IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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WILLIAM F. HASSAY, JR.,		
	*	
Plaintiff,		
	*	
v.		Civil Action No. 13-cv-01076-ELH
	*	
MAYOR AND CITY COUNCIL OF OCEAN CITY, MARYLAND, *et al*.,	*	
	*	
Defendants.	*	

* * * * * * * * *

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER PRELIMINARILY ENJOINING ENFORCEMENT OF DEFENDANT OCEAN CITY'S UNCONSTITUTIONAL NOISE ORDINANCE

On May 28, 2013, Defendants filed their opposition (ECF No. 20) (the "**Opposition**") to *Plaintiff's Motion for an Order Preliminarily Enjoining Enforcement of Defendant Ocean City's Unconstitutional Noise Ordinance* (ECF No. 2) (the "**Motion**").[1] Plaintiff, by his undersigned attorneys, respectfully submits this memorandum of law in reply to that Opposition.

PRELIMINARY STATEMENT

> **"We've written our ordinance probably more strenuous than we're going to get away with." - Ocean City Mayor Richard Meehan (May 20, 2013)**[2]

At issue in this case is a recent amendment to Ocean City's Noise Ordinance that effectively bans street performers from playing music on the Boardwalk. The Noise Ordinance contains two main sections. The first section, which has been in force for years, generally prohibits all unreasonable noise. The second section declares certain types of sound to be

[1] Capitalized terms that are not otherwise defined herein have the meanings ascribed to them in Plaintiff's memorandum of law in support of the Motion (ECF No. 2-1) (the "**Memo**").

[2] Video: Mayor and City Council Regular Session (May 20, 2013), at Part 1, 01:59:42-01:59:59, http://www.oceancitymd.gov/City_Clerk/videofiles/2013/20130520.html.

unreasonable per se and thus prohibited, including sound from musical instruments or devices that is audible from a distance of 30 feet. This targeted restriction on music—which Plaintiff refers to as the 30-Foot Audibility Restriction—was added in 2012. Violation of the new restriction is a criminal offense punishable by up to three months imprisonment and a $500 fine.

The preliminary injunction Plaintiff is requesting is limited in scope. (*See* ECF No. 2-7.) Plaintiff only requests that the Court enjoin Defendants from enforcing the 30-Foot Audibility Restriction. The preliminary injunction will have no effect on Defendants' ability to enforce every other aspect of the Noise Ordinance, including the first section's general prohibition on unreasonable noise. Thus, the question posed by the Motion is *not* "whether the Court should enjoin the Town from enforcing its Noise Ordinance and thus nullify the Town's ability to protect its citizens from unreasonable and intrusive levels of noise." (*Cf.* Opposition at 3.) Rather, it is whether the 30-Foot Audibility Restriction violates the First Amendment by restricting music that is not excessively loud. The answer to that question can only be "yes."

The 30-Foot Audibility Restriction is substantially broader than is necessary to achieve Defendants' interest in controlling excessive noise. This is demonstrated by the findings of Mr. Gary Ehrlich, a professional acoustical engineer, which show that, in the Boardwalk's ambient environment, audibility at a distance of 30 feet is an invalid threshold for identifying excessively loud music.[3] It is also confirmed by street performers' reports that the 30-Foot Audibility Restriction substantially impairs their ability to exercise their First Amendment rights to play music on the Boardwalk—an established public forum. (*See* Affidavit of William F. Hassay, Jr., ECF No. 2-2 ("**Hassay Aff.**"); Declaration of Mark Chase, ECF No. 12-1.)

[3] As discussed below, Mr. Ehrlich conducted additional testing on May 30, 2013 and confirmed that there was no material change from his original March 20, 2013 findings. (*See generally* Supplemental Declaration of Gary Ehrlich, Ex. A ("**Ehrlich Supp. Dec.**").)

Defendants make no meaningful attempt to rebut Plaintiff's showing. Instead, Defendants brazenly assert that this Court may not "second-guess" their decision to enact the 30-Foot Audibility Restriction. That, of course, is not the law. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Yet, that is precisely what Defendants have done here. Indeed, the 30-Foot Audibility Restriction is so overbroad that Plaintiff cannot legally play a violin—the means by which he expresses himself.

Accordingly, Plaintiff is likely to succeed on the merits of his First Amendment claims. Plaintiff thus respectfully requests that the Court grant the Motion and preliminarily enjoin Defendants from enforcing the 30-Foot Audibility Restriction.

ARGUMENT

I. MR. HASSAY IS LIKELY TO SUCCEED ON THE MERITS OF HIS FIRST AMENDMENT CLAIMS.

A. The Noise Ordinance is Not Content Neutral and, Therefore, the Court Should Apply Strict Scrutiny.

As a threshold issue, the Court ordinarily must determine what level of constitutional scrutiny to apply when conducting its analysis. (*See* Memo at 11-12.) Here, however, Defendants acknowledge that the 30-Foot Audibility Restriction is subject to at least "intermediate scrutiny." (Opposition at 5.) Because the 30-Foot Audibility Restriction fails to satisfy even that standard, the Court need not decide whether to apply the still more exacting "strict scrutiny" standard. *Cf. Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 626 n.23 (D. Md. 2011) ("Because the City has not met its burden of justifying [§] 62-5(b)(10) under intermediate scrutiny, I need not determine whether [it] is . . . subject to strict scrutiny.").

To the extent that the Court is nevertheless inclined to reach the issue of what level of scrutiny it should apply, Defendants acknowledge that "strict scrutiny" is warranted if the 30-Foot Audibility Restriction "is shown to be a content-based restriction." (Opposition at 5.) On its face, the 30-Foot Audibility Restriction discriminates based on content. To determine whether the 30-Foot Audibility Restriction applies to a given sound, one must first consider the content of the sound and ask whether it is sound played from musical instruments or other devices or is instead yelling, shouting, hooting, whistling, or singing, for example, which is subject to a different 50-foot audibility restriction. *See* Noise Ordinance, Div. 2, § 30-272(3)b.

Defendants' purported justification for the 30-Foot Audibility Restriction is protecting visitors' and citizens' "comfort, repose, health, peace, and safety." (*See* Opposition at 12.) But nowhere in Defendants' Opposition do they offer any explanation as to why they believe music is more disturbing to visitors' and citizens' "comfort, repose, health, peace and safety" than other sounds that are permitted to be audible at a distance of 30 feet on the Boardwalk. Indeed, no rational explanation exists. (*See* Declaration of Gary Ehrlich ("**Ehrlich Original Dec**."), ECF No. 2-3, Ex. A, at 6 ("We are unaware of any reason why noise from musical instruments or . . . devices would be considered more annoying to the average person than would noise from singing, yelling, etc.").) Instead, Defendants try to evade Plaintiff's argument that the 30-Foot Audibility Restriction is under-inclusive, and thus constitutionally suspect,[4] in three ways.

First, Defendants misrepresent that the Noise Ordinance "sets a uniform volume restriction" by misleadingly asserting that "sound emanating from musical instruments or other

[4] *Cf. Fla. Star. v. B. J. F.*, 491 U.S. 524, 540 (1989) ("[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact, serving with this statute, the significant interests which appellee invokes in support of affirmance."); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984) ("The patent . . . underinclusiveness of [the] ban undermines the likelihood of a genuine governmental interest . . . .") (quotation omitted).

devices is . . . subject to a 50 foot audibility restriction between midnight and 7:00 a.m." and that "[t]his is the same restriction applied to other noise (yelling, shouting, hooting, whistling, or singing)." (Opposition at 8-9 (emphasis omitted).) In truth, the 50-foot audibility restriction to which Defendants refer only applies to sound from musical instruments or devices located in a "building, structure or vehicle," and not to sound from musical instruments or devices *on the Boardwalk*. *See* Noise Ordinance, Div. 2, § 30-272(2)c. The Noise Ordinance imposes a different restriction on sound from musical instruments or devices played on the Boardwalk—the 30-Foot Audibility Restriction—which plainly is not "the same" as the 50-foot audibility restriction that governs yelling, shouting, hooting, whistling, or singing. *Compare* Noise Ordinance, Div. 2, § 30-272(2)b *with id.* § 30-272(3)b. A "Public Advisory" created by Ocean City's Police Department explains the distinction in simple terms:

> Performances must be in compliance with the Noise Ordinance
> (30' Amplification, Musical Instruments / 50' Singing)

(Hassay Aff., Ex. A (Ocean City Police Department, "OCPD Public Advisory Regarding Street Performers and the New Noise Ordinance" ("**OCPD Public Advisory**").)[5] Thus, Defendants' representation that the restrictions set by the Noise Ordinance are "uniform" is patently false.

Second, Defendants compare the 30-Foot Audibility Restriction to other restrictions "in the majority of the Town" and argue that it is justified by "the uniqueness of the boardwalk compared to the rest of the Town." (Opposition at 9.) But this argument lacks merit as well. The relevant inquiry for determining whether Defendants' purported justification for the 30-Foot

[5] It is unclear at what hours of the day the 50-foot audibility restriction on yelling, shouting, hooting, whistling, or singing applies. The Noise Ordinance states that it applies between midnight and 7:00 a.m. Noise Ordinance, Div. 2, § 30-272(3)b. But the OCPD Public Advisory does not acknowledge that limitation. To the extent that it only applies between midnight and 7:00 a.m., that limitation also sets it apart from the 30-Foot Audibility Restriction on sound from musical instruments or devices on the Boardwalk, which applies all day.

Audibility Restriction explains their disparate treatment of music versus other sounds is not how the Boardwalk compares to the rest of Ocean City, but how music compares to the other sounds.

Third, Defendants contend that Plaintiff's argument "is the same argument that was rejected by this Court in [*Chase v. Town of Ocean City*, 825 F. Supp. 2d 599 (D. Md. 2011)]." (Opposition at 7.) But Defendants know that is not true. The Court's decision in *Chase* did not address Ocean City's Noise Ordinance and, what is more, the 30-Foot Audibility Restriction that is the focus of Plaintiff's argument was not even adopted until after the *Chase* case concluded.[6]

Nevertheless, comparison to the *Chase* case is instructive. There, the Court was asked to review an ordinance in the Ocean City Code that restricted peddling, soliciting, hawking and street performing to certain locations on the Boardwalk. 825 F. Supp. 2d at 618. The plaintiff argued that the ordinance was content-based because the same restriction did not apply to other varieties of speech or expressive conduct. *Id.* The Court rejected that argument based on credible testimony from Ocean City's witnesses that the activities subject to the restriction posed special concerns for public safety and the management of the free flow of pedestrian traffic on the Boardwalk because they tended to attract gathered, stationary crowds. *Id.* at 619-20. Here, in contrast, Ocean City has failed to identify any special concerns that distinguish the types of sound that are subject to the 30-Foot Audibility Restriction (music played from instruments or devices) from the types of sound that are not (e.g., singing). Thus, this case is not controlled by *Chase* but rather by *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) and its progeny. As this Court recognized, Cincinnati's "sin" in *Discovery Network* was that it imposed greater restrictions on newsracks that distributed commercial handbills despite the fact that

[6] It was just four months after the Court issued its opinion enjoining Ocean City's permitting scheme for street performers that Ocean City began considering the amendment to its Noise Ordinance that later became the 30-Foot Audibility Restriction. (*See* Memo at 6.)

"[t]here were no secondary effects attributable to the [restricted] newsracks that distinguished them from the newsracks Cincinnati permit[ted] to remain on its sidewalks." *Chase,* 825 F. Supp. 2d at 619 (quotation omitted). Given that there are no secondary effects attributable to music played from instruments or devices that distinguish it from other sounds permitted to be audible at distance of 30 feet on the Boardwalk, Defendants are guilty of the same sin here.[7]

Accordingly, the Court should apply strict scrutiny when conducting its analysis. Ultimately, Defendants cannot satisfy that standard because they cannot show that the 30-Foot Audibility Restriction is a "precisely drawn means of serving a compelling interest." *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980). Indeed, as discussed in Plaintiff's Memo and below, the 30-Foot Audibility Restriction fails even intermediate scrutiny.

B. <u>The Noise Ordinance is Unconstitutional Under Even Intermediate Scrutiny</u>.

1. The Noise Ordinance is Not Narrowly Tailored.

Assuming intermediate scrutiny applies, Defendants bear the burden of proving that the 30-Foot Audibility Restriction does not "regulate speech in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. They cannot satisfy that standard.

Instead, Defendants pay lip service to that established First Amendment principle, arguing that "dalliances into hypothesizing how much control of the volume of noise is appropriate should not be entertained by the Court" and that the Court may not "second-guess

[7] Defendants' disparate treatment of music as compared to other sounds also distinguishes this case from *Ward*. Defendants quote portions of the opinion in *Ward* in which the Supreme Court held, on the facts of that case, that the government's interest in regulating noise "had nothing to do with content, and . . . satisf[ied] the requirement that time, place, and manner regulations be content neutral." (Opposition at 6 (quoting *Ward*, 491 U.S. at 792).) In *Ward*, however, there was no suggestion that the government was treating music disparately from other sounds, and thus no reason to suspect that the government's justification was actually a pretext.

the Town's decision as to how much control of sound is necessary." (Opposition at 13, 14.) Defendants misleadingly excerpt portions of the Supreme Court's opinion in *Ward* for support, but, when read in context, those excerpts "do[ ] not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests" and they only apply "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 799, 800. Thus, Defendants' false contention that the Court may not "second-guess" them just begs the question: Is the 30-Foot Audibility Restriction substantially broader than is necessary to achieve Defendants' legitimate interest in controlling excessive noise? The evidence shows that it is.

Defendants' position that the 30-Foot Audibility Restriction is narrowly tailored cannot be reconciled with fact that the Noise Ordinance does not prohibit other sounds when they are similarly audible at a distance of 30 feet on the Boardwalk. As discussed above, the Noise Ordinance does not prohibit "yelling, shouting, hooting, whistling or singing" unless it is audible at a distance of 50 feet. Noise Ordinance, Div. 2, § 30-272(3)b. There is no reasoned basis for imposing a greater restriction on music played from instruments or devices. (*See* page 4 *supra*.) *Cf. Chase*, 825 F. Supp. 2d at 625 (holding that an Ocean City ordinance which "prohibit[ed] commerce only by persons situated on the boardwalk itself" was not narrowly tailored because "it is well known that Ocean City's boardwalk is host to a veritable bazaar of commercial activity from the shops and attractions that line it" and "Ocean City did not present any evidence explaining the rationale for allowing peddlers, hawkers, solicitors, or street performers to . . . collect tips, while barring the sale of expressive material in those same locations").

Moreover, Mr. Gary Ehrlich's March 2013 acoustical analysis of the Boardwalk's ambient environment demonstrated that music from instruments or devices that is just audible at

a distance of 30 feet (or even farther) would not be any louder than various other sounds created by the normal pattern of activity at the Boardwalk. (*See* Memo at 16-18.) Mr. Ehrlich's findings are proof that the 30-Foot Audibility Restriction prohibits music that cannot be considered excessively loud and that the Defendants have no legitimate interest in prohibiting. (*Id*.)

Mr. Ehrlich's March 2013 analysis also demonstrated that the unnecessary burden on musical performers' speech would be substantial because it is "infeasible" for any performer to comply with the 30-Foot Audibility Restriction insofar as "the sound of all musical instruments and . . . devices would be audible at 30 feet." (Ehrlich Original Dec., Ex. A at 6.) The actual experiences of Plaintiff and other performers on the Boardwalk confirm Mr. Ehrlich's analysis. (*See generally* Hassay Aff.; Declaration of Mark Chase, ECF No. 12-1.)

Defendants argue that Mr. Ehrlich "fail[ed] to take into account the unique problems presented by the boardwalk during the Town's busy season" in the summer months. (Opposition at 14.) In doing so, Defendants ignore that the 30-Foot Audibility Restriction applies to the Boardwalk year-round, not just in the summer months, and that they bear the burden of proving that any "unique problems" during the summer months would produce different findings. *Cf. Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) ("Since the State bears the burden of justifying its restrictions, it must affirmatively establish the . . . fit we require.") (citation omitted). Conspicuously, Defendants failed to offer any acoustical analysis in rebuttal.

In any event, Mr. Ehrlich has since confirmed his original findings by conducting additional testing in the evening on Thursday, May 30, 2013, which was after Memorial Day—the start of the summer season. Once again, Mr. Ehrlich found that "[v]irtually all ambient sounds are audible at distances greater than the noise ordinance limit of 30 feet." (Ehrlich Supp. Dec., Ex. A., at 3.) Some of the sounds audible at distances greater than 30 feet included

children's footsteps, normal conversational speech, flags flapping in the wind, and a bicycle.[8] (*Id.*) Because "the sound of all musical instruments and sound amplification devices would be audible at 30 feet," Mr. Ehrlich again concluded that it would be "infeasible" for a musical performer to comply with the 30-Foot Audibility Restriction (*Id.*) Indeed, Mr. Ehrlich observed two performers and "[b]oth were audible at distances far greater than 30[feet]." (*Id.*)

Defendants' other responses in support of the 30-Foot Audibility Restriction emphasize two specific ways that it serves their interest by: (1) deterring performers from competing for attention by increasing their volumes in a "battle of the bands scenario," and (2) protecting residences, hotels, and park benches that are located within 30 feet of where performers play. (*See* Opposition at 9-10, 15-16.) Here again, Defendants miss the point. Defendants' interest in controlling excessive noise is undisputed. The relevant question is whether the 30-Foot Audibility Restriction is substantially broader than is necessary to achieve that interest. Defendants' responses do not answer that question. Indeed, any noise ordinance would deter performers from increasing their volumes beyond the limit specified in the ordinance, whether in a "battle of the bands scenario" or otherwise. Defendants must prove that an ordinance that is substantially less restrictive than the 30-Foot Audibility Restriction could not prevent performers from increasing their volume beyond the point at which it becomes excessive.[9] Here, they did not. Similarly, Defendants have no legitimate interest in protecting residences, hotels, and park

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[8] *Cf. Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006) (holding that an ordinance that prohibited all noise audible at 25 feet "restrict[ed] considerably more than is necessary to eliminate excessive noise" based on expert testimony that "the decibel level of speech that would comply with the 25 foot rule was often lower than the decibel level generated by the foot steps of a person in high heeled boots, conversation among several people, the opening and closing of a door, the sounds of a small child playing on the playground, or the ring of a cell phone").

[9] It bears mention that the "battle of the bands scenario" that Defendants lament is a product of their own creation insofar as Defendants confine performers within limited spaces. (*See* Memo at 4.)

benches located within 30 feet of performers from all sound; just sound that is excessive.[10] Yet, Defendants did not prove that an ordinance that is substantially less restrictive than the 30-Foot Audibility Restriction could not protect such locations from excessive sound.

In sum, Defendants' Opposition fails to satisfy Defendants' burden of proving that the 30-Foot Audibility Restriction does not "regulate speech in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. For this reason alone, Plaintiff is likely to prevail on his First Amendment claims.

2. There Are Not Adequate Alternative Channels for Communication.

Defendants' Opposition also fails to satisfy their burden of proving that the 30-Foot Audibility Restriction "leave[s] open ample alternative channels for communication" for performers such as Plaintiff. *Ward*, 491 U.S. at 791. Defendants baldly assert that the 30-Foot Audibility Restriction is "merely a restriction on volume which allows music to be played at all times." (Opposition at 16.) But Defendants do not point to any evidence that it is actually feasible for a musical performer to comply with the restriction. Based on acoustical analysis of the Boardwalk's ambient environment, Mr. Ehrlich twice concluded that it is not. (*See* Ehrlich Supp. Dec., Ex. A at 3.) Thus, while the 30-Foot Audibility Restriction may masquerade as a restriction on volume, in effect it is tantamount to a total ban on street performers playing music from instruments or other devices and leaves such performers with inadequate alternatives to communicate their expressive messages on the Boardwalk. (*See* Memo at 19-20.) For this reason as well, Plaintiff is likely to prevail on his First Amendment claims.

[10] In fact, Ocean City's Municipal Charter only authorizes the Mayor and City Council to regulate noise that is "excessive." Ocean City, MD, Code, Part I, Title XIV, § C-1403.B.

CONCLUSION

Defendants have failed to meet their burden of proving that the 30-Foot Audibility Restriction complies with the First Amendment. Indeed, Ocean City Mayor Richard recently admitted that he and the City Council had "written our ordinance probably more strenuous than we're going to get away with."[11] Plaintiff thus respectfully reiterates his request that this Court (i) grant the Motion, (ii) enter an order preliminarily enjoining Defendants from enforcing the 30-Foot Audibility Restriction during this case, and (iii) award such other relief as is proper.

Dated: June 5, 2013
Washington, DC

Respectfully submitted,

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[11] *See* page 1 *supra*. Since Plaintiff filed the Motion, Ocean City's Police Department also appears to have removed the OCPD Public Advisory from the website Plaintiff cited (*see* Memo at 5), and the current guidance provided to street performers no longer states that "[a]ny person playing a musical instrument or operating a sound amplification device that can be heard at a distance of 30 feet (roughly the width of the boardwalk) or greater is in violation of the Noise Ordinance." *Compare* OCPD Public Advisory *with* City Clerk, "Street Performers Rules & Regulations," *available at* http://oceancitymd.gov/City_Clerk/StreetPerformers.pdf.

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2013, I caused a true and complete copy of the foregoing to be served on the following persons by electronic mail, and that notice of this filing will be sent to all parties that have entered appearances by operation of the Court's electronic filing system:

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