreement, and the City’s exclusion of Fantasy Plaza and other similarly-situated businesses from the Agreement constitutes a policy or custom of the City of Houston. This policy or custom allows some businesses to pay a fee to be excused from compliance with city ordinances while denying that right to other, similarly-situated businesses. Former City Attorney, David Feldman, was the City’s policymaker who created and implemented the policy with the assistance of Charlie Dunn. The City and Houston

Police Department's current administration continue to implement the policy.

148. Through this policy or custom, the City deprived Fantasy Plaza and other similarly-situated entities of their constitutional rights to equal protection under the law in violation fo 42. U.S.C § 1983 and the Fifth and Fourteenth Amendments to the Constitution of the Untied States.

149. There is no compelling interest, important interest, or even legitimate governmental interest motivating the City's creation of a scheme that allows some businesses to pay a fee to be excused from compliance with city ordinances and denies that right to other, similarly-situated entities. The resulting restrictions on Fantasy Plaza and these other entities are not necessary, narrowly tailored, or rationally related to any legitimate governmental interest.

150. There is no compelling interest, important interest, or even legitimate governmental interest motivating the City's selective enforcement of the generally-applicable SOB Ordinances. The City's selective enforcement is motivated by the animosity and ill will of certain City officials toward Fantasy Plaza and other similarly-situated adult-oriented businesses. The City's selective enforcement is not necessary, narrowly tailored, or rationally related to any legitimate governmental interest.

Declaratory Relief

151. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 160 of this Complaint.

152. Fantasy Plaza seeks declaratory judgment under 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure.

153. Specifically, Fantasy Plaza seeks declarations from the Court that:

- a. The Agreement violates 15 U.S.C. §§ 1 and/or 2;
- b. the Agreement constitutes an illegal commercial bribery scheme in violation of 15 U.S.C § 13(c) and Texas Penal Code § 36.02(a); and
- c. the Agreement, its enforcement, and the denial of Fantasy Plazas's request to be treated the same as the Clubs violate Fantasy Plaza's federal constitutional equal protection and substantive and procedural due process rights.

Request for Temporary Restraining Order

154. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 163 of this Complaint.

155. Fantasy Plaza's request for a temporary restraining order is authorized by Federal Rule of Civil Procedure 65(b). This request for a temporary restraining order is made with notice to the City.

156. Fantasy Plaza will suffer irreparable injury if the City's selective enforcement of its ordinances is not restrained. Because there is no foreseeable end to the unequal treatment by the City, further injury to Fantasy Plaza is actual, imminent, and irreparable.

157. Fantasy Plaza has no adequate remedy at law for its injuries. Its injuries and losses are continuing. Its loss of business reputation, sales, potential sales, customers, and potential customers is not subject to easy measurement in terms of monetary damages.

158. In particular, as a direct and proximate result of the City's selective enforcement of its own ordinances in violation of statutory and constitutional law, Fantasy Plaza has suffered and will continue to suffer irreparable harm to its trade and business for which monetary damages would not be curative. Fantasy Plaza therefore is entitled to injunctive relief.

159. The injuries and losses to Fantasy Plaza cannot be quantified because of the unique and irreplaceable nature of the business opportunities and rights involved.

160. Without the issuance of a temporary restraining order, there is a very real danger that Fantasy Plaza will be permanently deprived of important federal rights, thus altering the status quo.

161. On its face, the Agreement, its enforcement, and the City's refusal to allow other similiary-situated entities, such as Fantasy Plaza, to become party to the Agreement violates federal law in multiple respects. As such, Fantasy Plaza is likely to win on the merits.

162. Balancing the respective harms to the parties requires issuances of a temporary restraining order because Fantasy Plaza will suffer permanent injury to

its business. By contrast, this Court simply would be requiring the City to enforce the City's own laws equally and even-handedly and continue operating under ordinances that have been in place for several years.

163. Fantasy Plaza requests that the City be restrained from:

- a. Regulating sexually oriented businesses under the provision of the Agreement; and
- b. not enforcing City Ordinances against Clubs who are parties to the Agreement.

164. Fantasy Plaza is willing to post a bond.

Request for Permanent Injunction

165. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 174 of this Complaint.

166. Fantasy Plaza's requests a permanent injunction to prevent the City from:

- a. Regulating sexually oriented businesses under the provisions of the Agreement; and
- b. not enforcing City Ordinances against Clubs who are parties to the Agreement.

Damages

167. Fantasy Plaza re-alleges and incorporates as though fully set forth herein the allegations contained in paragraphs 1 through 176 of this Complaint.

168. At this time, Fantasy Plaza believes its total actual damages caused by the City's actionable conduct as described above exceed \$1 million, including lost profits.

169. Fantasy Plaza is entitled to treble damages sustained as a result of the City's federal antitrust violations. 15. U.S.C § 15.

Conditions Precedent

170. All conditions precedent to the filing of this suit has been fulfilled or waived.

Prayer

171. Dobbins Chang d/b/a Fantasy Plaza asks that the City be cited to appear and answer and that, following trial, have judgment entered against it for the following:

- a. actual and treble damages;
- b. all available special and consequential damages;
- c. declaratory relief;
- d. pre-judgment and post-judgment interest;
- e. permanent and injunctive relief;
- f. attorneys' fees and costs; and
- g. all other relief to which Fantasy Plaza is entitled.

172. For these reasons, Dobbins Chang, LLC d/b/a Fantasy Plaza, asks the court to enter judgment that defendant take nothing, assess costs against defendant,

and award plaintiffs all other and further relief to which they may be entitled.37

Respectfully submitted,

MONSHAUGEN & VAN HUFF, P.C.

 /s/ Albert T.VanHuff

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PLAZA

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been filed with the Court on this 1st day of February, 2018, using the ECF system, and the Clerk of the Court has electronically served notice upon all parties registered to receive electronic notice of this case.

 /s/ Albert T. Van Huff

ALBERT T. VAN HUFF