IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GARRGANNTUAN VENTURES, LLC,
d/b/a SCATZ SPORTS BAR AND
NIGHTCLUB and SCOTT PIERNOT,

OPINION AND ORDER

Plaintiffs,

11-cv-536-bbc

v.

CITY OF MIDDLETON,
BRAD KEIL and NOEL KAKUSKE,

Defendants.

- -

During the two-and-a-half years that plaintiff Scott Piernot and his company, plaintiff Garrganntuan Ventures, LLC, operated Scatz Sports Bar and Nightclub in the City of Middleton, Wisconsin, the Middleton Police Department responded to more than 500 calls and issued more than 100 citations and arrests for incidents related to the nightclub, ranging from noise complaints and traffic problems to fights, thefts and a nearby shooting. In March 2011, after the police department recommended that Scatz's liquor license be revoked, plaintiffs voluntarily surrendered the license. When plaintiffs applied for a new liquor license a few months later, the city denied the request.

In this civil rights lawsuit, plaintiffs contend that the City of Middleton and defendants Brad Keil and Noel Kakuske of the Middleton Police Department discriminated against plaintiffs because they held hip hop music events at Scatz that attracted African American patrons. Plaintiffs contend that defendants violated their right to equal protection

under the Fourteenth Amendment and freedom of expression under the First Amendment by engaging in a campaign of discriminatory enforcement and patrols of Scatz, categorizing Scatz as a public nuisance, filing formal complaints against Scatz and ultimately, by constructively revoking Scatz's liquor license and denying plaintiffs a new license. Additionally, plaintiffs contend that defendants violated their right to due process by applying Wisconsin's unconstitutionally vague "disorderly house" statute, Wis. Stat. § 125.12(2)(ag)2, and the city's related ordinance to revoke the bar's liquor license.

The case is before the court on defendants' motion for summary judgment on all plaintiffs' claims. After reviewing the parties' arguments and the evidence in the record, I conclude that plaintiffs have failed to provide evidence that any actions taken by defendants were motivated by the race of plaintiffs' patrons or by the music plaintiffs played at their nightclub. Rather, the evidence shows that defendants' actions were taken in response to public safety concerns. No trier of fact could reasonably conclude that defendants discriminated or retaliated against plaintiffs in violation of their constitutional rights. Additionally, I conclude that Wisconsin's disorderly house statute is not unconstitutionally vague and that defendants' invocation of the statute did not violate plaintiffs' right to due process. Therefore, I am granting defendants' motion for summary judgment in full.

From the parties' proposed findings of fact and the record, I find that the following facts are material and undisputed. In doing so, I note that many of plaintiffs' proposed facts are so conclusory, vague or unsubstantiated as to preclude meaningful consideration. For example, plaintiffs propose facts such as "The Middleton Police were constantly guiding SCATZ into not playing Hip-Hop music," Plts.' PFOF ¶ 7, dkt. #42; "Middleton Police

Department presence was 'completely different' when the clientele was more ethnically diverse compared to when it was almost all Caucasian," id. ¶ 9; "[One employee] noticed an excessive level of police attention on Thursday nights," id. ¶ 28; "There were always more police at SCATZ on Thursdays . . . than any other night of the week," id. ¶ 31; "[Police videotaped Scatz's front door] during times when the SCATZ had minority clientele and not during events that attracted predominantly a Caucasian crowd." Id. ¶ 54. Such vague generalizations do not satisfy the requirement under Fed. R. Civ. P. 56 that parties must set forth specific facts that are properly supported by evidence in the record. Thus, I have disregarded all proposed findings of fact that are not specific or supported by evidence in the record.

UNDISPUTED FACTS

A. The Parties

Plaintiff Scott Piernot is the owner of plaintiff Garrganntuan Ventures, LLC. He operated Scatz Sports Bar and Nightclub in the City of Middleton, Wisconsin from November 2008 until it closed in March 2011. Scatz featured many types of live entertainment, predominantly bands, and made its space available to many local charitable endeavors and organizations for the purpose of staging fund-raising events. Until it closed, Scatz was the largest nightclub in Dane County, with a permitted occupancy of 949.

Defendant City of Middleton is a Wisconsin municipal corporation. Defendant Brad Keil is the chief of police for the Middleton Police Department and defendant Noel Kakuske is a captain in the police department. The police department is charged with oversight of

establishments holding liquor licenses and with providing reports to the city's License and Ordinance committee. The committee consists of three members from the city council and makes recommendations to the council regarding licensed businesses. Typically, either defendant Keil or defendant Kakuske attends the committee's monthly meetings and provides a summary of law enforcement contacts, disturbances and citations occurring at establishments with liquor licenses.

B. 2009 Incidents Involving Scatz

Starting shortly after Scatz opened for business, the police department was receiving calls on a regular basis to address disturbances at Scatz ranging from noise complaints to intoxicated patrons, public urination and other incidents of disorderly conduct. By early 2009, the Middleton police department believed that too many incidents requiring police attention were occurring at Scatz. On April 21, 2009, defendants Keil and Kakuske attended a meeting of the city's License and Ordinance committee and provided information on problems that were occurring at Scatz. Plaintiff Piernot was present at the meeting. The committee members expressed concern that the police department could not continue to provide services to Scatz and still provide adequate services for the rest of community. Keil told the committee he was considering invoking the city's chronic nuisance ordinance and suggested that Scatz provide a plan of action in response to the police department's concerns. (Under the ordinance, three or more calls to law enforcement in a 30-day period constitute a chronic nuisance.)

On April 22, 2009, the police department issued plaintiffs an "Official Notice of

Chronic Nuisance Premises," itemizing 24 incidents resulting in police contact from March 20, 2009 to April 18, 2009. Dkt. #13-2. The "nuisance activities" cited in the notice included calls to the police regarding "tense" crowds, intoxicated patrons, public urination, theft, fights, alleged sexual assault, patrons and employees operating vehicles while intoxicated and several noise complaints from the neighboring Marriott hotel. Id. During that time frame, the police issued several citations to Scatz patrons for disorderly conduct and several citations to Scatz for unreasonable sound levels. The notice of chronic nuisance gave Scatz 10 days to propose a nuisance abatement plan in writing and advised him that the nuisance would be deemed abated when no police calls to the premises occured for a period of six consecutive months.

On May 12, 2009, plaintiffs and the city agreed on a nuisance abatement plan under which plaintiffs would implement several changes to increase alcohol awareness and security and reduce incidents requiring police presence at Scatz. Dkt. #13-3. Under the plan, Scatz was not required to obtain approval from the police department for the events that it hosted but agreed to notify the police department of scheduled events 72 hours before they were to occur. After the plan was implemented, the number of police calls to Scatz declined significantly. For example, there were 294 calls to the police between November 2008 and May 12, 2009, and 53 calls to the police between May 2009 and September 2009.

However, by September 9, 2009, defendant Keil had decided that the nuisance abatement plan was not working adequately. He filed a complaint with the city council asking it to confirm his previous determination that Scatz was a chronic nuisance premises and he requested that Scatz be ordered to pay for the cost of the police department calls to

Scatz. Dkt. #13-4. On September 30, 2009, the council accepted Keil's chronic nuisance premises determination by a vote of 6-0 and concluded that Scatz should pay the cost of police calls.

C. 2010 Incidents Involving Scatz

On February 2, 2010, the License and Ordinance committee reviewed Scatz's status as a nuisance property. The committee postponed a decision on the property to allow plaintiffs and the police department time to confer about the situation.

Defendants Keil, Kakuske and plaintiff Piernot attended the next committee meeting on February 16, 2010. After a lengthy discussion, the committee voted to continue Scatz as a nuisance premises and submit a complaint for the city council's consideration for suspension or revocation of Scatz's liquor license. Defendant Kakuske prepared the complaint, which he submitted to the city council on March 24, 2010. Dkt. #13-9. In the complaint, Kakuske noted several incidences involving Scatz that had occurred between July 2009 and March 2010, including calls for severely intoxicated patrons, a fight, a car accident involving intoxicated patrons, theft and several calls for noise disturbances from the neighboring Marriott hotel.

On March 30, 2010, the city and plaintiffs entered into a stipulation, agreeing to postpone the hearing on the March 24 complaint to allow plaintiffs to take measures to reduce Scatz's sound levels. Specifically, plaintiffs agreed to start a planned sound insulation construction project within 10 days of the agreement with the city. The sound insulation project was ultimately completed on May 10, 2010.

From March 20, 2010 until September 21, 2010, during the time plaintiffs were operating Scatz under the stipulation, the situation at Scatz improved and defendant Keil recommended that the hearing for revocation of Scatz's liquor license not be reconvened.

In October 2010, when plaintiffs and Scatz were no longer operating under the March 30, 2010 stipulation, police responded to several noise complaints from the Marriott hotel regarding Scatz and also responded on one occasion to a loud and unruly crowd and a patron with an open container of alcohol outside.

On December 8, 2010, Fred Harris emailed defendant Kakuske and stated that he had been hired recently by Scatz as the security director. He asked for training, stating he wished to build a positive relationship between Scatz and the police department. On December 9, Kakuske sent an email congratulating Harris on his new position, agreeing to the meeting proposed by Harris and providing contact information for other members of the police department. Kakuske also sent an email to numerous police officers asking them to respond to Harris, saying that he "wouldn't want to miss an opportunity to improve the situation."

On December 11, 2010, at 2:12 a.m., a police officer responded to a call from the head bouncer at Scatz regarding a fight in the parking lot of Scatz. A private security officer at Scatz had attempted to subdue and handcuff the aggressor, but could not and a Scatz employee had intervened. The aggressor got away and could not be located. One or both of the men involved in the fight had a gun.

D. 2011 Incidents Involving Scatz

Around January 2011, plaintiffs began offering "hip hop" music at Scatz on Thursday nights, which attracted African American patrons. (Before this, Scatz had hosted a few hip hop events, but not on regularly scheduled days.) (Plaintiffs say that at some point after Scatz began offering hip hop music, a police officer asked Scatz's manager, Caroline Dwyer-Clanton, whether she wanted "those people" and "those shows" at Scatz. When Dwyer-Clanton asked "what people" the officer meant, the officer responded with "You know what we're talking about." Dwyer-Clanton believed the officer was referring to African American people. Defendants deny that such a conversation ever took place.)

On Thursday, February 10, 2011, at 11:50 p.m., an officer performed a routine bar check at Scatz and arrested a patron for possession of marijuana and an open alcoholic beverage. On a Sunday morning, February 13, 2011, at 1:26 a.m., the police department received a call from a bouncer at Scatz that a crowd inside the bar was getting rowdy and that he needed police presence. An officer arrived and noticed a large crowd standing by the front door, smaller crowds walking through the parking lot and people yelling profanities at each other. The officer was able to disperse the group of people. The officer could smell marijuana but could not identify the source. The officer went to the front where a patron was yelling and a Scatz security person was pushing him through the doorway. The officer escorted the angry patron away from the door, cited him for disorderly conduct and spent about 40 minutes resolving parking lot and traffic issues. On the same night, other officers responded to a call for reckless driving in the parking lot.

On February 15, 2011, defendant Kakuske attended the License and Ordinance

committee meeting and reported that two to three police officers were involved in maintaining order in the Scatz parking lot on the preceding Thursday, Friday and Saturday nights. The committee asked that a Scatz representative attend the March 1, 2011 meeting for a "formal expression of concern."

On Saturday, February 19, 2011, a police officer patrolling in the area near Scatz noticed traffic and crowds in Scatz's parking lot, including a large group surrounding two women who were fighting. The officer intervened and separated the women. Other officers arrived and began directing traffic. The police officers requested mutual aid from other police departments, and two deputies from Dane County and one officer from Shorewood Hills responded. There were several minor disturbances, physical fights and loud boisterous behavior, including yelling, swearing, loud music, cars revving their engines and people loitering.

On Thursday, February 24, 2011, at 11:46 p.m., Officer Wood of the Middleton Police Department stopped a vehicle operated by several underage females who said they were going to Scatz. Later that night, Officer Wood was observing the parking lot of Scatz to determine whether the underage females gained entry to Scatz. At approximately 1:45 a.m., he observed the two women in Scatz's parking lot. Wood approached them and they denied entering Scatz. While he was speaking to the two females, Wood heard several individuals yell "fight" and saw approximately 10 people involved in a physical altercation and numerous other people watching the fight. At the time, there were between 125 and 150 people in Scatz's parking lot. As he approached the fight, Wood saw a person fall after being struck in the head. The attacker fled through the parking lot. Wood instructed him

to stop but he refused. Ultimately, Wood and another officer used a taser and pepper spray on the suspect and took him into custody.

While Wood was pursuing the suspect, more fights were breaking out in the parking lot and other police officers were arriving on the scene. Many people were in the parking lot yelling and honking horns and refusing to disperse when ordered to do so. Scatz's assistant manager called 911 for extra help. Eventually, a total of 16 officers were on the scene, including officers from other jurisdictions. One officer was punched in the head while attempting to arrest someone; one private security guard was kicked while trying to separate two men who were fighting, another was punched in the jaw and another was sprayed with pepper spray; women were throwing shoes; a man was hiding underneath an employee's truck to avoid an attacker; and a man who had been beaten in the parking lot came inside Scatz, bleeding. Later, a shooting occurred nearby, involving persons who had left Scatz.

E. Plaintiffs' Relinquishment of Scatz's Liquor License

On March 1, 2011, defendant Kakuske filed a complaint with the city council seeking suspension or revocation of plaintiffs' liquor license for Scatz. The complaint alleged that plaintiffs had violated Wisconsin's "disorderly house" statute, Wis. Stat. § 125.10, and Middleton General Ordinance § 7.08(2). Dkt. #13-14. An emergency hearing on the complaint was scheduled for March 5, 2011. In a March 1, 2011 letter from plaintiffs' counsel, plaintiffs offered to refrain from holding "hip hop" nights in exchange for keeping the liquor license. On March 2, 2011, an attorney representing the city wrote to plaintiffs' legal counsel stating that

> [T]he City cannot dictate to Scatz what type of music or events that it hosts. Any agreement we might enter into would be of questionable validity given the First Amendment concerns involved. Furthermore, it is extremely difficult, if not impossible, to define genres of music with sufficient specificity. Finally, while local experience seems to reveal a strong correlation between certain kinds of events and outbreaks of violence, the City has no desire, and is not required, to keep up with musical trends and dictate the type of clientele a licensed establishment should attract. The licensee is in a far better position to make such judgments. The City will, however, judge the success or failure of the licensee's judgments based upon what problems actually arise on the premises.

Dkt. #13-26. The letter also stated that the police department and city could not recommend a resolution to the problem that would allow plaintiffs to keep Scatz's alcohol license.

On March 4, 2011, before the hearing on the complaint seeking suspension or revocation of plaintiffs' liquor license, plaintiffs agreed to surrender the license effective March 6, 2011. Plaintiff Piernot believed it was a foregone conclusion that the license would be revoked.

F. Application for a New License

In an email dated May 18, 2011, plaintiff Piernot sent an email to the mayor, city council and defendant Keil, stating that he intended to reapply for a liquor license for Scatz. He referred to his decision to provide hip hop music as "a huge mistake to give a genre of music that clearly has a bad element of followers one night a week on Thursdays." Dkt. #13-24.

On June 14, 2011, plaintiffs applied for a new liquor license. By letter dated July 6, 2011, defendant Keil provided the police department's position regarding the application,

stating that the police department recommended that a liquor license not be granted for Scatz because of the history of "substantial deviation from the business plan presented at the time that a license was granted in September 2008." Dkt. #31-1. Keil noted that the previous operation of the nightclub resulted in a chronic nuisance premise determination, the scheduling of a formal expression of concern and two revocation complaints. He described a history of an adverse effect on the peace and quiet of the neighborhood, with 52 noise complaints and 22 citations for violations of the city's noise ordinance, as well as 559 police calls for service with a total of 111 citations and arrests. Keil stated that he was concerned that if a license was issued to Scatz, the police department might not have the ability to provide adequate police service to both Scatz and the remainder of the city.

On July 12, 2011, the License and Ordinance committee voted to recommend denial of plaintiffs' application for a new license for Scatz. On July 19, 2011, the full council took up Scatz's application for a new liquor license. Representatives for and against the license were provided an opportunity to speak, including plaintiff Piernot and defendant Keil. The city council held a discussion before voting 8-0 to deny the application.

G. Other Bars and Nightclubs in Middleton

To determine how Scatz compared to other bars, defendant Kakuske used information from the "bar check" report and police department "master location reports" and prepared a graph titled "Citations by location." Dkt. ##33-2, 33-3, 33-9. According to the graph, Scatz's incident rates were 480% higher than the average of other alcohol license holders and 85% higher than the next highest license holder in the city.

Another large nightclub in the City of Middleton, known as XS Pachucos, was declared a nuisance premises on September 28, 2009. On December 10, 2009, a complaint was filed to revoke or suspend the club's liquor license. On December 15, 2009, the city and Pachucos entered into a stipulation, but the problems continued. On March 5, 2010, defendant Kakuske prepared and filed another complaint regarding Pachucos and on March 10, 2010, the common council revoked its liquor license.

On February 15, 2011, the License and Ordinance committee considered an application for a liquor license from Headline Entertainment Inc., d/b/a Headliners, for a rock and roll club in the location of the former XS Pachucos. The police department, through defendant Kakuske, recommended that the application be denied because of the previous problems at the location. After discussion and deliberation, the committee voted to recommend denial of the application for license. At a subsequent city council meeting, the council voted to accept the committee's recommendation and deny the application.

OPINION

A. Equal Protection

The equal protection clause of the Fourteenth Amendment requires that "all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). A plaintiff may establish a violation of her right to equal protection by showing that a defendant intentionally discriminated against her because of her membership in a protected class, T.E. v. Grindle, 599 F.3d 583, 588 (7th Cir. 2010), or that the defendant targeted the plaintiff for discriminatory treatment without a rational basis.

Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Reget v. City of La Crosse, 595 F.3d 691, 695 (7th Cir. 2010).

In this case, plaintiffs contend that defendants discriminated against them in violation of the equal protection clause by engaging in a campaign of discriminatory enforcement and patrols at Scatz, imposing conditions and expenses on Scatz as a condition of keeping its liquor license and ultimately, by "constructively" revoking plaintiffs' liquor license and denying plaintiffs' application for a new one. Plaintiffs are not members of a protected class and they have not argued that they are asserting a "class of one" equal protection claim on the ground that defendants targeted them without a rational basis. Rather, plaintiffs contend that they have standing to assert an equal protection claim on the basis of their association with members of a protected class, namely, the African American patrons of plaintiffs' business.

Although the Court of Appeals for the Seventh Circuit has not decided whether discriminating against a person for association with persons from a protected class constitutes race discrimination in violation of the Fourteenth Amendment, several other courts have held that a plaintiff claiming injury as a result of her association with a protected characteristic may sue for discrimination under the Fourteenth Amendment or Title VII on her own behalf. E.g., Holcomb v. Iona College, 521 F.3d 130, 138-39 (2d Cir. 2008) (holding that claim of adverse action as result of employee's association with person of another race can be brought under Title VII); RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1056 (9th Cir. 2002) (owners of former nightclub contending that city discriminated against them because of their association with black patrons could bring equal protection claim); Tetro v. Elliott Popham

Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc., 173 F.3d 988, 994-95 (6th Cir. 1999) (plaintiff may state claim under Title VII for discrimination related to his biracial child); Club Xtreme, Inc. v. City of Wayne, 2010 WL 1626415, *5 (E.D. Mich. Apr. 21, 2010) (holding that nightclub could assert equal protection claims stemming from its association with black patrons).

I will assume for the purpose of this opinion that plaintiffs can assert an equal protection claim on the basis of their association with the African American patrons of Scatz. To succeed on such a claim, plaintiffs must show that the adverse actions defendants took against plaintiffs were motivated by a discriminatory intent. United States v. Moore, 644 F.3d 553, 557-58 (7th Cir. 2011); Chavez v. Illinois State Police, 251 F.3d 612, 645 (7th Cir. 2001). In other words, plaintiffs must submit evidence showing that defendants Keil and Kakuske targeted plaintiffs' nightclub for patrols and enforcement and that defendant City of Middleton pressured plaintiffs into relinquishing their liquor license and later denied their application for a liquor license because of their association with African Americans.

Plaintiffs do not come close to meeting their burden to submit evidence from which a trier of fact could reasonably infer that defendants' actions were motivated by the race of plaintiffs' patrons. Rather, the overwhelming evidence in the record shows that the police department believed Scatz was a serious problem and public nuisance long before it started offering "hip hop" nights and attracting African American crowds. In the short time that Scatz was open, the police were called on a regular basis to deal with problems there. Defendants reasonably believed that the problems at Scatz were overwhelming the police force and threatening the safety and welfare of other people in the city.

Plaintiffs do not deny that Scatz had a history of problems that required police attention. Nonetheless, they rely on speculation and vague, unsupported assertions from former Scatz employees to argue that the police treated Scatz unfairly because of Scatz's hip hop nights. For example, plaintiffs point to testimony of a Scatz employee who recalled an officer saying that if Scatz did not offer the Thursday night events, it would not have fights. Wilke Dep., dkt. #9, at 31. (The employee actually was "not sure" who made that remark or the specific words that the officer used.) Plaintiffs also say that one officer used the term "those people" and that plaintiffs "assumed" that the officer was referring to African Americans. Defendants deny any officers ever made such statements, but even if I assume they did, the statements are too vague to be of any evidentiary value. They are not clearly discriminatory or even related to race. Plaintiff Piernot himself acknowledged that there was a "bad element" attending his Thursday night events that caused problems. Piernot Dec., dkt. #44, ¶ 71. Further, plaintiffs have not connected these vague statements by two officers in the field to any actions taken by defendants. By themselves, these statements are not evidence of discriminatory intent of defendants Keil or Kakuske or the decision makers for the city.

Plaintiffs assert that there was an "excessive" level of police presence on Thursday hip hop nights and not on other busy nights and that police presence exacerbated security problems. However, plaintiffs have offered no concrete evidence to support these assertions. They did not conduct any analysis of the number of bar checks or level of police presence on hip hop nights versus other nights. Further, it is undisputed that police were present at Scatz on nights other than Thursdays and that Scatz employees frequently requested police

assistance. For example, Scatz employees called for police assistance on December 11, 2010, a Friday night, and on February 13, 2011, a Saturday night. Additionally, the evidence shows that the police department had more contact with Scatz before it started offering a regular hip hop night and particularly, in the spring 2009 and summer and fall of 2010. Plaintiffs' support their assertion of greater police presence on Thursday nights with nothing more than speculation.

Plaintiffs also contend that the police treated Scatz differently from other bars because of a business dispute between the neighboring Marriott hotel and Scatz. However, plaintiffs do not explain how its noise dispute with the Marriott is evidence of defendants' discriminatory animus. Moreover, according to plaintiffs, the noise issue was resolved in the fall of 2010, before plaintiffs started playing hip hop regularly.

Finally, plaintiffs contend that there is evidence showing that defendants treated Scatz differently from other similarly situated bars and nightclubs in the area that did not play hip hop music or cater to African American clientele. A plaintiff may show discriminatory intent by submitting evidence that the defendant treated similar entities not associated with the protected characteristic better than the defendant treated the plaintiff. Coleman v. Donahoe, 667 F.3d 835, 841 (7th Cir. 2012). For such evidence to be useful, the plaintiff must point to "sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury" to infer discrimination. Id.

In this case, plaintiffs have failed to identify a similarly situated establishment that was treated more favorably that Scatz. Plaintiffs argue in their brief that all licensed

establishments in the City of Middleton that play live music are similarly situated to plaintiffs and that the only difference is that Scatz is larger than other licensed establishments. Plts.' Br., dkt. #41, at 5. Plaintiffs cite no evidence to support their argument. They do not identify any licensed establishment that is similarly situated in size and events or that had the same volume of police calls, noise complaints and citations. In fact, plaintiffs do not identify any particular establishment by name that it believes was similarly situated to Scatz. It is not enough for plaintiffs to speculate that such an establishment exists. Rather, to survive summary judgment on the ground that they were treated more harshly than similarly situated establishments, plaintiffs must identify a particular establishment and submit evidence regarding its size, the race or ethnicity of the owners or clientele, what type of music it offers and how many people attend its shows. Additionally, plaintiffs would need to submit evidence regarding the number of violations or incidents requiring police presence that occurred at the establishment and the race or ethnicity of the persons at the establishment who incurred violations. Without such evidence, no jury could reasonably find that the police and the city treated Scatz differently from other bars when addressing directly comparable incidents. Plaintiffs' conclusory allegations that Scatz was similarly situated is not enough. Reget, 595 F.3d at 695 (affirming judgment against plaintiff on equal protection claim where he failed to produce evidence that his business was similarly situated to other businesses).

The only evidence in the record regarding similarly situated establishments was submitted by defendants and concerned Pachucos, a large nightclub that had numerous problems similar to those of Scatz, and also lost its liquor license. Also, the city later denied

a liquor license for a proposed rock and roll bar in the former location of Pachucos because of the previous problems there. Thus, the only evidence in the record shows that plaintiffs were treated no worse than a similarly situated bar that did not play hip hop music.

In sum, plaintiffs have submitted no evidence connecting the actions defendants took against them to the race of Scatz's patrons. Instead, the undisputed facts show that from the time it opened in 2008, Scatz had consistent, ongoing problems necessitating law enforcement response, including intoxicated patrons, assaults, public urination, parking problems, traffic congestion, noise complaints and finally, multiple fights and a nearby shooting. The police department and city attempted to work with plaintiffs and gave them multiple chances to fix the problems at Scatz, but decided ultimately that Scatz was consuming more than its share of police resources. No trier of fact could conclude that defendants took the actions they did for any reason other than public safety and welfare concerns. Defenants' motion for summary judgment will be granted on plaintiffs' equal protection claim.

B. First Amendment Retaliation

Plaintiffs have also raised a claim under the First Amendment, contending that defendants retaliated against them because they played hip hop music. Plaintiffs rely on the same allegations and arguments they relied on for their equal protection claim. As with their equal protection claim, plaintiffs have not shown that their decision to play hip hop music one night a week caused defendants adverse actions against plaintiffs or that defendants gave more favorable treatment to similarly-situated business that did not play hip hop music.

Plaintiffs cited RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045 (9th Cir. 2002), but that case is distinguishable. In RK Ventures, club owners sued the City of Seattle under the First Amendment, contending that the city had pursued a campaign designed to stop dowtown clubs from playing rap and hip hop music. The Court of Appeals for the Ninth Circuit concluded that plaintiffs had adduced sufficient evidence of a pattern of harassment against the plaintiffs and other clubs catering to African Americans to create a genuine issue of fact for trial. Id. at 1063. The court found that the defendants' settlement agreement with the plaintiffs postponing an abatement in return for plaintiff's agreement never to play rap music again was an impermissible content-based restriction. Id.

In this case plaintiffs have provided no evidence that defendants enacted any ordinances or regulations directed toward rap or hip hop music or that the parties entered into any stipulations precluding plaintiffs from playing a certain genre of music. Rather, the city's attorney advised plaintiffs specifically that, contrary to plaintiffs' offer, the city would not condition Scatz's retention of a liquor license on its discontinuing its presentation of hip hop. The city suggested that such a condition would likely violate plaintiffs' First Amendment rights.

Because plaintiffs have provided no evidence that defendants' actions against them were related to plaintiffs' decision to offer hip hop music, I am granting defendants' motion for summary judgment on plaintiffs' First Amendment claim.

C. Disorderly House Statute and Ordinance

Plaintiffs' final claim is that defendants violated their due process rights by citing Wis.

Stat. § 125.12(2)(ag)2, and the City of Middleton's related ordinance, §§ 7.08(2) and 7.08(8)(k)(iv) of the Middleton General Ordinances, in the complaint to revoke plaintiffs' liquor license.

Wisconsin's "disorderly house" statute provides that a liquor license holder may have its license revoked if the license holder "keeps or maintains a disorderly or riotous, indecent or improper house." Wis. Stat. § 125.12(2)(ag)2. Section 7.08(2) of the Middleton General Ordinances incorporates the state statute, and § 7.08(8)(k)(iv) states that "[e]ach licensed premises shall at all times be conducted in an orderly manner, and no disorderly, riotous or indecent conduct shall be allowed at any time on any licensed premises." According to plaintiffs, the language in the statute and ordinance is so vague as to render defendants' application to revoke plaintiffs' liquor license an arbitrary, discriminatory and unfair act in violation of due process. Plaintiffs contend that the statute gives no guidance as to what sort of conduct falls within its proscription, how frequently such conduct must occur in order to trigger its sanctions or whether it requires any showing of knowledge or fault on the part of the licensee before its license can be revoked or suspended.

As an initial matter, defendants contend that plaintiffs cannot state a claim for violation of their due process rights because plaintiffs' license was not actually revoked under the disorderly house statute and ordinances. Instead, plaintiffs relinquished their license voluntarily. Plaintiffs respond that they are asserting a claim of "constructive revocation" of their license because it was a foregone conclusion that the license would be revoked under the disorderly house statute.

I will assume for purposes of this opinion that plaintiffs' license was constructively

revoked by defendants. Even if it was, plaintiffs cannot state a claim for violation of their rights to due process. A statute is unconstitutionally vague only "if it fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." Fuller ex rel. Fuller v. Decatur Public School Board of Education School Dist. 61, 251 F.3d 662, 666 (7th Cir. 2001). In a recent opinion, the Court of Appeals for the Seventh Circuit rejected a vagueness challenge to Wisconsin's disorderly house statute in Hegwood v. City of Eau Claire, 676 F.3d 600 (7th Cir. 2012). In Hegwood, a bar owner had lost its liquor license after a series of altercations between its employees and customers that required police intervention. Id. at 601. The court of appeals concluded that the statute was not unconstitutional as applied to the bar owner because

> there is no doubt that the conduct described above was disorderly, riotous, indecent or improper: employees fought with patrons; brawls spilled onto the streets; underaged girls hid in the basement to escape police detection; and a patron required detoxification because he was overserved.

Id. at 604. The court concluded that the conduct "falls squarely within the ambit of the statute, particularly given the public health and safety concerns involved." Id. The court went on to explain that because the statute was applied permissibly to the plaintiff, the plaintiff's facial challenge to the law necessarily failed. Id. (concluding that facial challenge "cannot succeed as we have identified that the statute is sufficiently defined in at least one application").

The court of appeals' opinion in Hegwood is controlling in this case. As the police department had done with the bar at issue in Hegwood, the Middleton Police Department sought revocation of plaintiffs' liquor license because of incidents at Scatz that fit the natural

reading of "disorderly house." The incidents included multiple occurrences of public urination, severely intoxicated patrons, sexual assault, theft, noise complaints, patrons operating vehicles while intoxicated, patrons resisting arrest, physical fights, large and disorderly crowds and an intoxicated Scatz employee driving people home. The final straw for the police was the incident on February 25, 2011, when there were multiple fights in Scatz's parking lot, a law enforcement officer was punched in the head and a shooting involving Scatz patrons occurred shortly after they left the parking lot. These incidents qualify as disorderly, riotous, indecent or improper and fall squarely within the scope of Wisconsin's disorderly house statute. Because they do, plaintiffs' facial challenge necessarily fails. Therefore, I am granting defendants' motion for summary judgment on plaintiffs' due process claim.

In the absence of any evidence of statutory or constitutional violations, I need not consider defendants' immunity defenses or the issues surrounding the city's liability.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants City of Middleton, Noel Kakuske and Brad Keil, dkt. #14, is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 9th day of July, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge