

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

June 20, 2013

The Honorable President and Members
of the Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202



Re: City Council Bill 13-0239 – Ticket Sales – Consumer Protections

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 13-0239 for form and legal sufficiency. The bill would repeal Subtitle 21 (Ticket Agencies) of Article 15 (Licensing and Regulation) and Subtitle 55 (Ticket Sales) of Article 19 (Police Ordinances) of the City Code. The bill would add Subtitle 16 (Ticket Sales) to Article 2 (Consumer Protection) of the City Code. These changes will wholly revamp the City's laws on sales of tickets to entertainment venues in Baltimore City. The bill would place a cap on the amount that an operator or its authorized sales agent could charge for admission and would require certain disclosures, including itemization of charges. It would define scalping to be the sale of a ticket over the gross ticket price, as defined in the bill. It provides for civil and criminal enforcement and allows a private cause of action if a person is damaged by the failure to make the requisite disclosures.

The Law Department has also reviewed the amendments that are proposed to be offered. These amendments would remove the cap on the amount of the charge, modify the disclosures, remove the private cause of action, delete the prohibition on scalping and modify the criminal penalties.

The law and the proposed amendments will likely withstand any challenge under the Commerce Clause of the United State Constitution. U.S. Const., art. I, §8, cl. 3. Opponents may argue that the Clause prohibits the application of a local ordinance to transactions that take place out of the enacting jurisdiction; in this case, sales of tickets to events in the City sold over the Internet. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)(invalidating a law that had the effect of controlling prices in other states); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935)(invalidating New York law that had the effect of regulating price of milk sold in Vermont); *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 669 (7th Cir. 2010)(invalidated an Indiana law that deemed a sale took place in Indiana if an out-of-state company marketed to an Indiana resident even if the transaction was consummated outside of the state); *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, 492 F.3d 484 (4th Cir. 2007)(sale of truck in Atlanta to a South Carolina resident cannot be regulated by South Carolina law); *PSINet*,

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Inc. v. Chapman, 362 F.3d 227, 240 (4th Cir. 2004)(invalidating a Virginia law that criminalized disseminating material harmful to minors over the internet because the law regulated conduct occurring outside of state borders). However, all these cases can be distinguished from this bill and the proposed amendments because these cases impacted sales or other conduct clearly occurring outside of the jurisdiction. The City seeks to regulate sales to an event that takes place within its jurisdiction. Since the transaction at issue here has a definite relationship to the jurisdiction that seeks to regulate it, the law should withstand a challenge under the Commerce Clause based on extraterritorial regulation.

Opponents may also argue that the (dormant) Commerce Clause would prohibit the City from regulating sales of tickets over the internet because the burden on interstate commerce would outweigh the putative benefits. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This argument is very weak because other City laws regulating internet activity that have a clear nexus with Baltimore City have been upheld as not violating the Commerce Clause. In *Mayor of Baltimore v. Priceline.com Inc.*, 2012 U.S. Dist. LEXIS 103186 (D. Md. 2012), the federal court upheld the application of the City's hotel tax laws on internet vendors that sold hotel rooms in the City. The Court held that "retail rental of a hotel room, whether facilitated online using interstate or international computer servers or in person at the hotel reception desk, is most sensibly viewed as a discrete event facilitated by the laws and amenities of the place of the hotel." *Id.* at *18-*19. The Court also recognized that the prices charged by the internet retailer, which included an added service fee, were "intrinsically linked to the rental of a hotel room in the City and are built into the retail price of the hotel room." *Id.* Additionally, in *Mayor & City Council v. Vonage Am. Inc.*, 569 F. Supp. 2d 535, 538-39 (D. Md. 2008), the federal court held that the City's telecommunication tax statute could reach a transaction that arguably took place outside of the City (calls that the City sought to tax were placed over the internet and did not have to be placed while the person was physically located in the City). The Court explained that the Commerce Clause's prohibition on not regulating transactions outside of the jurisdiction could not have resulted in having internet commerce be free from any local regulation. "The City's taxation of a transaction billed to a Baltimore address - where the billing address is the only currently recognized nexus that Vonage has with any locality - does not burden interstate commerce." *Id.* at 539. Similarly, a court can conclude that the purchase of a ticket to an event in Baltimore City, whether facilitated online using interstate or international computer servers or in person at the ticket counter, are sales that have a local connection and can be regulated by the City.

The bill and the proposed amendments, as applied to original ticket sellers would also withstand a challenge under the Communications Decency Act of 1996 (the "CDA"), codified in 47 U.S.C. § 230. This federal law provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Thus, the CDA would likely prevent the reach of the City's law to websites that are mere bulletin boards for the resale of a ticket. *See, e.g., Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113, 1117-18, 1125 (N.J. Sup. 2010)(case dismissed because the defendant "does not possess any tickets for sale, but only provides access to the ticket listings posted by independent ticket sellers on the TicketNetwork Exchange."); *Fehrs v. Stubhub, Inc., et al.*, (Or. Cir. Ct., Sep. 9, 2008) (case was dismissed on the grounds that Stubhub was not a

provider of internet content because it was not the owner of the tickets sold). “[A]dvertising and selling concert tickets to consumers without actually having those tickets in their possession or control” is the operative factor. The recent North Carolina case of *Hill v. Stubhub, Inc.*, 727 S.E.2d 550 (N.C. Ct. App. 2012), held that StubHub could not be liable for violating a North Carolina law that capped ticket service fees because Stubhub did not set the price of the ticket and was not otherwise materially in control of the internet content. *Id.* at 561-62.

This is different than an original ticket seller that does have the tickets in its control as the agent of the seller. The content on websites providing for the original sale of the tickets would not be information “provided by another” as that term is used in the CDA. Internet ticket sellers that actually own the tickets they sell are not merely forums for the exchange of tickets owned by others, will materially control the content of their websites and their fees will set the ultimate price for the consumer. As such, the federal act would not apply. The case of *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009), clearly states that Internet websites can be liable for content that is attributable to them. Thus, although the CDA likely prevents the City’s bill and its proposed amendments from reaching internet bulletin boards and forums for resales, such as those by StubHub, the federal law will not prevent the City’s law from reaching internet sales by ticket agents that are making primary ticket sales.

As there are no legal impediments to this bill or to the proposed amendments, the Law Department approves both for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Assistant Solicitor

cc: The Honorable Bernard C. “Jack” Young, Council President
The Honorable Carl Stokes, Councilmember 12th District
The Honorable Rochelle Spector, Councilmember 5th District
George Nilson, City Solicitor
Angela C. Gibson, Mayor’s Legislative Liaison
Elena DiPietro, Chief Solicitor
Victor Tervalá, Assistant Solicitor
Jennifer Landis, Special Assistant Solicitor