STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

AHMED AHMED, individually and on behalf of all similarly situated persons,

Plaintiffs,

Case No. 11-014559-CZ

vs.

Hon. Kathleen MacDonald

McDONALD'S CORPORATION and FINLEY'S MANAGEMENT COMPANY, d/b/a/ McDONALD'S # 11663,

Defendants.
_____/

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_____/

NOTICE OF HEARING

PLEASE TAKE NOTICE that Majed Moughni's Motion to Vacate Preliminary Injunction and for Other Relief is set for hearing before the Honorable Kathleen MacDonald on Friday, March 1, 2013 at 8:30 a.m., or as soon thereafter as counsel may be heard.

Respectfully submitted,

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Dated: February 22, 2013

STATE OF MICHIGAN
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AHMED AHMED, individually and on behalf of all similarly situated persons,

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MOTION TO VACATE PRELIMINARY INJUNCTION AND FOR OTHER RELIEF

Majed Moughni hereby moves the Court to vacate the preliminary injunction entered against him on the ground, more fully arued in the accompanying brief, that it was a prior restraint forbidden by the First Amendment. Moughni, a member of the plaintiff class, argues that the entry of the prior restraint violated the Due Process rights of the class to decide whether to opt out or object to the proposed settlement by depriving the class of information they needed to make an independent

decision on the question, and hence that the period for opting out or objecting should be reopened.

Defendants and class counsel will oppose this motion, but have not responded to the question whether the hearing on this motion should be held on March 1, 2013. Moughni asks for a hearing on that date. At the hearing, he will also seek pro hac vice admission of his lead counsel, Paul Alan Levy, an attorney with the national consumer advocacy organization Public Citizen.

Respectfully submitted,

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February 22, 2013

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BRIEF SUPPORTING MOTION TO VACATE PRELIMINARY INJUNCTION AND FOR OTHER RELIEF

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CONSTITUTION, STATUTES AND RULES

Both Majed Moughni, and his wife and children, have eaten at McDonald's over the past eight years. They care about whether their food is halal, and about the rights of other Muslims who ate there. When Moughni he learned that lawyers representing a class to which he and his family belong had negotiated away their rights, and the rights of other members of the community, in return for charitable donations he deemed inappropriate, plus sizeable payments to themselves and their individual client, he was incensed, and sought to organize community opposition. He used a Facebook page that he had long maintained about the Dearborn community. Although some of his language was strong, he considered the settlement a sellout of the public interest, and those were the terms in which he objected to the proposal.

Class counsel first reacted with threats of defamation litigation and disciplinary proceedings; when Moughni was uncowed, they sought a preliminary injunction claiming that many of Moughni's opinions were defamatory statements of fact and would mislead the class about their rights as members of the class. Giving Moughni only a few days' notice, the Court convened an emergency hearing; then, without hearing from Moughni, issued a prior restraint of unparallelled breadth, barring Moughni from making **any** public statements about an entire subject matter, even statements that were entirely truthful and not at all misleading. It further compelled him to place speech with which he fervently disagreed on his own web page; and it forbade him from dissemination, circulation or publication of any opt-out form or objection during the crucial ten-day period before the deadline for members of the class to decide whether to opt out or object. On a literal reading of the injunction, Moughni was barred even from speaking to his own wife and children about the settlement, and even from submitting an objection to the settlement on his own behalf.

While he was pro se, Moughni acknowledged that he is not an expert in class action procedure; as his counsel, we readily concede that some of his statements could have been worded more felicitously. But Moughni was not counsel for a named party; he spoke only as a member of

the affected community, and the Court's order holding him to standards that would have been inappropriate even for a lawyer in the case violated black-letter law against prior restraints of speech. The injunction should, therefore, be vacated immediately. In addition, during the crucial ten-day period before the opt-out or objection deadline, the order deprived the class of the opportunity to hear dissenting views about whether to go along with a settlement that potentially deprives them of valuable rights. The Court should, therefore, reopen the period for the class to respond to the notice, and should defer any decision about approval of the settlement until that time has expired.

STATEMENT OF FACTS AND PROCEEDINGS TO DATE

This action was filed by Ahmed Ahmed as a class action, alleging that McDonald's and Finley's Management Company, which operates a McDonald's franchise restaurant in Dearborn, had deliberately sold meat advertised as halal —in compliance with Muslim dietary laws — but was not. The complaint alleged that this practice violated false advertising and unfair trade practices laws, and sought injunctive relief and damages, including damages for the considerable emotional distress that religious people suffer upon learning that they ingested, or even might have ingested, non-halal food (also known as "haram"). Without moving for class certification within 91 days, as required by MCR 3.501(B)(1)(a), plaintiff conducted discovery and held settlement discussions. Eventually these private negotiations, with help from a former judge, resulted in a proposed settlement agreement under which a class would be conditionally certified for settlement purposes only; the legal claims of the class members against the defendants would be extinguished.

The conditional class includes everyone who bought food at the McDonald's identified in the complaint, and who did so in the expectation that the food would comply with dietary restrictions. The class also includes users of an additional Dearborn McDonald's, operated by a franchisee defendant who had not even been sued. Under the proposed settlement agreement, the possibly thousands of victims in the class would release all of their claims and would get **nothing**

in return. There was not even injunctive relief designed to prevent a repetition of the deceitful conduct alleged in the complaint. Instead, Finley and McDonald's had to pay a total of $700,000, mostly to two charitable groups identified by the parties (a health clinic and a museum); the $700,000 also covered the individual plaintiff and his counsel who, subject to court approval, could get up to a $20,000 incentive payment, and up to $233,333 in fees, plus actual costs and expenses.

When movant Moughni learned about these terms, he was outraged. He believed that the emotional distress suffered by members of the plaintiff class was extreme, and that it was unfair for all members of the class to give up their valuable claims while defendants took credit for making charitable contributions to two neighborhood institutions that were, in his view, unrelated to the violations. He also believed that it was unfair for most members of the class to get nothing while the injury to a single member of the class was being valued at $20,000, and the lawyers were to receive hundreds of thousands of dollars in attorney fees.

Moughni chose to express his low opinion of the settlement on a Facebook page for the Dearborn community that he has maintained for several years, entitled "Dearborn Area Community Members." He included the following statement, among other things:

> The Law Offices of Majed Moughni, PLLC has retained the services of one of Michigan's best attorneys to intervene on our community's behalf. As you know, a backroom deal was made on behalf of our community where McDonald's was going to pay $700,000 for selling "Haram" chicken sandwiches and labeling it as "Halal." The current lawyer on the case wants the majority of the money to go to a medical center ($275,000) and a museum ($150,000), that lawyer, Kassem Daklallah, want to pocket $230,000, and the plaintiff, Ahmed Ahmed will keep $20,000. We think the money should go to you, the people who were lied to and bought and ate "Haram" chicken sandwiches, not a medical center or museum who were not injured. If you agree, please hit LIKE, and write your name and your email address in the comment section. We will give this list to the court ASAP. PLEASE DO NOT MAKE ANY COMMENTS, THIS POST WILL BE INTRODUCED AS EVIDENCE IN COURT.

Quoted in Motion for Injunctive Relief (referenced here as "Motion"), at 4-5.

Moughni made other statements criticizing the settlement, and created a form that members of the

public could sign to either opt out of the settlement entirely, or to register their objection to the payment of money to charities instead of to the injured parties.

Plaintiff's counsel did not like this attack on their efforts, or other statements on the Facebook page, and threatened to sue Moughni for defamation and to report him to the Attorney Grievance Commission. Motion, Exhibit C. Notably, their demand letter made no reference to protecting the class against deception. When Moughni refused this demand, plaintiff moved for emergency injunctive relief, claiming that Moughni's statements were false and defamatory, and that they would "undermine the Class Members' confidence in Class Counsel and the Court" (that is, by disagreeing with class counsel about whether they had done a good job for the class), and confuse the class both about their rights under the settlement agreement and about the procedures for registering objections to the agreement. The motion was not accompanied by any affidavits attesting that the statements on the Facebook page were false. In fact, by and large, the statements were either substantially true, were matters of opinion that cannot be actionable under the First Amendment, or were just poorly worded.

Finally, plaintiff complained that the Facebook page did not include the Class Notice, which, in plaintiff's opinion, is the only aspect of the proposed settlement that ought to be brought to the class members' attention. Motion at 9-10. He objected to Moughni's calling one Facebook page post a "Public Notice," contending that the term "deceives a potential Class member about the 'authority' of the post and threatens to invade the Class Members' ability to make independent and self-informed decisions about the Class Settlement and whether to participate." *Id.* at 9.

Based on these arguments, plaintiff asked that Moughni be immediately enjoined not only from keeping any of the statements he had made on his Facebook page, but also from making any future statements about the settlement or about the litigation to class members or "those who may be class members" without express written permission from the Court or from the parties. They also

demanded he be specifically to be barred from making any statements by electronic media or to the press, and that he be ordered to include the parties' own views in his Facebook page, as set forth in the Class Notice that the parties had written, and to include the settlement agreement itself.

Plaintiff set this motion for hearing on seven calendar days notice, and the Court held a hearing on that date. The Court did not afford Moughni any opportunity to take discovery to test plaintiff's factual claims. It did not take testimony, and of course did not afford Moughni a jury trial on the defamation claims. At the hearing, both plaintiff's counsel and defendants' counsel were allowed to speak at length, Transcript 7-33; then the court ruled without ensuring that Moughni had a response. Tr. 34. Indeed, when Moughni attempted to address the Court, at page 39 of the transcript, the Court cut him off, saying "No, don't even." Tr. 39.

The Court entered a preliminary injunction in substantially the same vague terms as plaintiff's proposed order, finding that Moughni had made "materially false, deceptive and misleading statements concerning the settlement . . . and concerning the rights of the members of the Settlement Class," and that Moughni "thereby engaged in deliberate and abusive conduct which has created a likelihood of confusion of class members, adversely has effected the administration of justice and has undermined this Court's responsibility and authority to protect Class members from such abuses." The Court ordered Moughni to remove all statements about the case from his Facebook page and to replace them with the Court's own expression, and the parties' own expression, about the proposed settlement, in the form of the preliminary approval order and class notice. Moughni was enjoined from making any other statements about the case in any other forum—whether in person or electronically, or to the press; Moughni was also ordered to identify to the Court and the parties those class members who had associated themselves with Moughni's point of view by using the Facebook "like" and comment functions. Finally, Moughni was forbidden from "dissemination, circulation or publication" or any form for opting out or objecting

to the settlement, even an opt out or objection actually signed by a class member. The injunction remained in effect for the entire remaining eleven days within which members of the class had the opportunity to opt out or object.

Because Moughni and his own family are class members, Moughni was effectively forbidden from speaking even to his own family about the case. Under the literal terms of the order, he could not file his own signed form to object to the proposed settlement agreement. Thus, the injunction suppressed Moughni's campaign urging members of the class to petition this Court for redress of a serious grievance.

Moughni moved pro se for reconsideration of this order, which was denied. Now that he has counsel, Moughni moves to vacate the injunction. As explained below, the injunction is an unconstitutional prior restraint. The remedy for this violation of the First Amendment should not be limited to rescission of the restraint. By preventing the class from hearing Moughni's adverse opinions about the settlement, the injunction violated the Due Process rights of members of the class. To paraphrase plaintiff's brief, it "invad[ed] the Class Members' ability to make independent and self-informed decisions about the Class Settlement and whether to participate." Motion at 9. The remedy for this Due Process violation should be a reopening of the opt-out and objection period. A ruling on the Settlement Agreement should await expiration of that renewed period.

ARGUMENT

A. The Emergency Injunction Is a Constitutionally Impermissible Prior Restraint.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v Stuart*, 427 US 539, 559 (1976). A court order prohibiting publication constitutes such a prior restraint. "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v United States*, 509 US 544, 550 (1993). Injunctions

barring speech threaten fundamental rights more than statutes with an equivalent effect, because they "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v Women's Health Center*, 512 US 753, 764-65 (1994).

Because of the seriousness of a prior restraint, a preliminary injunction prohibiting speech is justified only when publication would "threaten an interest more fundamental than the First Amendment itself." *Procter & Gamble Co. v Bankers Trust Co.*, 78 F3d 219, 226-27 (CA6 1996). Only a "grave threat to a critical government interest or to a constitutional right" can justify restraint of publication, and even then only when the threat "cannot be militated by less intrusive measures." *Id.* at 225; see *Nebraska Press Ass'n*, 427 US at 570 (rejecting a prior restraint issued to guarantee a criminal defendant's Sixth Amendment right to a fair trial); *New York Times Co. v United States*, 403 US 713 (1971) (declining to enjoin newspapers from publication despite the government's claim that publication could threaten national security).

A lawyer's reputation does not rise to that level of importance, as the Supreme Court held in *Organization for a Better Austin v Keefe*, 402 US 415 (1971). There, a lower court had issued a temporary injunction against leafleting that accused a local realtor of blockbusting and "panic peddling," but the Supreme Court struck it down as a forbidden prior restraint. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court." *Id.* at 419-20.

Thus, even in jurisdictions that allow an injunction against the repetition of a libel that has been found false and defamatory after a full trial, or in which that issue remains open, injunctions may not issue against speech that has **not** been thus finally determined.[1] For this reason, courts have

[1] *Lothschuetz* v *Carpenter*, 898 F2d 1200, 1208-09 (CA6 1990) ; *Balboa Island Village Inn v Lemen*, 40 Cal4th 1141, 1149-1154, 156 P3d 339, 344-348 (Cal 2007); *Metropolitan Opera v Local 100*, 239 F.3d 172; *Auburn Police Union v Carpenter*, 8 F3d 886 (CA1 1993); *Kramer v Thompson*, 947 F2d 666 (CA3 1991); *Cohen v Advanced Medical Group of Georgia*, 269 Ga 184,

rejected attempts to obtain preliminary injunctive relief against Internet speech.[2] Similarly, the Fourth Circuit has held that protection of a lawyer's reputation is not a sufficient basis to issue a preliminary injunction barring repetition of a statement that he is the target of a grand jury investigation. *In re Charlotte Observer*, 921 F2d 47, 49 (CA4 1990). Quoting the United States Supreme Court, the Fourth Circuit distinguished between preliminary relief and permanent injunctions against repetition of a libel, treating the former as a prior restraint:

> A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.
>
> *Id.*

The essence of a prior restraint is that it places specific communications under the personal censorship of a single judge, *Bernard v Gulf Oil Co.*, 619 F2d 459, 468 (CA5 1980), *aff'd* 452 US 89 (1981), and without the full panoply of protection that the law provides against erroneous factual and legal determinations, such as the ability to probe the plaintiff's case through discovery, trial before a jury of the defendant's peers, and the opportunity for appellate review. The need for such protections is well-illustrated by the proceedings here: the injunction was issued after a hearing for which no more than a week's notice was allowed, before Moughni had the opportunity to retain counsel with First Amendment experience, to file a brief or even to speak. There was no opportunity for discovery or cross-examination to pierce plaintiff's factual assertions and, indeed, the injunction

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496 SE2d 710 (Ga 1998); *Dupuis v Kemp*, 2006 WL 401125, at *3-*4 (Mich App 2006).

[2]*New Net v Lavasoft*, 356 FSupp 2d 1071 (CD Cal 2003); *Bihari v Gross*, 119 F Supp2d 309, 324-327 (SDNY 2000); *Ford Motor Co. v Lane*, 67 FSupp2d 745, 749-753 (EDMich 1999).

was imposed without any live testimony or even affidavits to support it. The court's order did not contain any specific factual findings about which statements were false or "misleading" and in what respect (although the Court addressed some specifics at the hearing). As the Supreme Court said in *Gulf Oil Co. v Bernard*, 452 US 89, 101 (1981), even without invoking the First Amendment, orders restricting speech "must be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." Moreover, "such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order" that limits communications with class members "as little as possible." *Id.* at 102. A preliminary record is not a sufficient basis to enjoin speech on a matter of public interest pending the resolution of this debate about whether plaintiff's representation of the plaintiff class was being improperly criticized, and the order issued in this case does not meet the constitutional test.[3]

The breadth of the injunction makes it particularly inappropriate. As the Michigan Court of Appeals has said, "A court may impose a prior restraint [only if] is necessitated by a compelling governmental interest. [cites omitted] Moreover, the court must narrowly tailor any prior restraint and must consider any reasonable alternatives to that restraint which have a lesser impact on first

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[3]Indeed, it is questionable whether even a permanent injunction would be allowed here. In *McFadden v Detroit Bar Ass'n*, 4 MichApp 554, 558 145 NW2d 285, 287 (MichApp 1966), the Court of Appeals endorsed the general rule that noted that "equity will not enjoin a libel,"*Willing v Mazzocone*, 393 A2d 1155, 1157-1168 (Pa 1978), because post-publication damages are an adequate remedy at law. *See Dupuis v Kemp*, 2006 WL 401125, at *3-*4 (MichApp 2006); *Ramos v Madison Square Garden Corp.*, 684 NYS2d 212, 213 (NYApp Div 1999); *Greenberg v De Salvo*, 229 So2d 83, 86 (La 1969). *See also Hajek v Bill Mowbray Motors*, 647 SW2d 253, 255 (Tex 1983) (Texas constitution); *Nyer v Munoz-Mendoza*, 430 NE2d 1214, 1217 (Mass 1982) (prior restraint). Explaining the rule, the Louisiana Supreme Court said in *Greenberg*, 229 So2d at 87-88:

> another libel and slander suit could ensue . . . if there is no injunction and [plaintiff] reiterates her prior statements. If successful, plaintiff would again receive damages. Plaintiff would have to bear his burden of proof, . . . and defendant would have to bear her burden of proving such defenses as she might aver. Under such circumstances, the proof might change from that herein offered.

Consequently the common law, as well as the First Amendment, requires that injunction be vacated.

amendment rights." *In re Disclosure of Juror Names and Addresses*, 233 Mich App 604, 592 NW2d 798 (MichApp 1999). But instead of being limited to a ban on repeating specific words that had been adjudicated false, misleading, or deceptive, or even limited to forbidding other deceptive statements, the injunction forbade Moughni to say **anything** about an entire subject —this lawsuit or the proposed settlement—in any manner that might reach a member of the class or even a possible member of the class. For example, if the use of the caption "Public Notice" was deemed impermissible, as discussed below, the Court could have required Moughni to change the wording of the caption, or to specify that his Facebook page was not conveying a court-approved class action notice. Similarly, if the Court believed that references to "becoming part of the settlement," or to clicking the "like" button on the Facebook page, or various other specific phrases singled out in plaintiff's papers, were legally improper, the proper remedy was a narrowly tailored order that extended no further than necessary to cure that problem.

Instead, Moughni was forbidden to speak publicly about this subject, at a time when it was a matter of intense public interest.[4] Indeed, because Moughni and his family are members of the class, he was even forbidden to speak about this subject in the privacy of his own home. This was an injunction that reached far too broadly.

B. The Injunction Also Violates the Strict Rule Against Compelled Speech.

The injunction also violates the First Amendment prohibition against compelled speech. The order requires Moughni to post on his own Facebook page speech with which he vehemently disagrees – the class notice.

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[4]After the injunction was issued, plaintiff sought to have Moughni held in contempt because Moughni made other statements, completely unrelated to this case, on the Dearborn Community page, and those other statements appeared first on the Facebook page (later posts generally appear first). Plaintiff argued that this violated the provision of the order that the required postings appear "prominently" on the page. As thus construed, the injunction would forbid Moughni to make any additional statements on the Facebook page, in further violation of the First Amendment.

> Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say" . . .. Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of 'purely factual and uncontroversial information,' outside that context it may not compel affirmance of a belief with which the speaker disagrees,
>
> *Hurley v Irish-American Gay, Lesbian & Bisexual Group*, 515 US 557, 574 (1995).

For that reason, too, the injunction violated the First Amendment and must be vacated.

C. Plaintiff Has Not Made the Showing Required for Any Relief Against Moughni's Criticisms, No Less a Prior Restraint.

Although plaintiff's motion for injunctive relief made bold claims about their counsel's having been victimized by false and defamatory statements, and about the danger that class members might be misled by some of Moughni's statements, plaintiff did not come close to making a sufficient showing to support **any** relief against Moughni, no less a preliminary injunction.

1. There Was No Showing of Falsity or Actual Malice.

First, there has not been an adequate evidentiary showing that any statements were false and defamatory, or actionably misleading. The brief for injunctive relief contains two arguments on this point: first, on pages 5 to 7, plaintiff singles out the blocked quotation from Moughni's Facebook page, set forth at page 3 of this brief; then, at pages 8 to 9, plaintiff included a table that purports to show how certain other fragments from the page could mislead members of the class about their rights. Neither of plaintiff's arguments supports any relief for plaintiff.

Plaintiff made five arguments about the blocked quotation:

1. Plaintiff argued that it was "false and misleading" to suggest that the attorney whose services Moughni had retained could "intervene on our community's behalf." Plaintiff argued that only individuals are "entitled to intervene." Motion at 5. It is certainly true that only individuals could voice objections to the settlement (strictly speaking, this is not an "intervention" because unnamed members of the class are already parties to the action). In fact, however, hundreds of

people hit the "Like" button, indicating their support for Moughni's statement. If such a large number of individuals agreed to have the same lawyer represent them in objecting, it would have been fair to characterize the lawyer as "intervening on behalf of the community."

2. Plaintiff objected to the characterization of the settlement as a "backroom deal," on the ground that plaintiff's counsel negotiated it in good faith and was not trying to enrich himself at the expense of the class. Motion at 5. Moughni's characterization of the settlement was certainly unfriendly, but there was no evidentiary showing that the agreement was negotiated in public sessions, and it is simply a matter of fact that the lawyer was to receive a substantial fee while individual members would give up legal claims and get nothing in return. It is up to the Court at the settlement hearing to decide whether the settlement is legally justified; it is Moughni's right to express his opinion that it is **not** justified. Opinions receive absolute protection under the First Amendment and can afford the basis for no relief. As the Supreme Court has said, "Under the First Amendment there is no such thing as a false idea." *Gertz v Welch*, 418 US 323, 339 (1974).

3. Plaintiff complained of the characterization of the proposed attorney fee award as "lawyer . . . wants to pocket $230,000," complaining that the statement is false and misleading and "threatens to undermine Class members' confidence in Class Counsel." Motion at 5-6. There was no evidence of falsity and, in fact, although the characterization is unfriendly, the settlement agreement **does** reflect that plaintiff's counsel wants a fee in excess of $230,000. Thus, the statement is most likely true; at most, the use of the term "wants to pocket" is rhetorical hyperbole which cannot constitutionally form the basis for a defamation judgment, no less a preliminary injunction. *Ireland v Edwards*, 230 MichApp 607, 618–619, 584 NW2d 632 (1998). Class counsel has no entitlement to prevent members of the Class from making true statements that portray counsel unfavorably.

4. Plaintiff complained of the statement that the individual plaintiff "will keep $20,000" on the ground that the Court had not yet ruled on the amount of the award, and that the

misrepresentation "creates a false understanding regarding the motive behind the litigation and the Settlement Agreement." Motion at 6. In fact, the individual plaintiff **is** seeking that amount of money, and the statement says nothing about motives.

5. Plaintiff complained that the last four lines of the post quoted above might mislead class members into believing that they would be "entitled" to monetary relief if they opt out, or that hitting the "like" button and including a name is a formal process that affects their rights; plaintiff also claimed that the words "lied to" was false because it is "contrary to [defendants'] position in this case" and because plaintiff's counsel does not believe there were any lies. Motion at 6. Of course, the statement says nothing about formalities; it was simply the first step in the identification of class members who might want to take the formal steps, and the very fact that several hundred people **did** "like" the statement could be evidence of community opposition to the proposed settlement terms that the court might well choose to consider in weighing the settlement agreement. Nor is there any proof that the phrase "lied to" is false, and in cases of defamation, the First Amendment puts the burden of proving falsity on the plaintiff. *In re Chmura*, 464 Mich 58, 71, 626 NW2d 876, 885 (Mich 2001). In sum, none of the specific arguments about false and misleading statements on pages 5-6 of the motion support plaintiff's assertion that Moughni's statement is actionably false.

Plaintiff's brief supporting the proposed injunction offered several "additional examples of the various false, misleading and deceptive statements" with which his counsel were charging Moughni, but they were not more persuasive. Plaintiff complained that it was misleading to use the phrase "if you would like to be included in the settlement" or "included in this lawsuit" or "if you want to let the judge know that you want to be a party" or to suggest that those who took no action would be "excluded from the class action." Motion at 7-8. Although these statements could surely have been worded more clearly, in context, Moughni was plainly saying that, if they took no action,

members of the class would be receive no personal benefits from the settlement. Certainly, they would have their claims released, but that was the heart of Moughni's objection.

Plaintiff also complained that Moughni characterized one of his statements as a "Public Notice," arguing that this was tantamount to issuing his own class action notice contrary to the notice approved by the Court. But it is literally true that each of Moughni's statements was a "public notice," and Moughni was constitutionally entitled to broadcast notices fomenting public disagreement with what class counsel were proposing and the Court had provisionally approved. Even if some class members could have misunderstood the label—the record contains no evidence of that—the proper remedy would have been more notice, or a narrow order, not a broad prior restraint. As Justice Brandeis explained, the possibility of "falsehood and fallacies" in our discourse does not justify prior restraint; rather, our Constitution teaches that "the remedy to be applied is more speech, not enforced silence." *Whitney v California*, 274 US 357, 377 (1927) (concurrence). Equally important, as argued below, "likely to confuse" is a commercial speech concept that does not apply to speech by a member of the class, whose economic interests are aligned with the class members to whom his speech is addressed, protesting actions approved by a judge.

Plaintiffs objected as well that Moughni urged those who did not support his position not to post any statements on the Facebook page, treating this as "a clear attempt to silence any dissent," Motion at 8, and that exclusion of contrary viewpoints was deceptive. The Court accepted this argument, and rested its preliminary injunction on this point, in part. Tr. 37-38. However, the Facebook page was a **privately owned forum**, and Moughni had a First Amendment right to decide what opinions would be expressed on his own page. *Hurley,* 515 US at 574. Federal law bars any liability for exercising editorial functions on one's own Facebook page. 47 USC § 230; *Zeran v America Online*, 129 F3d 327, 330 (CA4 1997). Consequently, Moughni would have had every right to delete comments that he did not like. Moreover, in light of the fact that Moughni was so explicit

about the request that comments not be added, it is hard to understand how members of the class viewing his page could be deceived by the absence of comments. Would this policy make his page less persuasive as a basis for arguing that there is strong community sentiment against the cy pres settlement? Maybe so, but that is not a basis for a preliminary injunction against Moughni's protected speech.

2. There Is No Basis for Evading the Requirement that Plaintiff Prove Falsity and Not Just Likely "Confusion."

The motion for injunctive relief relied in part on court rulings that authorize courts to take actions to ensure that class members are not misled by statements by the parties to litigation, or by lawyers for parties. Insofar as a court orders additional notices, or cancels opt-outs and sets a new period for submitting opt-outs, such orders do not implicate prior restraint concerns. Indeed, in *Georgine v Amchem Prods*, 160 FRD 478, 511 (EDPa 1995), one of the court's reasons why the First Amendment did not forbid its order establishing a second opt-out period was that the remedy "did not constitute a prior restraint on communication, and does not directly punish the speakers." *Accord Li v A Perfect Day*, 270 FRD 509, 519 (ND Cal 2010) (court chooses corrective notices in lieu of ban on communications).

Moreover, plaintiff formulated his argument carefully in characterizing his authority as enabling trial judges to regulate conduct "by a person opposing a class." Motion at 12. Every injunction case he cited involved communications by a **party** with a pecuniary interest in opposing the class, mostly defendants who were trying to prevent the pursuit of class actions against them. In many of plaintiff's cases, the defendant was also in a position to intimidate members of the class, and the demonstrated pecuniary objective made the speech commercial in the sense that defendants were trying to limit their financial exposure by reducing the number of participants in a class action seeking money from the defendant. Not a single case has been cited to the Court (and we are not

aware of any) where a court enjoined a member of a class from urging other members of the class to oppose a settlement or a class action, not to speak of any injunction protecting mambers' right to "participate" in a cy pres settlement. Nor is a broad injunction against any public statements proper: in the *School Asbestos Litigation* case cited by plaintiff, the court limited the injunction to "direct communications with plaintiff class members" by defendants and their representative, while overturning the part of the injunction barring public communications that might reach class members, such as the ban on media interviews. 842 F2d 671, 683-684 (CA3 1988). Nor, indeed, would the likelihood that some class members will follow Moughni's advice and opt out of the settlement, or object to it, justify suppression of his perspective. As the Supreme Court wrote in *Sorrell v IMS Health*, 131 S Ct 2653, 2670 (2011), "the fear that speech might persuade provides no lawful basis for quieting it."

In this regard, the injunction here cannot be justified on the theory that it protects class members' rights. No class member will lose any personal gain by opting out, or indeed by objecting. That is not to say that the cy pres remedy that is proposed in the settlement agreement that is before the court is inappropriate under the law — that is a separate issue that the Court will address at the proper time. Cy pres awards are appropriate in some class actions. *E.g., Powell v Ga.-Pac. Corp.*, 119 F3d 703, 706-07 (CA8 1997); *Democratic Central Committee v Washington Metropolitan Area Transit Commission*, 84 F3d 451, 455 (CADC 1996). It is not the function of this brief to address whether cy pres is appropriate here. That is an issue that the Court can properly address after all members of the class—including Moughni —have had a fair opportunity to advocate their point of view and to encourage others in the class to object to the settlement or opt out.

But the only thing that class members have to lose personally by opting out (or defeating the settlement) is the entry of a judgment that extinguishes certain legal claims that they might have against defendants. In short, this is an injunction that protects the defendants, not the class.

Finally, the cases that authorize bans on communications to the class rely directly on a commercial speech analysis to justify an order that would otherwise be an impermissible prior restraint, and here, the prior restraint cannot be justified on those grounds. Moughni was not speaking as a lawyer representing clients, or representing the class, but as a member of the class appealing to fellow members of the class. In those circumstances, plaintiff must meet the ordinary standards for relief against core, noncommercial speech that enjoys the highest level of speech under the constitution.

The standard of forbidding speech that is not false, but only "misleading" or "deceptive," finds its basis in commercial speech cases. But as the Sixth Circuit held in *Taubman v WebFeats*, 319 F 3d 770, 774 (1983), that standard cannot constitutionally be applied to noncommercial speech; the federal trademark laws' prohibition on "misleading" speech that is "likely to cause confusion" are constitutional only because they are limited to regulating commercial speech. For example, a political flyer or a newspaper article about a public figure could not be enjoined, or made the basis for an award of damages, simply because some readers would likely find it confusing. *O'Connor v Superior Court*, 223 CalRptr 357, 361 (1986). The concept of regulating speech that has the potential to be misleading, even though it is not strictly speaking false, has developed over the 37 years since the Supreme Court first extended First Amendment protection to commercial speech. *Thompson v Western States Medical Center*, 535 US 357, 367 (2002); *Lorillard Tobacco Co. v Reilly*, 533 US 525, 554 (2001). Unlike non-commercial speech, commercial speech can be regulated even if it is "not provably false, or even wholly false, but only deceptive or misleading." *Friedman v Rogers*, 440 US 1, 9 (1979). Thus, although "[a] company has the full panoply of protections available to its direct comments on public issues, . . . there is no reason for providing similar constitutional protection when such statements are made in the context of commercial

transactions." *Bolger v Youngs Drug Products Corp.*, 463 US 60 (1983). [5]

Here, Moughni was not engaged in commercial speech. Although he is an attorney, the Facebook page made clear that he was not seeking to represent class members himself, but rather that he had retained a different lawyer, Mr. Miller, to object on behalf of members of the class who agreed with his views. Plaintiff accused Moughni of grandstanding to make himself look like a hero in his community Tr. 20, 22; but if taking positions on public issues could be treated as commercial speech on that theory, every candidate for office would be subject to having campaign literature regulated as commercial speech. Indeed, when a lawyer disseminated flyers with his name and phone number, denouncing defendant in a case where he was representing plaintiffs, a federal judge refused to treat the flyer as commercial speech subject to a lower level of constitutional protection because, as here, "the communication involved a clear matter of public concern and represented speech at the core of First Amendment protection." *Karhani v Meijer*, 270 FSupp2d 926, 930-931 (EDMich 2003). The application of commercial speech standards cannot be justified here.

D. The Wrongful Injunction Should Be Vacated, and the Period for Class Members to Respond to the Settlement Proposal Extended.

Because the prior restraint imposed on Moughni was a violation of the First Amendment, the Court should vacate the injunction. Although we believe that **no** emergency relief can be justified under the First Amendment, if the Court disagrees with that broader contention, it should issue a new, narrowly tailored injunction supported by detailed findings and admissible evidence.

However, vacating the injunction is not a sufficient remedy. Just as a court may

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[5] *Accord Bates v State Bar of Arizona*, 433 US 350, 383 (1977) ("the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena"); *Smith v United States*, 431 US 291, 318 (1977) ("Although . . . misleading statements in a political oration cannot be censored, . . . misleading representations in a securities prospectus may surely be regulated."); *Young v American Mini Theatres*, 427 US 50, 68 & n31 (1976) ("regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive").

appropriately invalidate opt-outs and establish a new opt-out period when the Court is persuaded that opt-outs have been secured by misleading communications, *e.g., Georgine* 160 FRD at 502, so should the Court establish a new opt-out period when a prior restraint has interfered with class members' "expos[ure] to information that will enable them to make an informed, intelligent decision whether to opt out or remain a member of the class" and hence to make their own, independent judgments. *Id.* As plaintiff stated in his motion for an injunction, the Court should exercise its duty to prevent " threat[]s to invade the Class Members' ability to make independent and self-informed decisions about the Class Settlement and whether to participate." Motion at 9.

Here it was the injunction that invaded class members' ability to make their own judgments about how best to protect their own interests. For example, several hundred individuals indicated that they "liked" Moughni's expression. The Court enjoined Moughni from communicating with these individuals. It is quite possible that some of them would have responded to a suggestion that they file an opt out or objection had the injunction not been imposed. Indeed, plaintiff argued, Motion at 6, 7, 8 and the Court itself apparently agreed, Tr. 36, 37, that Moughni's Facebook page could have led class members to believe that clicking "like" was enough to put their positions before the Court without ever following up through a court filing. Moughni disputes that conclusion, but it follows from the conclusion that affirmative steps were needed to rectify the confusion. Indeed, it is respectfully submitted that approving the settlement at this time would violate the Due Process rights of the absent class members that demand the provision of notice in the first place. *In re Telectronics Pacing Sys.*, 221 F3d 870, 881 (CA6 2000) ("[C]onstitutional considerations of due process and the right to a jury trial all lead to the conclusion that in an action for money damages class members are entitled to personal notice and an opportunity to opt out."). Because the class was deprived of a fair opportunity to consider arguments against the proposed settlement, the Court should not bind those individuals, or indeed anybody else, to release their claims, until the

marketplace of ideas has had a full opportunity to function, free of improper prior restraints.

CONCLUSION

The injunction should be vacated, and the Court should reopen the period for class members either to file objections to the settlement, or to opt out of the class.

Respectfully submitted,

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February 22, 2013

STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

AHMED AHMED, individually and on behalf of all similarly situated persons,

Plaintiffs,

Case No. 11-014559-CZ

vs.

Hon. Kathleen MacDonald

McDONALD'S CORPORATION and FINLEY'S MANAGEMENT COMPANY, d/b/a/ McDONALD'S # 11663,

Defendants.
_____/

Proof of Service

I, H. William Burdett, Jr., certify that on February 22, 2013, I filed a copy of the foregoing paper with the Wayne County Circuit Court's Electronic Filing System, which will serve copies on counsel for all parties of record.

/s/H. William Burdett, Jr.
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