**Case No. 15-3265**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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**DANTE A.R. COMBS and ADAM S. WILLIAMS,**
**Appellants,**

**vs.**

**THE CORDISH COMPANIES, *et alia*,**
**Appellees.**

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**Appeal from the U.S. District Court**
**for the Western District of Missouri**
**Honorable Ortrie D. Smith, District Judge**
**Case No. 4:14-cv-00227**

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# CORRECTED BRIEF OF THE APPELLANTS

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**ORAL ARGUMENT REQUESTED**

## Summary of the Case

The Cordish Companies, its subsidiary, Entertainment Concepts, and its security provider, First Response ("the defendants"), devised and implemented a pervasive segregationist scheme to prevent African-American men from patronizing establishments in its Power & Light entertainment district in Kansas City. Dante Combs and Adam Williams were victims of that scheme and sought 42 U.S.C. § 1981 relief against the defendants. Nonetheless, the district court granted the defendants summary judgment. This was error.

First, the district court erred in holding Mr. Combs was "judicially estopped" from bringing his claims due to his failure to list them as "assets" in a prior bankruptcy. He had no legal duty to list them. Even if he did, his failure was an inadvertent, good-faith mistake. In any case, he cured any failure by reopening the bankruptcy and amending the petition, upon which the trustee abandoned the claims to him.

Second, viewing the record in the plaintiffs' favor, the defendants violated § 1981 by preventing the plaintiffs from contracting with establishments in the district due to their race. This Court should reverse the judgment below and remand for further proceedings.

## Request for Oral Argument

The issues on appeal are complex, subtle, and fact-intensive. The interchange of oral argument would assist the Court in understanding and deciding them. The appellants request at least 15 minutes per side.

## Corporate Disclosure Statement

Appellants Dante Combs and Adam Williams are individuals.

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## Jurisdictional Statement

This is an appeal from a final order and judgment of the U.S. District Court for the Western District of Missouri in an action brought under 42 U.S.C. §§ 1981 and 2000a. The district court had jurisdiction under 28 U.S.C. § 1331, because the plaintiffs' claims were a civil action arising under the laws of the United States, and 28 U.S.C. § 1343(a)(4), because the plaintiffs sought to recover damages or secure equitable relief under acts of Congress providing for the protection of their civil rights.

The district court entered its final order and judgment disposing of all parties' claims on June 15, 2015 (Appellants' Appendix ("Aplt.Appx.") 1781,1804). On July 14, 2015, the appellants timely filed a post-judgment motion under Fed. R. Civ. P. 59(e) and 60(b), which the district court denied on August 28, 2015 (Aplt.Appx.1805,2057).

The appellants filed their notice of appeal on September 28, 2015 (Aplt.Appx.2075). Under Fed. R. App. P. 4(a)(1)(A) and 4(a)(4)(A), the notice of appeal was timely, as it was filed within 30 days of the district court's order denying the appellants' post-judgment motion. Therefore, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

## Statement of the Issues

I. The district court erred in holding Mr. Combs was judicially estopped from bringing his claims against the defendants. He had no duty to list his claims in this case as an "asset" in his bankruptcy. Even if he did, his failure was inadvertent, mistaken, and not in bad faith. And because he cured the omission in good faith and his bankruptcy trustee abandoned the claims, he derived no unfair advantage from the initial failure in any case.

*Stallings v. Hussman Corp.*, 447 F.3d 1041 (8th Cir. 2006)

*Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542 (7th Cir. 2014)

*Ah Quin v. Cnty. of Kauai Dept. of Transp.*, 733 F.3d 267 (9th Cir. 2013)

*Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339 (11th Cir. 2006)

II. The district court erred in granting the defendants summary judgment on the merits of the plaintiffs' claims under 42 U.S.C. § 1981. Viewing the record in a light most favorable to the plaintiffs, there was a genuine dispute of material fact whether the defendants intentionally and racially discriminatorily interfered with the plaintiffs' equal right to patronize bar and restaurant establishments within the LiveBlock.

*Dunaway v. Cowboys Nightlife, Inc.*, 436 Fed.Appx. 386 (5th Cir. 2011)

*Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990)

*Wyatt v. Sec. Inn Food & Beverage, Inc.*, 819 F.2d 69 (4th Cir. 1987)

*McCaleb v. Pizza Hut of Am., Inc.*, 28 F.Supp.2d 1043 (N.D.Ill. 1998)

## Statement of the Case

### A. Race Discrimination in the Power & Light District

#### 1. The Cordish Defendants/Appellees

Appellee the Cordish Companies, Inc. ("Cordish"), is a Maryland corporation who developed the Power & Light District ("the District"), an eight-block entertainment district in Downtown Kansas City, Missouri, containing multiple establishments (Aplt.Appx.102,113-15,164,789,1109-10). In the middle of the District is its "centerpiece," a "core" covered area named the Kansas City Live! Block ("the LiveBlock"), a single building consisting of a spacious common covered patio space named the "Living Room," surrounded by various establishments (Aplt.Appx.115-16,306,789,1110,1234).

The LiveBlock includes its own entrances; after going through, a patron seeking to enter one of its establishments then would go through a separate entrance to that establishment (Aplt.Appx.307,111-12,1141). After the District's development, Cordish continued to oversee its operations, and its vice-president, Reed Cordish, regularly came to Kansas City to do so (Aplt.Appx.307-08,831,867,2390).

Appellees Entertainment Holdings, LLC, formerly named Entertainment Consulting Investors, LLC, and Entertainment Consulting International, LLC (collectively "ECI") are Maryland limited liability companies (Aplt.Appx.113-14). ECI is related to Cordish and functions as a "holding company" for other Cordish entities, and in the

period from 2009-2012 managers of District establishments reported not only to their individual employers, but also to Cordish and ECI (Aplt.Appx.65,306,786-87,816-17,2392-93). This is a common way Cordish developments operate nationwide (Aplt.Appx.2394). ECI's employee and officer Jacob Miller was the "Regional Vice-President" in charge of the District and regularly came to Kansas City to oversee it (Aplt.Appx.306,825,887,902). Managers of every establishment in the District reported to him (Aplt.Appx.307).

Appellee Lounge KC, LLC ("Lounge KC") is a Missouri limited liability company that owns the Mosaic Ultra Lounge ("Mosaic"), an establishment inside the LiveBlock (Aplt.Appx.65,112,115). Mosaic is located along the perimeter of the interior of the LiveBlock, with both an indoor and outdoor portion, all inside the LiveBlock (Aplt.Appx.1111). As with all establishments in the LiveBlock, to gain access to Mosaic, one entered the LiveBlock through one of its three entrance points, each of which had its own security, and then proceeded upstairs to Mosaic's own entrance (Aplt.Appx.308,311,789,1111-12,1141). Once inside the LiveBlock, patrons could "hop from club to club" within it, "all without leaving the building" (Aplt.Appx.789).

**2. Defendant/Appellee First Response, Inc.**

Appellee First Response, Inc. ("First Response"), is a Kansas corporation providing security and protective services (Aplt.Appx.32,164,375,747). Originally, Cordish had hired another

company as "the security guard company" for the District, including the LiveBlock, but in December 2010 replaced it with First Response (Aplt.Appx.375,747,785). First Response remained the District's security provider until October 2014 (Aplt.Appx.375,747).

### 3. The Defendants' Scheme to Prevent African-Americans from Patronizing the LiveBlock's Establishments

Glen Cusimano was hired in 2009 as a security guard at Angels Rock Bar, an establishment inside the LiveBlock (Aplt.Appx.306). After a few months, he was promoted to general manager of Angels, later to general manager of Mosaic, and later still to general manager of Club Hotel, another establishment in the LiveBlock (Aplt.Appx.307). In all these positions, however, Mr. Cusimano reported to ECI's Mr. Miller (Aplt.Appx.65,307). During this time, Mr. Cusimano also was made "Security Liaison for the entire" District, in which capacity he coordinated all the District's security work, including among First Response, "various club bouncers, and all of the clubs and related Cordish entities," and "reported directly to The Cordish Companies, including Nick Benjamin," Cordish's executive director for the District, "who reported to Reed Cordish" (Aplt.Appx.65,308,785,788).

Shortly after being hired at Angels, Mr. Miller taught Mr. Cusimano "harassment techniques … to exclude and eject from [the District] 'trouble-makers'" both at the main entrances to the LiveBlock and also at the individual LiveBlock establishments' own entrances,

and continued to instruct him to use these techniques throughout his time working in the District "to keep out the people [Cordish] did not want in the District" (Aplt.Appx.306,308,786).

Mr. Miller confirmed to Mr. Cusimano he also had instructed First Response's workers and the bouncers and managers at the LiveBlock's establishments to perpetrate the same techniques (Aplt.Appx.307,786,788). Instructions to do so came from both First Response's director, Lisa O'Brien, and the Cordish and ECI officers (Aplt.Appx.788). Ms. O'Brien testified First Response's carried out the wishes of the "clients," including Cordish's Mr. Benjamin and ECI's Mr. Miller (Aplt.Appx.1424). She agreed a "culture" developed between First Response and the LiveBlock establishments' bouncers (Aplt.Appx.1427-28).

When First Response ejected a patron, that meant from the whole LiveBlock (Aplt.Appx.788-89). Security workers called the LiveBlock's entrances "pinch points," meaning "the places from which you can control (or pinch) who gets in and out of the" LiveBlock (Aplt.Appx.796). Each one had its own security station, at which the guards would check the identification of those desiring to enter to ensure they were at least 21 years old (Aplt.Appx.796).

Over time, however, Mr. Cusimano "came to realize" these "trouble makers" "were largely made up of just one group – all blacks," "especially black males," and "most, if not all, of the employees who

worked" in the LiveBlock knew "the Cordish companies did not want blacks there" (Aplt.Appx.308,787). Mr. Miller "would become visibly upset whenever he saw African Americans" there, exclaiming, "How did THEY get in here?", "What are THEY doing in here?" (Aplt.Appx.66,308). He told Mr. Cusimano he could "tell just by looking whether a black man 'had character'" (Aplt.Appx.67,308).

The harassment techniques Mr. Miller ordered included:

- telling the "trouble makers" "they could not enter a club because they were in violation of the dress code, even though" they were not;
- "bouncers excessively questioning perceived 'trouble makers' while allowing other patrons to enter clubs without question," and "[w]hen the targeted 'trouble maker' would finally display annoyance at the unfair treatment," the bouncers "would accuse him of 'displaying aggression', and call" First Response's guards "to have [him] ejected;"
- "telling people who wanted into clubs, that the club was 'overbooked', or reserved for a VIP only event" when in fact it was not;
- "forcing people to wait in a line, as they watched other people bypass them and go on in" until they either would "get annoyed and leave, or voice frustration to the bouncers," at which "point, they would be told they had displayed aggression," and First Response's guards would be called to eject the person; and
- having the LiveBlock's establishments tell callers who "they could tell … had an African American dialect … all reservations were

> taken for the night," but otherwise to "make the reservation," and "if someone showed up for a reservation who was black," to "tell them that apparently a mistake had been made, because we had no reservation in their name, and we were entirely booked."

(Aplt.Appx.307,786-88).

Additionally, Cordish created a dress code "clearly written to exclude all blacks" and ordered all establishments and security guards to enforce it (Aplt.Appx.796-97). One guard, Garron Williams, described it as if "someone had driven through the part of town where they thought the most blacks lived, and made a list of what blacks were commonly wearing" (Aplt.Appx.797). The code changed weekly based on what African-Americans were observed wearing inside the LiveBlock; one time, Mr. Williams saw Mr. Miller take a photograph "of a young black man near the entrance" and soon thereafter change the dress code "to ban" what he was wearing (Aplt.Appx.797). The code would be "bent or broken to allow whites in, but … would be stiffened up for blacks" (Aplt.Appx.798).

When the pre-First Response security company's owner complained to Mr. Miller about the "racist" dress code, he directed the company not to enforce it and instead placed an ECI employee at each LiveBlock entrance to do so (Aplt.Appx.797). Mr. Williams continued working at his "pinch point, but [his] employer became ECI, so [he] would be in charge of the dress code" there (Aplt.Appx.797). He

observed Mr. Cordish and Mr. Miller "target blacks and treat them in rude, exclusionary manners which would never be used against whites," and "each give instructions" to LiveBlock establishment managers to exclude blacks "at all costs" (Aplt.Appx.798). He observed Mr. Cordish indicate to entrance guards specific black people in line to exclude, never whites (Aplt.Appx.798-99).

Mr. Cusimano and Mr. Williams both stated they "[c]ountless times … observed First Response" security guards "move in on tension situations and remove blacks in the area, even if the blacks were on the perimeter of the tension and clearly not involved" (Aplt.Appx.788,799). "Nearly every time if there were both whites and blacks involved, First Response removed only the blacks, regardless of who the aggressor was" (Aplt.Appx.788). The culture to exclude, eject, and harass African-Americans was set by Mr. Miller and other Cordish-entity officers, including Mr. Benjamin, and was ordered of all the LiveBlock establishments' managers (Aplt.Appx.788). On one occasion, Mr. Benjamin ordered Mr. Cusimano to tell a bar in the LiveBlock that he wanted the bar "to stop attracting blacks" (Aplt.Appx.788).

Ms. O'Brien kept an "ejection log" in which she recorded each ejection from the LiveBlock, including the date, time, location, reason, names of the guards involved, and a description of the patron including his race, gender, and clothing worn (Aplt.Appx.1420-21). She told Mr. Cusimano, "if anyone looked at the logs to assess the numbers of blacks

we eject, it wouldn't look good" (Aplt.Appx.788). Although First Response's contract required her to keep the logs for five years, sometime in 2013 she removed the logs from 2011, 2012, and most of 2013 and burned them (Aplt.Appx.1669-70,2081).

In 2012, Mr. Miller ordered Mr. Cusimano "to employ a 'rabbit,' i.e. a Caucasian male willing to start arguments with groups of 'trouble makers' in the Living Room in order to get them kicked out" (Aplt.Appx.65,308,786-87). Mr. Miller instructed him to find someone "willing to take free drinks from Mosaic and cash;" "the rabbit would be told to hang around 'people' we wanted to eject from The Living Room, and then start an argument with them," upon which First Response's guards "would move in and eject" the target (Aplt.Appx.65,308,787).

Thereafter, the rabbit would "walk around the corner and come in a back staircase and up to Mosaic, where the door guard" would "let him re-enter" Mosaic and, from there, "could go back into The Living Room, and do it again" (Aplt.Appx.65,308). No "report would be created of the incidents" (Aplt.Appx.309,786-87). This was not a new tactic or limited to the District: at a Baltimore meeting of general managers from Cordish-developed districts nationwide, Mr. Cusimano learned this was a common Cordish practice (Aplt.Appx.309,787). David Skyrm, manager for a bar in a Louisville, Kentucky, Cordish district, testified Mr. Miller also complained about African-Americans in his establishment, telling Mr. Skyrm, "[I]f he ever saw this many niggers in

the building again, he would chain the doors and burn it down with [Mr. Skyrm] inside" (Aplt.Appx.1594).

Mr. Cusimano followed Mr. Miller's orders and recruited Thomas Alexitch, a white male, as a "rabbit" (Aplt.Appx.66,309,316,1241). Mr. Alexitch's job was "to make some cash, get some free drinks … in return for getting rid of undesirables in the LiveBlock area," and the LiveBlock's security guards and the individual establishments' door guards were aware of this (Aplt.Appx.1241,1263,1274). He started verbal altercations with the targets until just "at the point of when you're going to fight," at which security would eject the person; he described a number of these incidents (Aplt.Appx.1241-52,1271). In return, he was given cash and free drinks (Aplt.Appx.317,1254-55).

Mr. Alexitch said that "90% of the people" he was ordered to target "were African-Americans;" the only incidents he detailed involving whites began with the whites' belligerent behavior, but many he detailed involving black people comprised those blacks not "doing anything at all" and who "didn't seem undesirable," which surprised him to be ordered to eject them (Aplt.Appx.316,1245-46,1264-65,1269-70). Most of the incidents involved black males, but never just black females (Aplt.Appx.1273). Mr. Williams also observed a "rabbit" being used to exclude blacks (Aplt.Appx.799-800).

In early summer 2013, after more African-Americans began coming to Mosaic, Mr. Miller visited the District and was "upset by the

presence of African Americans, especially the males, in Mosaic, and throughout the District" (Aplt.Appx.66,309). He ordered Mr. Cusimano to "remove all black males, using the rabbit, and any and all other techniques" (Aplt.Appx.66,309). "[A]s the summer progressed, [Mr.] Miller increased the pressure on [Mr. Cusimano] to keep blacks out, telling" Mr. Cusimano "if [he] couldn't do it, [Mr. Miller] would 'find someone who would'" (Aplt.Appx.66,310).

In the four years Mr. Cusimano worked at the District, from 2009-2013, he "personally saw at least ten people per weekend, on average, ejected or targeted and excluded" "racially" (Aplt.Appx.311). He estimated that, as all "the bouncers and managers at each club" in the LiveBlock "and the security officers and ECI guards located at each of" its three entrances all were "under orders to racially target" black patrons for exclusion, "200 persons were racially victimized each week, throughout the year" (Aplt.Appx.311,788-89). Mr. Williams also said that, in the four years he worked at the District, he "saw hundreds of blacks discriminated against each year" (Aplt.Appx.801). Both said this became widely known among Kansas City's African-American community, leading blacks to fear coming to the District and call it "Power and White" since at least 2009 (Aplt.Appx.311-12,788,800).

Christina Martinez, who worked at the Maker's Mark Restaurant ("Maker's"), another establishment in the LiveBlock, from May 2009 to July 2013, including as manager from November 2010

(Aplt.Appx.812,823,831), echoed Mr. Cusimano's and Mr. Williams's statements. Mr. Cordish and Mr. Miller told her they did not want any black patrons in the LiveBlock, and that blacks were "undesired" was well-known to all employees throughout the District and communicated from the very top of Cordish corporate management on down (Aplt.Appx.830-31,886-87). Mr. Cordish would refer to blacks in code as "urbans" or "Canadians" and Ms. Martinez twice heard Mr. Miller order LiveBlock establishments to turn off "nigger music" (Aplt.Appx.883-85,912-13). When either was in town, employees throughout the District worked even harder to exclude blacks (Aplt.Appx.829-33).

Ms. Martinez echoed that the LiveBlock's "dress code" was used to exclude blacks (Aplt.Appx.876-77). She also echoed Cordish/ECI's orders to refuse reservations to callers whose names, accent, or dialect sounded African-American, despite freely giving reservations to all whites (Aplt.Appx.881-82). She also witnessed the use of "rabbits" to start altercations with blacks throughout the LiveBlock and its establishments to result in the blacks' exclusion, and heard Mr. Miller discuss this with Mr. Cusimano (Aplt.Appx.898-902). Mr. Miller instructed Ms. Martinez to give groups of white VIPs having events at Maker's discounted and complimentary food and drink, but to ensure groups of African-American VIPs paid "full price for everything" and were hurried out (Aplt.Appx.938-44).

Mosaic employee Victoria Rush also echoed that Mr. Miller sought to exclude African-Americans from the District (Aplt.Appx.1006-08). She recounted that, one night, he asked her whether it was "always this dark in here," which she knew to refer to the number of blacks; she warned the DJ when Mr. Miller was there so he would know to stop playing music Mr. Miller thought was "black" (Aplt.Appx.1006-08).

## B. The Defendants' Discrimination Against the Plaintiffs

### 1. Plaintiffs/Appellants Dante Combs and Adam Williams

Appellant Dante Combs is an African-American resident of Overland Park, Kansas (Aplt.Appx.1077,1096,1103). In the period around 2009-2012, he owned and operated several companies and also worked in pharmaceutical sales (Aplt.Appx.1091-94,1101). Appellant Adam Williams, who also is African-American, is Mr. Combs's college fraternity brother and moved to the Kansas City area in 2008 (Aplt.Appx.1078,1105,1481,1489). In 2010-2011 he worked in medical sales consulting (Aplt.Appx.1105,1486).

### 2. Maker's Incident

On August 26, 2010, Mr. Combs and Mr. Williams, along with a group of their fraternity brothers and friends comprised of all African-American men and one Asian-American, entered the LiveBlock and then Maker's for happy hour (Aplt.Appx.748,1112,1365). Maker's was owned and operated by Kentucky R&L, LLC, which is not a party to this case (Aplt.Appx.1365).

After about 30-60 minutes, an employee noticed the size of the group and asked whether they "wanted to purchase a private spot" on the patio on the LiveBlock's interior perimeter, which cost a lot of money; Mr. Combs did not, but other members of the group agreed, so they did (Aplt.Appx.1155). This was not unusual: while Cordish and ECI did not want African-Americans inside the LiveBlock, exceptions could be made if the blacks were willing to pay a lot more money than was charged to whites (Aplt.Appx.1024). Over the next few hours, Mr. Combs spent most of the time on the patio but occasionally went back inside (Aplt.Appx.1154-55).

Eventually, Mr. Combs wound up inside at Maker's' bar with Mr. Williams, who had spent most of his evening inside (Aplt.Appx.1154-55,1551). While speaking with two white female physicians who Mr. Williams knew, Mr. Combs and Mr. Williams encountered a white man named Cail Hendry, who neither they nor the physicians knew (Aplt.Appx.791,1156,1491,2525). Mr. Hendry later claimed he was there with his girlfriend and approached Mr. Williams because he believed Mr. Williams was staring at her (Aplt.Appx.2525,2549,2551).

Mr. Hendry "came out of nowhere," interrupted, and asked one of the physicians, "Are you okay?" (Aplt.Appx.1156). Mr. Williams objected to the interruption, to which Mr. Hendry responded belligerently, "What's up?" (Aplt.Appx.1156). Mr. Williams extended his hand, and Mr. Hendry knocked it down (Aplt.Appx.1156). Mr.

Hendry claimed he did not do this, but rather it was another white male named "John" (Aplt.Appx.2560).

Mr. Hendry then stepped back and security rushed in, first Maker's' bouncers and then LiveBlock guards (Aplt.Appx.2564). By that point, other whites who Mr. Combs and Mr. Williams did not know were physically attacking them and Mr. Williams punched back (Aplt.Appx.1157,1495,1554). The guards and bouncers surrounded only Mr. Williams, stretching out his arms while he continued to be choked and hit by the whites (Aplt.Appx.1161-63,1181-82,1483,1497-98,1609). One guard stood in front of him holding a Taser and a can of mace and yelled, "[S]top resisting" (Aplt.Appx.1497-98).

Conversely, the Maker's bouncers and LiveBlock guards did nothing to the white attackers, even while bystanders demanded, "Why did you let those white guys go? You are completely letting the guys that are the aggressors in the situation get away" (Aplt.Appx.1162). Even a Maker's employee told the guards she saw two of the white aggressors "right there crossing the street," to which they looked at her "nonchalantly" and responded, "We have it, we're going to take it from here" (Aplt.Appx.1162,1527).

The LiveBlock guards briefly detained and spoke with Mr. Hendry, but then released him and he was free to remain in the LiveBlock; no other whites were detained (Aplt.Appx.1588-89,2526,2567-68,2570). Conversely, the guards detained and held Mr.

Williams, ultimately taking him back to Maker's and ordering him to pay his tab with guards standing over him, and then ejecting him from the LiveBlock (Aplt.Appx.792,1183,1449,1500,1527).

Mr. Hendry claimed he was not a "rabbit" and never had been affiliated with any entity operating in the District (Aplt.Appx.2524).

**3. Mosaic Incident**

In early summer 2011, after putting on a business presentation at an upscale restaurant in the District outside the LiveBlock, Mr. Combs went into the LiveBlock to meet some of his clients at Mosaic (Aplt.Appx.792,1112,1138,1150). At the LiveBlock's entrance, guards confirmed he was over 21 and met the dress code (Aplt.Appx.1449). He "was professionally dressed, wearing a custom made suit, a bow tie, and upscale shoes" (Aplt.Appx.792).

Mr. Combs then proceeded up to Mosaic, where he stood in a line outside to gain access to it (Aplt.Appx.1140). The line moved steadily, with everyone in front of him "g[etting] right in" (Aplt.Appx.1140). He noticed no whites in the line were being asked for any identification and were allowed in "no questions asked," but when his turn came, the bouncer demanded his identification (Aplt.Appx.792,1140-41,1144).

Then, suddenly, the bouncer demanded Mr. Combs step out of line and off to the side (Aplt.Appx.1140). He did so and saw those behind him, all white, be let into Mosaic (Aplt.Appx.792,1141). He then asked, "Why was I told to step off to the side," and the bouncers replied they

would be with him shortly (Aplt.Appx.1141). Eventually, everyone else in line, all white, was let in, and the bouncer overseeing the line turned his back on Mr. Combs and laughed (Aplt.Appx.792).

Mr. Combs then waited and calmly asked why he had been told to step out of line, whether he would be admitted into Mosaic, and to speak with the manager (Aplt.Appx.1141). At this, the bouncers "escalated the conversation," surrounding Mr. Combs and becoming hostile (Aplt.Appx.792,1140,1196). One bouncer stated he "wasn't going to let [Mr. Combs] in because [his] pants were" "too f***ing baggy" (Aplt.Appx.792,1142). This surprised and upset Mr. Combs, making him feel he was being treated like a hoodlum (Aplt.Appx.1196). He asked for the manager's name, but the bouncer refused (Aplt.Appx.792).

Instead, the bouncer radioed for LiveBlock security to remove Mr. Combs (Aplt.Appx.792). The guards arrived and surrounded him (Aplt.Appx.792,1143). Mr. Combs attempted to explain what had happened, but the guards said, "Sir, you know what, you just got involved into an altercation, … we cannot have this. I think it's going to be safe … for you to go ahead and leave the premises" (Aplt.Appx.1196). They then "herded [Mr. Combs] away from Mosaic, down a staircase and out an exit," and "told [him he] could not return that night to the" LiveBlock (Aplt.Appx.793).

**4. Tengo Incident**

On July 6, 2011, Mr. Combs had an appointment to meet a friend, Nicolette Lewis, and her friends, at Tengo Sed Cantina ("Tengo"), an establishment in the LiveBlock (Aplt.Appx.793,1130). Tengo is owned by Mexas Kansas City, LLC, which is not a party (Aplt.Appx.1385).

At the LiveBlock's entrance, guards confirmed Mr. Combs was over 21 and met the dress code (Aplt.Appx.1449). He then stopped about 30 feet from Tengo's door, outside its entrance line, to send a text-message to Ms. Lewis to confirm whether she already was inside or whether, perhaps, she had gone to another establishment in the LiveBlock (Aplt.Appx.793,1118,1130,1132,1153). He intended to enter Tengo but wanted to make sure Ms. Lewis was there, and if she had gone to another LiveBlock establishment, he would go there (Aplt.Appx.1448). In fact, Ms. Lewis was inside Tengo waiting for Mr. Combs (Aplt.Appx.1048,1053).

Before Mr. Combs received any response, a white male he did not know briskly walked by, purposefully knocked his cell phone out of his hand, and kept walking (Aplt.Appx.793,1130-31,1386). Mr. Combs bent down to pick up his phone, looked up at the man, and "the next thing" Mr. Combs knew, the man was "right in [his] face" and became "belligerent," yelling "Fuck you. Screw you" (Aplt.Appx.793,1132).

Suddenly, LiveBlock security guards "surrounded" Mr. Combs "within seconds" (Aplt.Appx.793,1131-33). While the guards also spoke

with the white man, they surrounded and treated Mr. Combs "as if [he] had been the trouble maker" and treated the white man differently: they "maintained a respectful distance" from him "and were not interacting with him as if he had done anything wrong – they were only doing that to" Mr. Combs, and instead treated the white man as if he had been a victim (Aplt.Appx.793,1132-33,).

Mr. Combs attempted to explain to the guards what happened and also addressed his disparate treatment from the white man, asking the guards, "Why is [*sic*] there three or four of you guys around me asking me all of these questions?" but only "two guys talking to" the white man "just kind of listening to his story," whereas the guards surrounding Mr. Combs were "amped" and treating him as if he were "causing this big huge problem for a lot of people" (Aplt.Appx.1191,1193,1199). Unlike the white man, the guards did not give Mr. Combs an opportunity to explain what had happened (Aplt.Appx.793,1199).

Instead, the guards told Mr. Combs he had to leave the LiveBlock and could not return that evening, upon which four guards, one in front, one behind, and one on each side, escorted him through the crowd all the way to the LiveBlock's exit and ejected him, which was "embarrassing and shameful" (Aplt.Appx.793,1132). Mr. Combs did not see the guards do the same to the white man, who, as he was being escorted out, was "still kind of belligerent" towards him and "having this nice conversation" with the guards (Aplt.Appx.793,1191).

### 5. Mr. Combs's Response to the Incidents

Mr. Combs felt discriminated against in all three incidents, but after speaking with friends who were lawyers, did not believe "filing a lawsuit was worth the trouble" (Aplt.Appx.1169,1448). All of that changed when he heard publicity about another lawsuit in 2014 concerning discrimination in the District and learned of the "rabbit" scheme, upon which he "realized that what happened to me wasn't just random, but targeted strategies and tactics in place on a corporate level designed to keep blacks out [of the District] through hidden illegal practices" (Aplt.Appx.1448,1465-66). He then "decided … it was very important to me to file a lawsuit" (Aplt.Appx.1448,1465-66).

## C. Mr. Combs's Bankruptcy

In April 2011, Mr. Combs and his wife filed a bankruptcy petition in Kansas, *In re Combs*, No. 11-21183 (Bankr.D.Kan.) (Aplt.Appx.667,1392). The petition's "Schedule B" required them to list all personal property assets, including "other contingent and unliquidated claims of every nature" and "other personal property of any kind not already listed" (Aplt.Appx.695,1392). They listed a vehicle (Aplt.Appx.695). Mr. Combs said it "never occurred to [him] that the discriminatory incidences [*sic*] [he] experienced would be considered an asset by anyone, and [he] certainly did not consider them such" (Aplt.Appx.1465). On August 31, 2011, the bankruptcy court issued the Combses a final discharge (Aplt.Appx.718,1394).

## D. Proceedings Below

### 1. Initial Proceedings

On March 10, 2014, Mr. Combs and Mr. Williams filed a complaint in the U.S. District Court for the Western District of Missouri against Cordish, ECI, First Response, and Lounge KC, seeking a class action on behalf of all African-Americans who had suffered race discrimination in the District as a result of the defendants' conduct, with Mr. Combs and Mr. Williams as representatives (Aplt.Appx.4,28-29). They stated two counts, each relating to all three incidents: (1) that they constituted racial discrimination in a place of public accommodation in violation of 42 U.S.C. § 2000a; and (2) that they constituted racial discrimination denying equal rights in violation of 42 U.S.C. § 1981 (Aplt.Appx.45-52). They sought class certification, damages, and declaratory and injunctive relief (Aplt.Appx.49,52-53). The defendants denied the plaintiffs' allegations (Aplt.Appx.107,163).

In August 2014, the district court dismissed the § 2000a count, holding that, because the plaintiffs had not given notice to the Missouri Human Rights Commission before filing their complaint, they did not meet the prerequisite in § 2000a-3(c) (Aplt.Appx.160-62). In December 2014, the plaintiffs moved for class certification, which the district court denied in February 2015 (Aplt.Appx.12,173,318,327,339).

**2. Summary Judgment Proceedings**

In April 2015, all defendants moved for summary judgment on the plaintiffs' § 1981 claims (Aplt.Appx.340,486).

First Response first argued it could not be liable for the Maker's incident, as it was not providing security in the District at the time (Aptl.Appx.360-61). It then argued it could not be liable for the Mosaic or Tengo incidents because the plaintiffs could not "identify the security personnel involved," even if it were involved its guards did not impair the plaintiffs' right to contract, and there was no evidence of any discrimination (Aplt.Appx.361-72).

Cordish, ECI, and Lounge KC first argued that, because Mr. Combs filed for bankruptcy in 2011 and did not list his § 1981 claims in that bankruptcy, he either lacked standing to bring them or was judicially estopped from bringing them (Aplt.Appx.503-08). They then argued that, regardless, Mr. Combs and Mr. Williams could not establish the elements of their claims against any defendant for any of the three incidents (Aplt.Appx.508-17).

The plaintiffs opposed both summary judgment motions, arguing Mr. Combs had standing, judicial estoppel did not apply, and all defendants' liability under § 1981 for all three incidents was subject to genuine disputes of material fact, precluding summary judgment (Aplt.Appx.744,1358). They conceded, however, that First Response was not liable for the Maker's incident (Aplt.Appx.749).

### 3. Proceedings to Reopen Mr. Combs's Bankruptcy

On April 20, 2015, Mr. Combs and his wife moved the bankruptcy court to reopen their 2011 bankruptcy and amend their petition to list Mr. Combs's claims against the defendants as an asset (Aplt.Appx.1453). They explained that, at the time they filed the bankruptcy, they "were unaware of the discriminatory actions by the Defendants" in this case that "constitute the basis of" Mr. Combs's claims (Aplt.Appx.1453,1460). Mr. Combs explained in an affidavit that he did not know in 2011 either the full nature of his claims in this case or that they were "assets" that had to be listed in the bankruptcy petition (Aplt.Appx.1465-66). He said, "In no way would I ever want to 'mislead' or 'misuse' any judicial process, nor have I ever wanted or intended to do so. Omitting the claims was an innocent mistake on my part, that's all" (Aplt.Appx.1466).

On June 5, 2015, the bankruptcy court held an evidentiary hearing on the Combses' motion, at which both the former bankruptcy trustee and counsel for the defendants appeared and Mr. Combs testified at length (Aplt.Appx.1827,1829). The trustee stated that, after investigation, he had decided not to intervene and, if the court agreed to reopen the bankruptcy, he would abandon the claims against the defendants to Mr. Combs (Aplt.Appx.1835-36,1987). At the end of the hearing, the bankruptcy court promised a ruling within a week or so (Aplt.Appx.1961,1966).

**4. Judgment**

On June 15, 2015, the district court granted all defendants' motions for summary judgment and entered final judgment (Aplt.Appx.1781,1804; Addendum ("Add.") A1,A24). It held Mr. Combs was judicially estopped from bringing his § 1981 claims because of his failure to list them in his bankruptcy, which it held "was not inadvertent" (Aplt.Appx.1797).

As to the Maker's incident, the court held Mr. Williams could not recover as he "was ejected because he was involved in a bar fight/altercation and not because of his race," and there was no evidence Cordish or ECI had any part in starting the fight (Aplt.Appx.1800).

As to the Mosaic incident, it held that, if Mr. Combs's claims were not judicially estopped, "There are disputed issues of material fact that would otherwise preclude summary judgment on [his] claim against Lounge KC," but not as to Cordish, ECI, or First Response (Aplt.Appx.1801-02).

As to the Tengo incident, the court held Mr. Combs "was not engaged in a protected activity," as he was not "trying to enter" Tengo and "there is no triable issue as to whether Defendants interfered with his ability to contract" (Aplt.Appx.1802-03).

**5. Reopening and Amendment of Mr. Combs's Bankruptcy**

On June 16, 2015, the day after the district court's judgment, the bankruptcy court granted the Combses' motion to reopen the

bankruptcy and accepted their amended bankruptcy petition listing Mr. Combs's claims in this case as "assets," holding his omission of them from the original petition "was inadvertent," "an innocent mistake entirely devoid of bad faith" (Aplt.Appx.1979,1981).[1] It held that, under Tenth Circuit precedent, the Combses had no obligation either to list the Maker's claim in the first place or update their schedules to reflect the Mosaic or Tengo incidents, which occurred after their initial bankruptcy filing (Aplt.Appx.1986).

**6. Post-Judgment Proceedings**

On July 14, 2015, the plaintiffs timely moved to alter or amend the district court's summary judgment or for relief from judgment (Aplt.Appx.1805). *Inter alia*, they explained that the bankruptcy court's decision that Mr. Combs had not acted in bad faith, allowing him to reopen the bankruptcy and amend his petition, and the trustee abandoning the claims to him, obviated any application of judicial estoppel (Aplt.Appx.1806,1808-13).

The district court denied the plaintiffs' motion, and they timely appealed to this Court (Aplt.Appx.2057,2075;Add.A25).

[1] A 15-page excerpt from the bankruptcy court's order is included in the addendum to this brief under 8th Cir. R. 28A(g)(1) (Add.A43-57).

## Summary of the Argument

The district court erred in holding that Mr. Combs was judicially estopped. First, the law of the Tenth Circuit, which applied to his Kansas bankruptcy proceedings, is he was under no duty to list his claims in this case as "assets." Only the Maker's incident occurred prepetition, and he did not have an actual claim under 42 U.S.C. § 1981 as to it. As the other two incidents occurred postpetition, they were not part of the bankruptcy estate and did not have to be listed. Second, even if Mr. Combs did have to list any claims, his failure to do so was inadvertent and mistaken. Finally, he cured the failure in good faith by reopening the bankruptcy and amending his petition, and the claims were abandoned to him, obviating judicial estoppel in any case.

The district court also erred in granting the defendants summary judgment on the merits of the plaintiffs' § 1981 claims. It wholly failed to view the evidence in a light most favorable to the plaintiffs, ignoring the great volume of direct and circumstantial evidence that Cordish and ECI devised and implemented a pervasive, segregationist scheme to prevent African-American men from patronizing the LiveBlock's establishments, in which First Response and all LiveBlock establishments were complicit. The plaintiffs established a prima facie case under § 1981 that all defendants interfered with their equal right to contract due to the defendants' discriminatory intent.

## Argument

*Standard of Appellate Review as to All Issues*

This Court "reviews de novo a grant of summary judgment." *Torgerson v. City of Rochester*, 645 F.3d 1031, 1042 (8th Cir. 2011) (en banc). It will "view the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in the nonmoving party's favor." *Watkins Inc. v. Chilkoot Distrib., Inc.*, 655 F.3d 802, 803 (8th Cir. 2011). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are" functions for trial, not summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Summary judgment only is proper when "the record taken as a whole could not lead a rational trier of fact to find for the" non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The "pleadings, the discovery and disclosure materials on file, and any affidavits" must "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c)(2).

## I. The district court erred in holding Mr. Combs was judicially estopped from bringing his claims against the defendants. He had no duty to list his claims in this case as an "asset" in his bankruptcy. Even if he did, his failure was inadvertent, mistaken, and not in bad faith. And because he cured the omission in good faith and his bankruptcy trustee abandoned the claims, he derived no unfair advantage from the initial failure in any case.

*Additional Standard of Appellate Review*

This Court reviews a district court's application of judicial estoppel for abuse of discretion, even when it arises in summary judgment. *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1046 (8th Cir. 2006). It will be reversed if "it plainly appears that the court committed a clear error of judgment in the conclusion that it reached upon a weighing of the proper factors." *Id.* at 1046-47 (citation omitted).

Still, "[t]he abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal … error: 'A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law ….'" *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744, 1748 n.2 (2014) (citation omitted). Thus, "A district court abuses its discretion when it makes an error of law," and such legal conclusions are reviewed de novo. *Geier v. Mo. Ethics Comm'n*, 715 F.3d 674, 678 (8th Cir. 2013).

* * *

Judicial estoppel bars a litigant from deliberately changing positions in separate litigations to gain an unfair advantage in the later

one. After the Maker's incident, Mr. Combs filed for bankruptcy but did not list any claim against the defendants as an "asset." Later, he reopened the bankruptcy, amended his filing to list the claims, and the trustee abandoned them to him. Did he deliberately intend to mislead the bankruptcy court? Did his initial failure to list his claims ultimately result in an unfair advantage?

### A. To judicially estop a plaintiff's cause of action not listed as an "asset" in a prior bankruptcy, the claim must have been required to be listed, its omission must have been in bad faith, and he must have derived an unfair advantage from it.

"The doctrine of judicial estoppel 'protects the integrity of the judicial process,'" *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1047 (8th Cir. 2006) (citation omitted), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted). Under this rule, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the" former position. *Id.* (citation omitted). In short, judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.*

While "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation," in *New Hampshire* the Supreme Court set forth three factors that "typically inform whether to apply the doctrine in a particular case":

1. [A] party's later position must be clearly inconsistent with its earlier position.
2. [C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity.
3. [W]hether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

*Id.* at 750-51 (separated out, internal quotations and citations omitted).

Judicial estoppel can arise from representations during a party's prior bankruptcy. "In the bankruptcy context, a party may be judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure

statements." *Stallings*, 447 F.3d at 1041. This is because, when a debtor must list a claim as an asset "in mandatory bankruptcy filings," his failure to do so can be "tantamount to a representation that no such claim existed." *Id.* (citation omitted).

At the same time, it is well-established that "judicial estoppel does not apply" in this context "when a debtor's prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court." *Id.* at 1048 (quotations and citation omitted). For,

> Although it may generally be reasonable to assume that a debtor who fails to disclose a substantial asset in bankruptcy proceedings gains an advantage, the specific facts of a case may weigh against such an inference. A rule that the requisite intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding [would] unduly expand the reach of judicial estoppel in post-bankruptcy proceedings and would inevitably result in the preclusion of viable claims on the basis of inadvertent or good-faith inconsistencies. Careless or inadvertent disclosures are not the equivalent of deliberate manipulation.

*Id.* at 1049 (internal quotations and citations omitted). Moreover, in the bankruptcy context, judicial estoppel is particularly inapplicable

when the debtor later "amend[s] his bankruptcy petition to add" the claims at issue "as a potential asset." *Id.* at 1048.

Put simply, "[c]ourts should only apply" judicial estoppel "***as an extraordinary remedy*** when a party's inconsistent behavior ***will result in a miscarriage of justice***." *Id.* (emphasis added). It only applies to deliberate inconsistencies "tantamount to a knowing misrepresentation to or even fraud on the court." *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 n.6 (8th Cir. 1987).

For these reasons, this Court and other circuits have reversed numerous applications of judicial estoppel stemming from a plaintiff's failure to list his claim against the defendant in a prior bankruptcy when it did not meet these stringent standards. *See, e.g.*:

- *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 546-48 (7th Cir. 2014) (summary judgment that judicial estoppel barred Title VII claim not listed in bankruptcy reversed where, viewing record in light most favorable to plaintiff, whether she intended to conceal claim was disputed fact and, in any case, bankruptcy was reopened, petition was amended, and trustee abandoned claim);
- *Ah Quin v. Cnty. of Kauai Dept. of Transp.*, 733 F.3d 267, 274-77 (9th Cir. 2013) (judicial estoppel did not bar Title VII claim not listed in bankruptcy where plaintiff reopened bankruptcy and filed amended petition listing claim);

- *Stephenson v. Malloy*, 700 F.3d 265, 273-75 (6th Cir. 2012) (summary judgment that judicial estoppel barred negligence claim not listed in bankruptcy reversed where, viewing record in light most favorable to plaintiff, nothing suggested he intended to conceal claim);
- *Strauss v. Rent-A-Center, Inc.*, 192 Fed.Appx. 821, 823 (11th Cir. 2006) (judicial estoppel did not bar Title VII claim not listed in bankruptcy where there was no evidence that plaintiff intentionally misled bankruptcy court);
- *Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1344-46 (11th Cir. 2006) (summary judgment that judicial estoppel barred TILA claim not listed in bankruptcy reversed where plaintiff amended bankruptcy petition to list claim and, viewing record in light most favorable to plaintiff, whether he intended to conceal claim in bankruptcy was disputed fact);
- *Stallings*, 447 F.3d at 1049 (judicial estoppel did not bar FMLA claim not listed in bankruptcy where facts resulting in claim occurred after filing bankruptcy petition);
- *Muse v. Accord Human Res., Inc.*, 129 Fed.Appx. 487, 488-89 (11th Cir. 2005) (judicial estoppel did not bar FLSA claim not listed in Chapter 13 bankruptcy where facts resulting in claim occurred after confirmation of Chapter 13 plan);
- *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 898-99 (6th Cir. 2004) (judicial estoppel did not bar breach of contract claim not listed

in bankruptcy where plaintiff amended bankruptcy petition to list it, trustee abandoned claims to plaintiff, and there was no evidence of "fraudulent intentions");

- *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 363-65 (3d Cir. 1996) (judicial estoppel did not bar breach of warranty claim not listed in bankruptcy where there was no evidence plaintiff acted in bad faith to obtain unfair advantage); and
- *Brooks v. Beatty*, 25 F.3d 1037 (Table), 1994 WL 224160 at *2-3 (1st Cir. 1994) (judicial estoppel did not bar wrongful foreclosure claim not listed in bankruptcy where plaintiff sought to reopen bankruptcy and file amended petition listing claim, even where those proceedings were not final at time of appellate decision).

As in all these cases, this Court should reverse the district court's summary judgment that judicial estoppel barred Mr. Combs's claims against the defendants. First, his claims were not "assets" that had to be listed in his bankruptcy petition. Second, even if they were, his omission of them was not intentional, knowing, or in bad faith. Finally, because Mr. Combs successfully reopened the bankruptcy and amended his petition to list the claims, and the trustee abandoned the claims to him, his initial failure to list did not result in any unfair advantage.

### B. There is no inconsistency between Mr. Combs's claims in this case and his statement of assets in his bankruptcy, because the law of the Tenth Circuit is his claims were not "assets" he had to list.

The first of the *New Hampshire* factors is the "party's later position must be clearly inconsistent with its earlier position." 532 U.S. at 750. The district court held this was met because Mr. Combs was "obligated to divulge all of his assets," "'includ[ing] property acquired during the pendency' of the bankruptcy case" with "a continuing obligation to 'amend his financial statements if circumstances change,'" and he did not list his claims against the defendants (Aplt.Appx.1794-95) (citations omitted). The court did not analyze, though, whether Mr. Combs's particular claims in this case qualified as "assets" that had to be listed (Aplt.Appx.1794-95).

In fact, they did not. The district court's conclusion otherwise was error. As a matter of law, and just as the bankruptcy court ultimately found, applying Tenth Circuit precedent, which governed the Kansas bankruptcy court and its proceedings, Mr. Combs's claims against the defendants were not prepetition "assets" subject to listing. Even if the Maker's incident somehow could be deemed so, Tenth Circuit law is he *was not* required to update his asset schedule to reflect the changes in that claim against the defendants due to later incidents.

To be a required listed "asset" on a bankruptcy petition, i.e., to be properly considered as part of the bankruptcy estate, a cause of action

must be "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt['s] ability to make an unencumbered fresh start." *Segal v. Rochelle*, 382 U.S. 375, 380 (1966).

To determine this, the Tenth Circuit follows the "conduct approach": if the events giving rise to the cause of action occur before filing of the bankruptcy petition ("prepetition"), it is an "asset" subject to listing in the petition and belongs to the estate, but if it occurs afterward ("postpetition"), it is not. *In re Parker*, 264 B.R. 685, 697 (B.A.P.10th Cir. 2001), *aff'd*, 313 F.3d 1267 (10th Cir. 2002); *cf. In re Witko*, 374 F.3d 1040, 1042 (11th Cir. 2004) ("Pre-petition causes of action are part of the bankruptcy estate and post-petition causes of action are not"). At the same time, even if an asset is prepetition and must be listed, the Tenth Circuit holds the debtor has no "duty to amend his bankruptcy schedules about the evolving valuation of existing assets," and judicial estoppel cannot be predicated on a failure to do so. *Vehicle Market Research, Inc. v. Mitchell Int'l, Inc.*, 767 F.3d 987, 997-99 (10th Cir. 2014).

In this case, the only one of the three incidents at issue that occurred prepetition was the Maker's incident. It occurred in August 2010, and Mr. Combs filed his bankruptcy petition on April 25, 2011 (Aplt.Appx.670,1365,1392). The other two incidents occurred postpetition: the Mosaic Incident in early summer 2011 and the Tengo incident in July 2011 (Aplt.Appx.792-93). Therefore, under Tenth

Circuit precedent, standing alone, the postpetition Mosaic and Tengo incidents did not qualify as "assets" required to be listed on the bankruptcy petition. *Parker*, 264 B.R. at 697. And if they increased the value of some other asset, Mr. Combs was under no duty to list that, either. *Vehicle Market Research*, 767 F.3d at 997-99.

That leaves only the Maker's incident, which did occur prepetition. But "[t]here is a valid question whether [Mr. Combs was] under any obligation to disclose the claim at all" (Aplt.Appx.1999). The plaintiffs' allegations about that incident barely involve any discriminatory treatment of Mr. Combs, and the claim for damages goes to the detention and ejection of Mr. Williams (Aplt.Appx.41-43). The defendants have argued that, even taking the plaintiffs' allegations as true, Mr. Combs does not have a cause of action in the first place that he suffered any actionable discrimination under 42 U.S.C. § 1981 in the Maker's incident, because he was not ejected (Aplt.Appx.509-12).[2]

Mr. Combs concedes this and will not argue that summary judgment against *him* as to the merits of the Maker's incident should be reversed. Only Mr. Williams argues that. As the bankruptcy court put it, at the time of that incident it "never occurred to Mr. Combs that he had enough evidence or any basis to bring any kind of lawsuit" and "had no idea that this incident could be considered a legal claim"

[2] Indeed, the plaintiffs concede that First Response has no liability for that incident at all (Aplt.Appx.749).

(Aplt.Appx.1982,1994). Any claim related to the Maker's incident was "so inchoate as to not merit disclosure" (Aplt.Appx.1999). It was "implausible that [Mr. Combs] would have a viable claim after" that one incident (Aplt.Appx.1999). "Only after the second and third," *post*petition incidents "could [he] reasonably have understood he might have a claim" against the defendants (Aplt.Appx.1995). *Cf. Witko*, 374 F.3d at 1044 (all elements for debtor's legal malpractice claim had not occurred until postpetition, and so did not belong to estate).

Mr. Combs had no cause of action against the defendants that arose prepetition. Under Tenth Circuit precedent, he had no duty to list his cause of action against the defendants arising from the postpetition Mosaic and Tengo incidents.[3] As a result, his position in this case was not "clearly inconsistent with [his] earlier position" in the bankruptcy. *New Hampshire*, 532 U.S. at 750.

The district court erred in holding otherwise. Because the district court agreed that, but for its application of judicial estoppel, Mr. Combs's claims against Lounge KC would survive summary judgment (Aplt.Appx.1801-02), at the very least this Court must reverse the summary judgment for Lounge KC against Mr. Combs.

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[3] In *Stallings*, this Court agreed that failure to list a postpetition cause of action as an "asset" did not give rise to judicial estoppel, reversing a summary judgment holding otherwise. 447 F.3d at 1049.

### C. Even if Mr. Combs somehow had a duty to list his claims against the defendants as "assets" in his bankruptcy, his failure to do so was inadvertent, mistaken, and in good faith, and at the very least there is a genuine dispute of fact as to this, precluding summary judgment.

To give rise to judicial estoppel, an inconsistency must be "tantamount to a knowing misrepresentation to or even fraud on the court." *Total Petroleum*, 822 F.2d at 737 n.6. And "judicial estoppel does not apply" in the bankruptcy context "when a debtor's prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court." *Stallings*, 447 F.3d at 1041 (quotations and citation omitted). When an inconsistency is "inadvertent," "careless," or "good-faith," it is "not the equivalent of deliberate manipulation," and judicial estoppel does not apply. *Id.* at 1049 (internal quotations and citations omitted).

The district court held Mr. Combs's failure to list his claims against the defendants as "assets" in his bankruptcy was not inadvertent or mistaken because he had "made contrary statements about the reason for" that failure, "he knew he had the claims," he "did not disclose them because he did not think they had any value," and he did so with the motive to ensure any damages would go to him and not his creditors (Aplt.Appx.1796-97).

This was error. If Mr. Combs somehow had any duty to list the claims, it is plain both from the facts and the law that his failure to list

them was due entirely to his good-faith, inadvertent mistake, not an attempt to commit a fraud on the bankruptcy court. At the very least, there is a genuine dispute of fact on this question, precluding summary judgment.

Mr. Combs explained he did not list his claims against the defendants as an "asset" in his April 2011 bankruptcy because it "never occurred to [him] that the discriminatory incidences [*sic*] [he] experienced would be considered an asset by anyone, and [he] certainly did not consider them such" (Aplt.Appx.1465). While he felt discriminated against in all three incidents, after speaking with friends who were lawyers, he did not believe "filing a lawsuit was worth the trouble" (Aplt.Appx.1169,1448).

All of that changed three years later in 2014, however, when Mr. Combs heard publicity about another lawsuit concerning discrimination in the District and learned of the "rabbit" scheme, upon which he "realized that what happened to me wasn't just random, but targeted strategies and tactics in place on a corporate level designed to keep blacks out [of the District] through hidden illegal practices" (Aplt.Appx.1448,1465-66). He testified to all of this at the hearing over his motion to reopen his bankruptcy (Aplt.Appx.1844-1936). Indeed, it was Mr. Combs who first disclosed anything about his bankruptcy to the defendants, in his December 2014 deposition, without prompting (Aplt.Appx.1091). Plainly, Mr. Combs had no intent to hide the

bankruptcy filing; otherwise, why disclose it to the defendants freely? *Cf. Ah Quin*, 733 F.3d at 278 (plaintiff voluntarily disclosing bankruptcy to defendant weighed strongly in favor of mistake).

As the bankruptcy court noted, there was no evidence that Mr. Combs's failure to list the claims was anything other than "an innocent mistake entirely devoid of bad faith" (Aplt.Appx.1979). "There is no evidence that [Mr. Combs] sought to manipulate the court system" or was "gaming the system" (Aplt.Appx.1994,1999). He simply "had no knowledge that the P&L incident constituted 'property' or an 'asset' that had to be disclosed" (Aplt.Appx.1993-94). "There is no evidence suggesting that [Mr.] Combs thought, or realistically should have thought, he had a claim when he filed bankruptcy" (Aplt.Appx.1995). "He never knowingly misled the bankruptcy court, the trustee, or his creditors by misrepresenting the existence of his claim" (Aplt.Appx.1995).

Under these circumstances, it cannot reasonably be said that Mr. Combs's failure to list his claims against the defendants as "assets" in his bankruptcy was "tantamount to a knowing misrepresentation to or even fraud on the court." *Total Petroleum*, 822 F.2d at 737 n.6. Rather, if he even had a duty to list the claims in the first place, plainly his "prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court." *Stallings*, 447 F.3d at 1041 (quotations and citation omitted). His omission was "inadvertent,"

"careless," and "good-faith," was "not the equivalent of deliberate manipulation," and judicial estoppel does not apply. *Id.* at 1049 (internal quotations and citations omitted). The district court's conclusion otherwise was error, and this Court must reverse the summary judgment for Lounge KC against Mr. Combs.

Moreover, because the district court's application of judicial estoppel arose in summary judgment, this Court must view the evidence on Mr. Combs's failure to list in a light most favorable to him. *Ah Quin*, 733 F.3d at 278. Even if there is any evidence contrary to his affidavit and testimony that possibly could go to show bad faith, fraud, and intentional manipulation, it would make for a disputed question of fact, precluding a summary judgment that he had acted in bad faith. *Ah Quin*, 733 F.3d at 277-78; *Spaine*, 756 F.3d at 546-48; *Stephenson*, 700 F.3d at 273-75; *Ajaka*, 453 F.3d at 1344-46. Either way, summary judgment could not lie.

### D. Regardless, Mr. Combs reopened his bankruptcy, amended his schedules to include his claims against the defendants, and the trustee abandoned the claims to Mr. Combs, obviating two of the three necessary factors for judicial estoppel.

In the bankruptcy context, judicial estoppel is particularly inapplicable when the debtor "amend[s] his bankruptcy petition to add" the claims at issue "as a potential asset." *Stallings*, 447 F.3d at 1048. This is a "key factor" in determining whether to apply judicial estoppel

in this context. *Ah Quin*, 733 F.3d at 272. For, "most importantly, once a plaintiff-debtor has amended his … bankruptcy schedules and the bankruptcy court has processed or re-processed the bankruptcy with full information, two of the three primary *New Hampshire* factors are no longer met." *Id.* at 274.

First, reopening and amending means "the bankruptcy court ultimately *did not accept* the initial position," and "'absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations and thus poses little threat to judicial integrity.'" *Id.* (quoting *New Hampshire*, 532 U.S. at 750-51) (emphasis in the original). Second, it means "the plaintiff-debtor *did not obtain an unfair advantage*," and indeed "obtained no advantage at all, because he … did not obtain any benefit whatsoever in the bankruptcy proceedings." *Id.* (emphasis in the original). Otherwise, "the only 'winner'" would be "the alleged bad actor in the estopped lawsuit." *Id.*; *see also Spaine*, 756 F.3d at 546-48; *Ajaka*, 453 F.3d at 1344-46; *Eubanks*, 385 F.3d at 898-99; *Brooks*, 1994 WL 224160 at *2-3.

As in all these cases, all of which reversed summary judgments of judicial estoppel on this basis, that is exactly what happened here. "When [Mr.] Combs learned … that Cordish was interpreting the single pre-petition incident at Maker's Mark in August 2010 as a 'contingent claim' [that] he should have listed" as an "'asset' on Schedule B," he immediately sought to reopen the bankruptcy and amend, "fully

recognizing that if he were to recover any damages," those funds would be in the trustee's purview (Aplt.Appx.1986-87). The bankruptcy court then allowed him to reopen and amend, and the trustee opted to abandon the claims to Mr. Combs (Aplt.Appx.1835-36,1987,2001).

As a result, the second and third *New Hampshire* factors cannot be met. Mr. Combs did not succeed in persuading the bankruptcy court to accept an inconsistent position, because it ultimately accepted a consistent position. As well, Mr. Combs obtained no unfair advantage, because he obtained no benefit at all.

Moreover, as the trustee ultimately *abandoned* Mr. Combs's claims against the defendants, the property reverted to Mr. Combs and was not part of the bankruptcy estate. *See* 11 U.S.C. 554(a). "[W]hen property of the bankruptcy is abandoned, the title 'reverts to the bankrupt, *nunc pro tunc*, so that he is treated as having owned it continuously." *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 791 (D.C. Cir. 2010) (citations omitted). If the property is a cause of action, abandonment means the debtor is "free to seek redress as if no bankruptcy petition has been filed." *Id.* (citing 5 COLLIER ON BANKRUPTCY § 554.02, n.3 (15th ed. rev.2008)).

Therefore, the reopening, amendment, and abandonment eliminate any concerns that might give rise to judicial estoppel. There is no inconsistent position, no acceptance of an inconsistent position, no

advantage to Mr. Combs, and no detriment to the defendants or any of Mr. Combs's creditors. Judicial integrity is safe.

This Court should reverse the judgment holding Mr. Combs judicially estopped from pursuing his claims against the defendants and, at the very least, reverse the summary judgment in favor of Lounge KC and against Mr. Combs.

## II. The district court erred in granting the defendants summary judgment on the merits of the plaintiffs' claims under 42 U.S.C. § 1981. Viewing the record in a light most favorable to the plaintiffs, there was a genuine dispute of material fact whether the defendants intentionally and racially discriminatorily interfered with the plaintiffs' equal right to patronize bar and restaurant establishments within the LiveBlock.

42 U.S.C. § 1981 provides relief when a defendant has prevented an African-American plaintiff from patronizing a bar/restaurant establishment due to the defendant's racially discriminatory intent. Viewing the record most favorably to the plaintiffs, the defendants executed an intentional scheme to prevent African-American men from patronizing establishments in the LiveBlock, and the plaintiffs were victims of it. Were the defendants entitled to summary judgment?

### A. A plaintiff has a right to relief under 42 U.S.C. § 1981 when he establishes through direct or circumstantial evidence that he is a member of a protected class and the defendant interfered with his ability to make and enforce contracts due to discriminatory intent against that class.

42 U.S.C. § 1981 provides:

> (a) Statement of equal rights
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

> (b) "Make and enforce contracts" defined
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Due to part (b), § 1981 "applies to all phases and incidents of the contractual relationship …." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302 (1994). It is not "limited to existing contractual relationships," but also "protects the would-be contractor along with those who already have made contracts, and it thus applies to discrimination that blocks the creation of a contractual relationship that does not exist." *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 469 (8th Cir. 2009) (en banc) (internal quotations and citation omitted) (quoting *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006), and *Runyon v. McCrary*, 427 U.S. 160, 172 (1976)).

Accordingly, in the bar/restaurant/recreational context, a defendant violates § 1981 when it intentionally prevents an African-American plaintiff from purchasing food or drink due to the plaintiff's race, even if the plaintiff has not yet made the purchase. *See, e.g.*:

- *Dunaway v. Cowboys Nightlife, Inc.*, 436 Fed.Appx. 386, 391-92 (5th Cir. 2011) (nightclub violated § 1981 by refusing African-American plaintiffs entry and ejecting plaintiffs after entry, even though plaintiffs had not purchased any food or drink);

- *Charity v. Denny's, Inc.*, No. 98–0554, 1999 WL 544687 at *5 (E.D.La. Jul. 26, 1999) (restaurant violated § 1981 by initially refusing service to African-American plaintiffs and, even when served by manager, subjecting plaintiffs to harassment, threats, and a racial slur, resulting in plaintiffs' leaving restaurant);
- *McCaleb v. Pizza Hut of Am., Inc.*, 28 F.Supp.2d 1043, 1047-48 (N.D.Ill. 1998) (restaurant violated § 1981 by refusing African-American plaintiffs plates, utensils, and drinks and confronting, threatening, and ignoring them, resulting in their leaving);
- *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 243 (6th Cir. 1990) (club violated § 1981 by ejecting African-American plaintiffs due to its "rule against blacks" before plaintiffs could purchase any drinks at club's bar);
- *Wyatt v. Sec. Inn Food & Beverage, Inc.*, 819 F.2d 69, 70 (4th Cir. 1987) (lounge violated § 1981 by ejecting African-American plaintiffs due to its supposed policy that patrons had to purchase drinks, where it allowed whites to remain without doing so).

The reason for this is straightforward. "Section 1981 [was] designed to eliminate invidious discrimination by … private actors." *Gonzales v. U.S. Air Force*, 88 Fed.Appx.371, 378 (10th Cir. 2004). If purchasing food or drink were a prerequisite to stating a claim under § 1981 involving a bar, restaurant, or similar establishments, a defendant "could avoid liability merely by refusing minorities entrance to the

establishment before they had a chance to order." *Watson*, 915 F.2d at 243. Making them "leave in order to prevent them from purchasing [food and drink] could be found to be merely the method used to refuse to contract." *Id.*

A plaintiff establishes a prima facie case under § 1981 by showing: "(1) membership in a protected class, (2) discriminatory intent on the part of the defendant, (3) engagement in a protected activity, and (4) interference with that activity by the defendant." *Gregory*, 565 F.3d at 469. He "may prove intentional race discrimination" under § 1981 "using either direct or indirect (circumstantial) evidence." *Putman v. Unity Health Sys.*, 348 F.3d 732, 734 (8th Cir. 2003).

In this case, as in all the others *supra* at 49-50, viewing the record in a light most favorable to the plaintiffs, they proved a prima facie case that Cordish, ECI, Lounge KC, and First Response interfered with their ability to make contracts with the restaurant/bar/recreational establishments in the LiveBlock due to their discriminatory intent against African-Americans. The district court erred in holding otherwise and granting the defendants summary judgment.

### B. Viewing the record in the light most favorable to the plaintiffs, Cordish and ECI interfered with Mr. Williams's right to contract in the Maker's incident due to their discriminatory intent against African-American men.

This case involves three separate incidents comprising the plaintiffs' § 1981 claim: the Maker's incident, the Mosaic incident, and the Tengo incident. *Supra* at 15-21. For all three incidents, the first element for § 1981 relief is uncontested: the plaintiffs, both African-Americans, are members of a protected class (Aplt.Appx.1800).

For the Maker's incident, as the district court observed, the second element also is uncontested: Mr. Williams, a patron at Maker's, was engaged in a protected activity (Aplt.Appx.1800). It held, though, that he failed the second and fourth elements, as he "was ejected because he was involved in a bar fight/altercation and not because of his race," and there is no evidence "the fight was started at the Cordish defendants' behest" (Aplt.Appx.1800).[4]

This utterly fails to view the direct and circumstantial evidence in a light most favorable to Mr. Williams. There is substantial evidence in the record that Cordish and ECI, who ran the LiveBlock and oversaw and gave orders to all the LiveBlock's establishments and security personnel, engaged in a pervasive, years-long, racist, segregationist scheme to prevent African-Americans from patronizing the LiveBlock's

[4] The plaintiffs concede, as they did below, that First Response has no liability for this incident, and also concede this claim only is as to Mr. Williams, not Mr. Combs.

establishments, including Maker's, through the use of exactly the tactics employed against Mr. Williams in this incident. This leaves more than enough for a reasonable juror to conclude that Cordish's and ECI's segregationist directives were followed in the Maker's incident, in violation of § 1981, victimizing Mr. Williams.

Glen Cusimano, former security liaison for the entire District, explained Cordish and ECI's scheme in great detail, personally directed by ECI's Jacob Miller and Cordish's Nick Benjamin since at least 2009, to prevent African-Americans from patronizing the LiveBlock's establishments, a policy common among Cordish districts nationwide, which was ordered of all LiveBlock establishments, and which all establishments followed. *Supra* at 6-13.

Mr. Cusimano, Thomas Alexitch, and Garron Williams confirmed that techniques included ejecting only African-Americans when there were altercations between blacks and whites and the use of young white men as "rabbits" throughout the LiveBlock to start altercations with blacks that would result in the blacks' ejection from the LiveBlock. *Supra* at 10-13. Christina Martinez and Victoria Rush, workers at respective LiveBlock establishments, echoed all of this. *Supra* at 13-15. As well, the LiveBlock was one, centrally-overseen area: a person could not patronize any of its establishments without first being admitted through its guarded entrances, and once ejected from the LiveBlock could not patronize any of its establishments thereafter. *Supra* at 7.

Cordish and ECI's control of the LiveBlock thus controlled the ability of patrons to contract with the individual establishments inside.

Viewed most favorably to Mr. Williams, what happened to him in the Maker's incident was a fruit of exactly what all of these witnesses described. While Mr. Williams was patronizing Maker's, a young white man, Cail Hendry, started an altercation with him, other whites began attacking him, security was called, and *only* Mr. Williams was physically detained and then ejected from the LiveBlock, despite numerous individuals pleading with security that the whites were to blame and Mr. Williams had done nothing wrong. *Supra* at 15-18. *Contra* the district court, viewing the evidence most favorably to Mr. Williams, he "was ejected … because of his race," not "because he was involved in a bar fight" (Aplt.Appx.1800).

The district court held it could not conclude Mr. Hendry was a "rabbit" for Cordish/ECI because Mr. Hendry claimed so, there only was evidence of "rabbits" being used at Mosaic, not Maker's, and concluding otherwise was "speculat[ion]" (Aplt.Appx.1784-86,1800). This was error.

First, while Mr. Hendry denied working for Cordish/ECI or in the District, the direct evidence that Cordish/ECI used "rabbits" to order exactly what happened to Mr. Williams to happen to black men throughout the LiveBlock, viewed most favorably to Mr. Williams, is circumstantial evidence and a reasonable inference that Mr. Hendry

*was* a "rabbit" and Cordish/ECI *were* liable, despite Mr. Hendry's claims otherwise (which a jury would be entitled to disbelieve). To hold otherwise would require ignoring the vast volume of evidence of the racial segregation that Cordish/ECI planned and implemented.

Second, Mr. Cusimano, Mr. Alexitch, and Ms. Martinez – a manager at Maker's – all testified that "rabbits" worked throughout the LiveBlock, including at Maker's. *Supra* at 11-14. Taking their direct testimony as true, as well as reasonable inferences from that testimony and all the evidence of Cordish/ECI's segregationist scheme, a reasonable juror could conclude that Mr. Hendry was lying, "rabbits" were employed at Cordish/ECI's behest to start altercations with blacks throughout the LiveBlock, including at Maker's, resulting in the blacks' prevention from patronizing LiveBlock establishments, and Mr. Hendry was one of the "rabbits."

The district court also concluded that "the security company's actions" in treating Mr. Williams differently than Mr. Hendry or the other whites and ejecting him but not them "cannot be attributed to The Cordish Defendants because there is no evidence The Cordish Defendants hired the security company," and Mr. Combs testified "Maker's Mark's bouncers ejected [Mr.] Williams – and Maker's Mark is not a party" (Aplt.Appx.1800-01). This, too, failed to view the evidence in the light most favorable to the plaintiffs.

First, just as with the conclusion about Mr. Hendry, concluding that would require ignoring the huge volume of evidence from Mr. Cusimano, Garron Williams, Ms. Martinez, Ms. Rush, and others addressed above as to Cordish/ECI's segregationist scheme and how they carried out that scheme, including through their contracted security agents and by ordering the LiveBlock establishments to carry it out. Second, Mr. Cusimano testified that Cordish/ECI hired the security company working from 2009-2010 (Aplt.Appx.375,747,785). Finally, Mr. Cusimano, Garron Williams, and Mr. Alexitch all testified that Cordish's contracted security workers were part of the scheme to exclude blacks (but not whites) during altercations. *Supra* at 7, 10-13.

There is a multitude of circumstantial evidence from which a reasonable juror could infer that Mr. Williams's detention and ejection from Maker's was entirely a result of Cordish/ECI's scheme to prevent African-Americans from patronizing establishments in the LiveBlock. The district court's conclusion otherwise was error. Mr. Williams established he was a member of a protected class, he was engaged in a protected activity at Maker's, and Cordish and ECI interfered with that activity due to their discriminatory intent.

This Court should reverse the trial court's summary judgment in favor of Cordish and ECI and against Mr. Williams, and remand this case for further proceedings.

### C. Viewing the record in the light most favorable to the plaintiffs, Cordish, ECI, and First Response interfered with Mr. Combs's right to contract in the Mosaic incident due to their discriminatory intent against African-American men.

As to the Mosaic incident, the district court held Mr. Combs's claim would survive summary judgment against Lounge KC but for its (erroneous) judicial estoppel holding (Aplt.Appx.1801-02). He was a member of a protected class and Lounge KC's employees prevented him from patronizing Mosaic under discriminatory intent (Aplt.Appx.1801-02). Unlike white patrons, he was made to stand out of line and questioned as to his identification, and then was accused of violating the "dress code" designed to exclude blacks. *Supra* at 9-10, 18-19.

The court, however, held there was "no connection between [Mr.] Combs's refusal" to Mosaic and Cordish or ECI (Aplt.Appx.1801). This, too, entirely fails to view the record most favorably to Mr. Combs.

First, it again ignores the massive volume of evidence that Cordish/ECI intentionally devised and ordered all LiveBlock establishments to implement a segregationist scheme to prevent African-Americans from patronizing any LiveBlock establishment, including Mosaic. Second, Mr. Cusimano detailed that among Cordish/ECI's "techniques" to exclude blacks ordered of all LiveBlock establishments were: (1) telling blacks "they could not enter a club because they were in violation of the dress code" when they were not; (2) questioning blacks in a way whites would not be and when blacks

objected, First Response would eject them for "displaying aggression;" and (3) forcing blacks to wait in line at clubs while they watched whites go in until they either would leave or "voice frustration," at which First Response would eject the person for displaying aggression. *Supra* at 8. Finally, Garron Williams also detailed that the dress code itself was instituted by Cordish/ECI specifically to target African-Americans and prevent them from patronizing LiveBlock establishments, including Mosaic. *Supra* at 9-10. *Cf. Dunaway*, 436 Fed.Appx. at 393-94 (dress code at nightclub was pretext for racial discrimination).

And this was exactly what happened to Mr. Combs. He was asked for ID when no whites were, made to stand aside and watch whites pass him by when no whites were, and when he inquired about this, was told his pants were "too f***ing baggy," despite being well-dressed and already having been admitted to the LiveBlock. When he asked to speak with a manager, he was accused of displaying aggression and ejected from the LiveBlock completely. *All* of this was ordered by Cordish/ECI. The district court's conclusion that these facts "reveal no connection" with Cordish/ECI was error.

The district court also held First Response could not be liable for this incident because, while it was Cordish's security contractor at the time and its guards ejected Mr. Combs, "it was employees of the Mosaic Lounge who declined to admit [Mr.] Combs, and that decision had been

made and communicated to [Mr.] Combs before any security guards arrived" (Aplt.Appx.1802). This, too, was error.

First, this ignores that Mr. Combs's claim is not merely that the defendants prevented him from patronizing Mosaic, but the LiveBlock at all, and First Response's employees plainly prevented him from patronizing any of its establishments. Second, this ignores the volume of evidence from Mr. Cusimano and Garron Williams that First Response obeyed Cordish/ECI's orders to exclude blacks from the LiveBlock by targeting them as aggressors and was complicit in the segregationist scheme by performing the actual ejections with full knowledge of the racist intent. *Supra* at 7-13. Finally, it ignores the testimony of First Response's director, Lisa O'Brien, that its job was to carry out Cordish/ECI's wishes and she burned its "ejection log" after noting "the numbers of blacks we eject" it showed "wouldn't look good." *Supra* at 10-11.

There is a multitude of circumstantial evidence from which a reasonable juror could infer that Mr. Combs's refusal of admittance to Mosaic and ejection from the LiveBlock were entirely a result of Cordish/ECI's scheme to prevent African-Americans from patronizing establishments in the LiveBlock, and First Response was complicit in doing so. The district court's conclusion otherwise was error.

The Court should reverse all defendants' summary judgment against Mr. Combs and remand this case for further proceedings.

### D. Viewing the record in the light most favorable to the plaintiffs, Cordish, ECI, and First Response interfered with Mr. Combs's right to contract in the Tengo incident due to their discriminatory intent against African-American men.

The district court held the defendants were entitled to summary judgment on Mr. Combs's claim as to the Tengo incident primarily because he "was not engaged in a protected activity" – he "was not even trying to enter the establishment," "had not even determined that he was going to enter the establishment," and "was not in line to enter" (Aplt.Appx.1802). It held this was because, "in the retail context" a plaintiff "must demonstrate that that he or she actively sought to enter into a contract with the retailer, and made a tangible attempt to contract" (Aplt.Appx.1802) (quoting *Gregory*, 565 F.3d at 470).

But this was not "the retail context." It was in the context of patronizing a bar, restaurant, or similar establishment. While this Court has not yet encountered a § 1981 claim in this context, every other circuit that has holds it is different and this is not required. *See Dunaway*, 436 Fed.Appx. at 391-92; *Watson*, 915 F.2d at 243; *Wyatt*, 819 F.2d at 70. Moreover, Mr. Combs testified he *did* intend to enter and patronize Tengo and merely stopped to confirm his friends were there; if they were at a different LiveBlock establishment, he would have entered and patronized that establishment (Aplt.Appx.793,1118,1130,1132,1153,1448). As in *Dunaway*, *Watson*,

and *Wyatt*, that intent was enough: he sought to patronize a LiveBlock establishment, and discriminatorily was prevented from doing so.

The district court also held that, "even if Combs was engaged in protected activity," there was no evidence that the defendants "interfered with his ability to contract" (Aplt.Appx.1802). It held this was because there was "no evidence … that the unidentified person who caused [Mr. Combs] to drop his cell phone was a rabbit," and "no evidence … that any of the Defendants had anything to do with the hiring of the rabbit" (Aplt.Appx.1802-03).

Effectively, the district court required that, to prove this, the white person – who did not "cause Mr. Combs to drop his cell phone" but instead intentionally knocked it out of Mr. Combs's hand (Aplt.Appx.793,1130-31,1386) – would have had to say to Mr. Combs, "Hi, I've been hired by Cordish and ECI to start altercations with African-Americans in the LiveBlock so that First Response's guards will eject them and prevent them from patronizing establishments here." Thankfully for the enforceability of § 1981, that is not and never has been the standard. The question is whether there is "direct or indirect (circumstantial) evidence" of "intentional race discrimination …." *Putman*, 348 F.3d at 734.

Here, just as with Mr. Hendry and the Maker's incident involving Mr. Williams, there is a multitude of circumstantial evidence from which a reasonable juror could conclude that Mr. Combs was the victim

of Cordish/ECI's "rabbit" scheme. Mr. Cusimano, Mr. Alexitch, and Ms. Martinez all explained how the "rabbit" scheme, directly devised, implemented, and ordered by Cordish/ECI, worked. *Supra* at 11-14. What happened to Mr. Combs in the Tengo incident precisely fit that scheme: a young white male purposefully started a pretextual altercation with Mr. Combs, upon which First Response ejected Mr. Combs from the LiveBlock, preventing him from patronizing any of its establishments. A reasonable inference from the evidence is that the man was a "rabbit" working under Cordish/ECI's scheme.

The district court then held in a footnote that First Response could not be liable for this anyway, because Mr. Combs could not know for sure whether the white person was ejected, too, and Mr. Combs "was arguing with the security guards, which may have accounted for any differences in the guard's reactions" (Aplt.Appx.1803). Viewed in the light most favorable to Mr. Combs, the evidence does not support this. Instead, it was Mr. Combs who spoke calmly and the white man who was belligerent, the guards listened calmly to the white man and had a conversation with him but would not allow Mr. Combs to explain what had happened, and they surrounded Mr. Combs and ejected him from the LiveBlock but did not do the same to the white man (Aplt.Appx.793,1132-33,1191,1193,1199).

Finally, the district court held First Response's liability could not implicate Cordish/ECI, because "none of The Cordish Defendants

contracted with First Response, so" First Response's liability "would not extend to The Cordish Defendants" (Aplt.Appx.1803). This is untrue.

First, a contractual relationship between defendants is not required for both to have § 1981 liability: only discriminatory intent and interference with a plaintiff's protected activity are. Here, the evidence of Cordish/ECI's discriminatory scheme to prevent blacks from patronizing any LiveBlock establishments, as happened to Mr. Combs in the Tengo incident, ordered upon and implemented by First Response, is glaring. *Supra* at 6-15. Second, Nick Benjamin, a Cordish officer who answered to Reed Cordish, signed First Response's security agreement (Aplt.Appx.308,788,2083). Finally, Mr. Cusimano stated it was Cordish who hired the District's security provider (Aplt.Appx.785).

There is a multitude of circumstantial evidence from which a reasonable juror could infer that the white man's starting an altercation with Mr. Combs outside Tengo and Mr. Combs resultant ejection from the LiveBlock were entirely a result of Cordish/ECI's scheme to prevent African-Americans from patronizing establishments in the LiveBlock, and First Response was complicit in carrying it out. The district court's conclusion otherwise was error.

This Court should reverse the trial court's summary judgment against Mr. Combs as to all defendants and remand this case for further proceedings.

## Conclusion

This Court should reverse the district court's judgment against Mr. Williams in favor of Cordish and ECI and its judgment against Mr. Combs in favor of all the defendants, and should remand this case for further proceedings.

Respectfully submitted,

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**Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,954 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally spaced typeface, Century Schoolbook size 14 font, using Microsoft Word 2016.

I further certify that the electronic copies of both this Brief of the Appellant and the Addendum filed via the Court's ECF system are exact, searchable PDF copies thereof, that they were scanned for viruses using Microsoft Security Essentials and, according to that program, that they are free of viruses.

/s/Jonathan Sternberg
Attorney

## Certificate of Service

I certify that, on February 9, 2016, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system.

/s/Jonathan Sternberg
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