

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**MARK CHASE,** )  
 )  
 )  
1224 Guildford Road )  
Glen Burnie, Maryland 21060 )  
County of Anne Arundel )  
 )  
 )  
 )  
 )  
*Plaintiff,* )

Civil Action No. \_\_\_\_\_

v. )

**COMPLAINT**

**TOWN OF OCEAN CITY, MARYLAND,** )  
**a municipal corporation,** )  
 )  
 )  
 )  
City Hall )  
301 Baltimore Avenue )  
Ocean City, Maryland 21842 )  
County of Worcester )  
 )  
 )  
*Defendant.* )  
\_\_\_\_\_ )

COMES NOW the Plaintiff, Mark Chase, and files this Complaint against the Defendant, the Town of Ocean City, Maryland, in order to defend and secure the Plaintiff's fundamental right under the First Amendment to the United States Constitution to engage in expression within a traditional public forum. In support of this Complaint, the Plaintiff alleges and avers as follows:

**Jurisdiction and Venue**

1. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343, as it is a civil action arising under the Constitution and laws of the United States and seeks redress and relief for deprivations and/or threatened deprivations under color of state law of rights and privileges secured by the Constitution of the United States and to secure relief under an Act of Congress providing for the protection of civil rights. This Court has jurisdiction to enter a declaratory judgment under 28 U.S.C. §§

2201-2202, as there presently exists an actual controversy between the Plaintiff and the Defendant concerning the constitutionality of actions taken by the Defendant which have restricted and burdened the Plaintiff in his exercise of his rights under the First Amendment to the United States Constitution.

2. This Court has jurisdiction over the Plaintiff's claims arising under the Constitution and laws of the State of Maryland under 28 U.S.C. § 1367(a), as such claims are part of the same case or controversy giving rise to the claims over which this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

3. Venue for this action is properly in this Court under 28 U.S.C. § 1391(b), as the Defendant resides within this judicial district and the State of Maryland and a substantial part of the events or omissions giving rise to the action occurred within this judicial district.

#### **Parties**

4. The Plaintiff, Mark Chase, is an adult natural person who resides in Glen Burnie, County of Anne Arundel, Maryland.

5. The Defendant Town of Ocean City, Maryland (hereafter "Ocean City") is a municipal corporation created and existing under the laws of the State of Maryland. In all respects set forth herein, Ocean City acted under color of the law of the State of Maryland.

#### **Factual Allegations**

6. The Plaintiff is an accomplished visual artist whose medium is gloss based enamel spray paints. The Plaintiff operates under the trade name "Stellar Paintings."

7. The Plaintiff also is a street performer because he creates his paintings in the open air in the presence of the public. Because spray paints are quick drying, the Plaintiff is required to work quickly in creating his paintings and his audience is able to watch his work develop from start to finish.

Most of the Plaintiff's paintings are completed in the span of 15 minutes or less and each is a unique piece of art.

8. Because the Plaintiff's artistic performances are outdoors, he changes the location of his performances seasonally to places where a significant number of the public gathers, such as public plazas and sidewalks.

9. As a native of Maryland, the Plaintiff has settled in Ocean City, Maryland and during the spring and summer months he performs and creates paintings on the boardwalk of Ocean City.

10. The Ocean City boardwalk is a three-mile long pedestrian way that runs parallel to the Atlantic Ocean shoreline abutting Ocean City and between the ocean beach and the major streets and thoroughfares of Ocean City. The Ocean City boardwalk is in all respects like a municipal sidewalk, lined with shops and other attractions for pedestrians.

11. Since June of 2010, the Plaintiff has performed and created paintings on the Ocean City boardwalk, generally at the plaza located where North Division Street connects with the Ocean City boardwalk. The Plaintiff sets up his performance area with an assortment of spray paints, indoor/outdoor carpets to protect the ground, small ultra quiet portable generator, two heavy duty extension cords that plug into a surge protector, three work lights and various other painting supplies that are stored in plastic totes when not in use.

12. Ocean City has adopted numerous ordinances codified in the Ocean City Code of Ordinances (hereinafter "City Code") which restrict and regulate the activities of the Plaintiff and other street performers, which activities are expressive in nature and protected by the First Amendment to the United States Constitution and Article 40 of the Maryland Constitution Declaration of Rights.

13. Thus, City Code § 14-32 provides, in pertinent part, that “[n]o person shall engage in or carry on . . . , any business, occupation, or activity mentioned in this article . . . , without first having obtained from the Mayor and City Council of Ocean City a license for such business, occupation or activity.” A fee, established by the Ocean City Council, must be paid to obtain such a license and such licenses must be obtained annually. City Code §§ 14-33 and 14-34.

14. The activities for which a license must be obtained include “[a]rt dealer and gallery,” City Code § 14-34(b)(2).

15. City Code § 62-1 also provides that “no person shall engage in or carry on in Ocean City, Maryland, the business, occupation or activity of solicitor, distributor, peddler or hawker of any merchandise or commodity upon the streets or sidewalks of Ocean City, without first having obtained a license for such business, occupation or activity as provided in chapter 14, article II” (i.e., City Code §§ 14-31 et seq.). Otherwise, in order to engage in this activity a person must register with the City Clerk, take an oath and pay an administrative fee in order to obtain an identification tag and permit to engage in such activity. Persons may register and obtain such a permit only during normal business hours, or between 10:00 a.m. and 2:00 p.m. the day preceding a holiday. City Code § 62-3.

16. This article of the City Code further provides that “[i]t is unlawful for any person, upon the boardwalk or its benches, stairs and other fixtures, to engage in the public sale, rental or exchange for a donation of any goods, wares, merchandise, foodstuffs, refreshments or other commodities or services.” City Code § 62-2.

17. City Code § 62-4 also provides that “[i]t shall be unlawful for any person upon the boardwalk or upon its benches, ramps, stairs and other fixtures or upon the Caroline Street pad, or other street-end pads adjoining the boardwalk or upon any other publicly owned surface or street situated

within 75 feet of the edge of the boardwalk, or upon South Division Street from Philadelphia Avenue west to the Bay or upon South First Street from Baltimore Avenue east to the Boardwalk to engage in the public sale, rental or exchange for a donation of any goods, wares, merchandise, foodstuffs, refreshments or other commodities or services.”

18. Additionally, City Code § 62-5 regulates activities upon the boardwalk, making it unlawful for any person engaged in peddling, soliciting, hawking or street performing on the boardwalk to, inter alia, “[e]xercise or perform such activity or display in any area of the boardwalk other than within the area encompassed in the extended boundaries of the street ends,” “conduct sales or exchanges as prohibited by section 62-4 hereof,” “[s]et a price or fee or accept same for observing or participating in a display or performance, other than being a tip the amount of which is not solicited,” or “[h]andout or distribute any advertising or promotional material which promote an activity, product or service other than that which the peddler, solicitor, hawker, or street performer is engaged in as an integral part of the display or performance[.]”

19. Until June 20, 2011, the prohibition contained in City Code § 62-5 exempted “the area encompassed in the extended boundaries of the street ends.” However, at its June 20, 2011 meeting, the Ocean City Council adopted an ordinance amending City Code § 62-5(b)(1), which excluded from the exemption “the area encompassed within the extended boundaries from the south side of the boardwalk ramp on the south side of N. Division Street to the north side of the boardwalk ramp on the north side of N. Division Street, where such activity is also prohibited.” This enlargement of the prohibition on street performances encompasses the area where the Plaintiff generally set up for his artistic performances.

20. The provisions of the City Code set forth in ¶¶ 13 through 18 have been applied by Ocean City and its employees, agents and officers responsible for enforcement of the law against the Plaintiff to

restrict and burden the Plaintiff in the exercise of his art and other expressive activity that is protected by the First Amendment to the United States Constitution and by Article 40 of the Maryland Constitution Declaration of Rights.

21. The Plaintiff has been informed by Ocean City officials that before he may set up on the boardwalk or on other public sidewalks and areas within Ocean City, he must first obtain approval to do so from the City Clerk at City Hall. Such approval requires appearing before the City Clerk during regular business hours, presenting proof of identity (such as a driver's license) and providing other information and paying a fee of \$17.00 to Ocean City. The City Clerk, at his or her sole discretion, provides a permit that allows the Plaintiff to engage in his art and street performance on the boardwalk or other public places within Ocean City.

22. The permit process described in ¶ 20 is required of all persons who wish to engage in street performance or other expressive activities protected by the First Amendment to the United States Constitution and Article 40 of the Maryland Constitution Declaration of Rights.

23. The Plaintiff has been an outspoken critic of the restrictions placed on street performers by Ocean City. He has appeared before the Ocean City Council on several occasions and asserted that the restrictions imposed upon street performers and other persons engaged in constitutionally-protected expression on the Ocean City boardwalk are unconstitutional. The Plaintiff has provided the Ocean City Council and other Ocean City officials with legal precedent showing that the restrictions placed on him and other street performers violate the First Amendment to the United States Constitution.

24. On Saturday May 7, 2011 at approximately 2:00 p.m. the Plaintiff had set up his painting equipment on the boardwalk to begin to paint. In connection therewith he posted a sign setting forth the prices at which he would sell his artwork to passersby.

25. Soon after he set up, the Plaintiff was then approached by Ocean City police officers who told him he must remove the sign because of city ordinances forbidding the sale of goods or wares upon the boardwalk. Due to the threat of prosecution and possible arrest, the Plaintiff involuntarily removed his sign.

26. On this occasion the Plaintiff also was told by the Ocean City police officers that he was forbidden from orally informing passersby of the price at which he would sell paintings to them. The police officers informed the Plaintiff he must wait for an offer of money as a tip before he could accept any money for his artwork and performance.

27. On June 21, 2011, the Plaintiff came to the Ocean City boardwalk and began to set up, as described in ¶ 11 above, at about 3:30 p.m. across from the Ripley's Believe It or Not Museum near the terminus of Wicomico Street. The previous evening, the Plaintiff had been told by Ocean City Council member Doug Cymek that he could locate his art performance at this spot.

28. At about 4:00 p.m., the Plaintiff was approached by Officer Vicki Martin of the Ocean City Police Department. Officer Martin informed the Plaintiff that he must shut down and move his set up or he would be arrested. When the Plaintiff asked why, he was told that a complaint was made about the smell of his spray paints. At that time, the Plaintiff had not begun to use his paints. The Plaintiff later learned that the complaint had come from a Caruso food shop that was 50 feet upwind of and on the opposite side of the boardwalk from where the Plaintiff attempted to set up.

29. Officer Martin also told the Plaintiff that a tram car driver had complained that the Plaintiff's activity could potentially cause a hazard. The place at which the Plaintiff had set up was at least 15 feet from the normal tram car travel passage area, and at the time he was told he posed a hazard the Plaintiff had not begun performing and no crowds had gathered.

30. The Plaintiff asked Officer Martin if he could call Councilman Cymek about this to clarify what he was told the previous evening, but she refused to allow the Plaintiff to make the call. Officer Martin did radio for her superior officer to come to the scene as requested by the Plaintiff.

31. As the Plaintiff and Officer Martin waited for the other officer to arrive, Officer Martin stated that the Plaintiff's desired activity also violated a provision of Maryland law.

32. Ocean City Police Department Officer Jeff Heiser arrived at the scene and confirmed Officer Martin's order that the Plaintiff remove the equipment and materials he had set up and that he not engage in his performance at this spot.

33. When the Plaintiff pointed out that he had no other viable options for his set up, Officer Heiser told the Plaintiff that this area is not considered a street and that the Plaintiff is not allowed to perform there even with Councilman Cymek's permission and even if his activity did not pose a hazard.

34. Officer Heiser further gave the Plaintiff a direct order that he may not perform on North Division street and that if the Plaintiff did set up there he would be arrested.

35. The Plaintiff was wholly prevented from engaging in his performance and expression on June 21, 2011.

36. After shutting down on June 21, 2011, the Plaintiff spoke to another Ocean City Police Department officer while walking along the boardwalk. This officer told the Plaintiff that they would continue to shut him down no matter where he located if even a single complaint were received about the Plaintiff.

37. The actions taken against the Plaintiff on May 7 and June 21, 2011 and threat to continue to shut down the Plaintiff's performances no matter where he sets up, based on any complaint about him, whatever the reason for the complaint and however unreasonable, are in retaliation for the



Plaintiff's speech and activism against the restrictions imposed upon street performers and others engaged in constitutionally protected activity.

**First Cause of Action**

U.S. Const. Amend. 1 – 42 U.S.C. § 1983

38. The Plaintiff realleges and incorporates by reference the allegations in ¶¶ 1-37 set forth above.

39. The Plaintiff's activities of creating artwork in public constitute speech and expression protected by the First Amendment to the United States Constitution.

40. The Ocean City boardwalk, sidewalks and other public areas where the Plaintiff sets up and creates graphic artworks constitute public forums where speech and expression are presumptively allowed under the First Amendment.

41. The provisions of the Ocean City Code, and in particular City Code §§ 14-31 et seq., and 62-1 et seq., on their face and as applied restrict, burden and regulate the Plaintiff and other members of the public in the exercise of their rights under the First Amendment to engage in speech and expression within public forums located within Ocean City.

42. The provisions of the Ocean City Code, and in particular City Code §§ 14-31 et seq. and 62-1 et seq., are unconstitutional and violate the First Amendment to the United States Constitution, both on their face and as applied to the Plaintiff and other members of the public, because such provisions of the Ocean City Code (a) require a person obtain, for a fee, a permit and/or license before engaging in speech and expression in public forums within Ocean City, (b) forbid the Plaintiff and others from selling works of art or other expressive material to the public within public forums within

the Ocean City, and (c) wholly forbid certain activities that constitute speech and expression protected by the First Amendment to the United States Constitution.

43. The restrictions and burdens imposed by the Ocean City Code, and in particular City Code §§ 14-31 et seq., and 62-1 et seq., upon the exercise of rights protected by the First Amendment to the United States Constitution are not justified by any substantial or compelling governmental interest and/or are not narrowly tailored to serve any such interest.

44. The restrictions and burdens imposed by Ocean City Code, and in particular City Code §§ 14-31 et seq. and 62-1 et seq., upon the exercise of the rights of speech and expression have deprived and continue to deprive the Plaintiff of his rights under the First Amendment to the United States Constitution.

45. The Plaintiff has been deprived of his rights under the First Amendment because he has been targeted for enforcement of restrictions on activity upon the Ocean City boardwalk and has otherwise been harassed by Ocean City officials in retaliation for his exercise of his right of free speech in speaking out against these restrictions and petitioning Ocean City to ease restrictions on street performers.

46. For these deprivations of rights, the Plaintiff is entitled to relief under 42 U.S.C. § 1983.

### **Second Cause of Action**

#### Maryland Constitution Declaration of Rights, Article 40

47. The Plaintiff realleges and incorporates by reference the allegations in ¶¶ 1-46 set forth above.

48. The Plaintiff's activities of creating artwork in public constitute speech and expression protected by Article 40 of the Maryland Constitution Declaration of Rights.

49. The Ocean City boardwalk, sidewalks and other public areas where the Plaintiff sets up and creates graphic artworks constitute public forums where speech and expression are presumptively allowed under Article 40 of the Maryland Constitution Declaration of Rights.

50. The provisions of the Ocean City Code, and in particular City Code §§ 14-31 et seq., and 62-1 et seq., on their face and as applied restrict, burden and regulate the Plaintiff and other members of the public in the exercise of their rights under Article 40 of the Maryland Constitution Declaration of Rights to engage in speech and expression within public forums located within Ocean City.

51. The provisions of the Ocean City Code, and in particular City Code §§ 14-31 et seq., and 62-1 et seq., are unconstitutional and violate Article 40 of the Maryland Constitution Declaration of Rights, both on their face and as applied to the Plaintiff and other members of the public, because such provisions of the Ocean City Code (a) require a person obtain, for a fee, a permit and/or license before engaging in speech and expression in public forums within Ocean City, (b) forbid the Plaintiff and others from selling works of art or other expressive material to the public within public forums within the Ocean City, and (c) wholly forbid certain activities that constitute speech and expression protected by Article 40 of the Maryland Constitution Declaration of Rights.

52. The restrictions and burdens imposed by the Ocean City Code, and in particular City Code §§ 14-31 et seq., and 62-1 et seq., upon the exercise of rights protected by Article 40 of the Maryland Constitution Declaration of Rights are not justified by any substantial or compelling governmental interest and/or are not narrowly tailored to serve any such interest.

53. The restrictions and burdens imposed by Ocean City Code, and in particular City Code §§ 14-31 et seq., and 62-1 et seq., upon the exercise of the rights of speech and expression have deprived

and continue to deprive the Plaintiff of his rights under Article 40 of the Maryland Constitution Declaration of Rights.

54. The Plaintiff has been deprived of his rights under Article 40 of the Maryland Constitution Declaration of Rights because he has been targeted for enforcement of restrictions on activity upon the Ocean City boardwalk and has otherwise been harassed by Ocean City officials in retaliation for his exercise of his right of free speech in speaking out against these restrictions and petitioning Ocean City to ease restrictions on street performers.


55. For this deprivation of his rights under Article 40 of the Maryland Constitution Declaration of Rights, the Plaintiff is entitled to relief.

WHEREFORE, Plaintiff prays for judgment against the Defendant as follows:

- (1) that judgment be entered finding and concluding that Ocean City Code §§ 14-31 et seq., and 62-1 et seq. are unconstitutional to the extent they (a) require a person obtain, for a fee, a permit and/or license before engaging in speech and expression in public forums within Ocean City, (b) forbid the Plaintiff and others from selling works of art or other expressive material to the public within public forums within the Ocean City, and (c) wholly forbid certain activities that constitute speech and expression protected by the United States and Maryland Constitutions;
- (2) that a declaratory judgment be entered under 28 U.S.C. §§ 2201-2201 declaring Ocean City Code §§ 14-31 et seq. and 62-1 et seq. are unconstitutional to the extent they (a) require a person obtain, for a fee, a permit and/or license before engaging in speech and expression in public forums within Ocean City, (b) forbid the Plaintiff and others from selling works of art or other expressive material to the public within public forums within

- the Ocean City, and (c) wholly forbid certain activities that constitute speech and expression protected by the United States and Maryland Constitutions;
- (3) that this Court enjoin, both preliminarily and permanently, the Defendant from enforcing Ocean City Code §§ 14-31 et seq. and 62-1 et seq. to the extent they (a) require a person obtain, for a fee, a permit and/or license before engaging in speech and expression in public forums within Ocean City, (b) forbid the Plaintiff and others from selling works of art or other expressive material to the public within public forums within the Ocean City, and (c) wholly forbid certain activities that constitute speech and expression protected by the United States and Maryland Constitutions;
- (4) that this Court enter judgment that the Plaintiff has been deprived of his rights under the United States and Maryland Constitutions and award the Plaintiff compensatory and punitive damages in an amount to be determined at trial;
- (5) that this Court order the Defendant to pay the Plaintiff's attorneys fees pursuant to 42 U.S.C. § 1988, together with the costs of this litigation; and,
- (6) that this Court grant such other and further relief as this Court may deem just and proper.

DATED this 28th day of June, 2011.

  
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