

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BILAL KARHANI and  
MOHAMMED KARHANI,

Plaintiffs,

v.

Case No. 03-71654  
Hon. Paul D. Borman

MEJER, a Michigan Corporation,  
LYNNETTE SUSAN RECTOR,  
DANIEL JOE AQUILINA,  
CITY OF FRASER, a Municipal  
Corporation, POLICE OFFICER  
HOPPE, Jointly and Severally,

Defendants.

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**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR  
INJUNCTIVE RELIEF**

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**STATEMENT OF THE ISSUE PRESENTED**

SHOULD DEFENDANTS' MOTION FOR INJUNCTION BE GRANTED?

Plaintiffs answer "No."

Defendants answer "Yes."

## **STATEMENT OF FACTS**

On February 28, 2003, Plaintiffs Bilal and Mohammad Karhani went to Defendant's Meijer gas station located in Fraser, Michigan. Plaintiff Mohammad Karhani alleges that he was initially denied the right to service on the same conditions and terms as provided to other customers; to wit, payment for gasoline purchase by credit card, by defendant Lynette Susan Rector. When Plaintiff Bilal Karhani inquired as to why Defendant Rector advised his father of the denial of credit card usage, he was "stonewalled" by Defendant Rector. While she did, ultimately, agree to the use of Defendants credit card, she had advised Plaintiff Bilal Karhani "I don't have to explain nothing to nobody" and "I don't have to serve you guys, you can't make me serve you guys."

Allegedly, Defendant Rector was experiencing some difficulty with the credit card machine. She then advised Plaintiff Bilal Karhani that it would have to be manually processed. By this point tension and ill feelings had already arisen between Bilal Karhani and Lynette Rector. Bilal Karhani believed that Defendant Rector was "charging him twice" for the same purchase. Bilal Karhani inappropriately reacted and pushed the credit card machine towards Defendant Rector. At this point Defendant Daniel Joe Aquilina, another customer, became involved. Defendant Aquilina hurled ethnic slurs at Plaintiffs Bilal and Mohammad Karhani and yelled, "You fucking Arabs get the fuck out of here." Defendant Rector, following Defendant Aquilina's lead, stated, "You Arabs get out of here, we don't want to serve you guys. We don't have to serve you, go back to your country. Dirty Arabs!" Defendant Aquilina then assaulted Plaintiff Bilal Karhani.

Bilal Karhani reacted by throwing two bottles of windshield washer fluid. He felt he had been "wronged" in his treatment by Defendants Rector and Aquilina. As a result of his inappropriate reaction, Bilal Karhani was charged criminally. He subsequently plead guilty to a misdemeanor Assault and Malicious Destruction of Property. He was sentenced to 12 months probation, a \$600 fine including court costs, \$5.00 in restitution and to take an "anger management" class.

Plaintiffs were distressed by the treatment they had received in Defendant's "service" station. They were offended by the ethnic slurs hurled at them by Defendant Rector and Defendant Aquilina. While Defendant Bilal Karhani was criminally prosecuted for his inappropriate actions, Defendants Rector and Aquilina went unpunished. Defendant Meijer publicly stated; "Our team member didn't do anything wrong."

Plaintiffs decided to address this injustice in two ways. They filed this instant lawsuit to vindicate their wrongs. They also drafted a flyer advising the public as to the egregious behavior of the Defendants. The flyers were distributed in plaintiffs' residential community. Apparently, there are now third parties who are distributing the leaflets. The flyers ask the recipient to call Defendant Meijer to "let them know how you feel [about the plaintiffs treatment]." (See copy of flyers attached to defendants' brief.)

Defendant Meijer is seeking an injunction prohibiting Plaintiffs from further distribution of the flyer, an action which is fully protected by the First Amendment of the United States Constitution.

## ARGUMENT

### I. THE FIRST AMENDMENT PRECLUDES THE ISSUANCE OF AN INJUNCTION AGAINST THE DISTRIBUTION OF THE LEAFLETS.

Preliminarily, Defendants' application for an order to restrain plaintiff from any further distribution of his flyers is a prior restraint on the freedom of expression. A "prior restraint on expression comes ... with a heavy presumption against its constitutional validity," Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971) (internal quotation marks and citation omitted), and is "the most serious and the least tolerable infringement on First Amendment rights," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976).

Moreover, "[w]hen a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases." Metropolitan Opera Ass'n, Inc. v. Local 100, 239 F.3d 172, 176 (2d Cir. 2001).

The issuance of an injunction against the distribution of the flyer would violate the First Amendment's prior restraint doctrine. Any advance prohibition against expression, such as by means of an injunction, constitutes a prior restraint and so brings into play the prior restraint doctrine. Since a prior restraint directly interferes with the ability of the public to receive the information, it creates a "freezing effect" on expression and so is presumptively unconstitutional and requires a very heavy burden of justification. As the Sixth Circuit has stated:

It has long been established that a prior restraint comes to a court 'with a heavy presumption against its constitutionality . . . . Although the prohibition against prior restraints is by no means absolute, the gagging of publication

has been considered acceptable only in 'exceptional cases.' Even where questions of allegedly urgent national security,<sup>1</sup> or competing constitutional interests are concerned, we have imposed this 'most extraordinary remedy' only where the evil that would result from the reportage is both great and cannot be mitigated by less intrusive measures.

The Proctor & Gamble Company v. Bankers Trust Co., 78 F.3d 219, 224-225 (6th Cir.1996) (quoting Opinion of Justice Blackmun in Chambers, CBS v. Davis, 114 S.Ct. 912, 914 (1994) (citations omitted). See also the discussion in CBS v. Young, 522 F.2d 234, 238 (6th Cir. 1975).

Defendants (whose brief makes no reference whatsoever to the prior restraint doctrine) ask this Court to issue an injunction against the distribution of the leaflets on the ground that the information contained in the leaflets is "false, misleading, mischaracterizing, inaccurate and libelous," and will cause irreparable injury to Meijer's business reputation and customer goodwill. To say the least, the protection of a party's business reputation and customer goodwill does not constitute an "exceptional case" justifying the issuance of an injunction. In our constitutional system, it is the public and not the courts that must decide the truth or falsity about matters of public concern, and the prior

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<sup>1</sup>There is no "national security" exception to the commands of the prior restraint doctrine. *New York Times v. United States*, 403 U.S. 713 (1971) (The "Pentagon Papers" Case). In that case the government claimed that public disclosure of the information sought to be enjoined would be harmful to national security, but the Court refused to recognize a "national security" exception to the commands of the prior restraint doctrine. The government could not sustain its "heavy burden" to justify the issuance of an injunction against the publication of the particular information detailing the actions that led to American military involvement in Vietnam, despite its claim that the disclosure would impede peace negotiations between the United States and the North Vietnamese and the Viet Cong.

restraint doctrine precludes the courts from enjoining a publication dealing with such matters on the ground that the court finds that the information contained in the publication is "false, misleading, mischaracterizing, inaccurate and libelous."<sup>2</sup> This is especially true when the leaflets are a mechanism of promoting a public discussion on an issue of public concern.

Directly on point on this issue is Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). In that case a real estate broker sought an injunction against a civil rights organization seeking to maintain racially integrated neighborhoods that claimed that the broker was engaged in "blockbusting or "panic peddling." The organization distributed leaflets in the community where the broker resided describing and criticizing his real estate practices. The leaflets were passed out to some parishioners on their way to or from the broker's church and were left at the doors of his neighbors. The state court issued an injunction against the distribution of the leaflets on the ground that they violated the broker's "right of privacy" and caused him to suffer irreparable injury. The Supreme Court held that the issuance of the injunction was precluded under the prior restraint doctrine. As the Court stated:

Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity. Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden. No prior decisions support the claim that the

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<sup>2</sup>Meijer, of course, can bring a libel action for damages against the plaintiffs, but because the leaflets involve a matter of public concern, the libel action is subject to the constraints of the New York Times doctrine. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record.

402 U.S. at 419-420 (citations omitted).<sup>3</sup>

The facts of the present case are nearly identical to the facts in *Austin*. Arguably, the facts in *Austin* are even more compelling as the leaflets were directed at his neighbors and co-members of his religious congregation. In the instant case, the leaflets are directed to the general public. The ruling in *Austin* controls and precludes the issuance of an injunction against the distribution of the leaflets in the present case.<sup>4</sup>

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<sup>3</sup>The Court also observed that: "The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability." 402 U.S. at 419 (citations omitted).

<sup>4</sup>The defendants make the rather incredible argument that since the leaflets contain the name and phone number of the plaintiffs' attorney and advise the public to contact him for "details," the leaflets constitute commercial speech, or as the defendants put it, "appear to be designed to further a commercial interest on behalf of Plaintiff's attorney and not any protected First Amendment free speech interest." The commercial speech doctrine applies only to advertisements for products and services, that is, to speech involving the exchange of goods and services for profit, as distinct from speech involving the production and exchange of ideas. See e.g., *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980). As noted in footnote 2, the leaflets are expressing a matter of public concern about the alleged, unlawful practices of a Meijer's employee. To say the least, the leaflets constitute political speech for First Amendment purposes, and the commercial speech doctrine is completely inapplicable.

## II. ENTRY OF A JUDICIAL GAG ORDER BARRING THE DISTRIBUTION OF THE LEAFLETS BY IS NEITHER WARRANTED NOR APPROPRIATE

While the prior restraint doctrine has been invoked primarily by the media seeking to challenge restraints on publication, it applies with equal force to judicial "gag orders" issued against parties in a pending case. United States v. Ford, 830 F.2d 596, 598 (6th Cir.1987). As the Court there stated: "We see no legitimate reasons for a lower threshold standard for individuals, including defendants, seeking to express themselves outside of court than for the press."<sup>5</sup>

The prior restraint doctrine also applies to the issuance of gag orders by the courts against the press and parties to the litigation that are designed to protect fair trial rights in pending cases. The leading Supreme Court case on the issuance of gag orders for this purpose is Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). In that case, involving a highly-publicized murder trial, the Supreme Court held that a gag order could not be issued against the press unless the court made specific findings that the publication would create a "clear and present danger" to a party's fair trial rights and that there are no less restrictive alternatives available to protect the fair trial rights.

In United States v. Ford, *supra*, the Sixth Circuit addressed a gag order that had

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<sup>5</sup>The First Amendment does not provide the media with any greater First Amendment rights than are enjoyed by the public at large. Pell v. Procunier, 417 U.S. 817, 834-35 (1974). See also Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

been entered by a trial judge in a federal criminal prosecution against a Congressman for mail and bank fraud. The order prohibited the defendant from "making any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication, including any opinion of or discussion of the evidence and facts in the investigation or case, any statement about a prosecuting attorney, any statement about any alleged motive the government may have had in filing the indictment, or any statement which relates to any opinion as to the merits of the case." 830 F.2d at 597 (internal quotations and omissions omitted). The Sixth Circuit held that the issuance of the gag order was precluded by the prior restraint doctrine.

The Ford Court began by pointing out, as discussed previously, that the standard for the issuance of gag orders was the same for gag orders directed against parties as for gag orders directed against the press. 830 F.2d at 598. The Court went on to explain how the trial judge's authority to ensure a fair trial is constrained by the prior restraint doctrine:

Every trial judge is charged with the primary responsibility of ensuring that the judicial proceedings over which he presides are carried out with decorum and dispatch and thus has very broad discretion in ordering the day-to-day activities of his court. . . Yet as the authorities demonstrate, any restrictive order involving a prior restraint upon First Amendment freedoms is presumptively void and may be upheld only on the basis of a clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial" citing *CBS v. Young*, 522 F.2d 234, 241 (6th Cir.1975).<sup>6</sup>

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<sup>6</sup>In *CBS v. Young*, which involved a highly-publicized lawsuit arising out of the killings of student protestors at Kent State by the Ohio National Guard in 1970, the District Judge issued a gag order ordering all counsel and court personnel, all parties concerned with the litigation, their relatives, close friends, and associates, to refrain from discussing in any manner whatsoever these cases with members of the news media or the public. In holding that the broad order violated the First Amendment, the Court quoted from the Seventh

Id. at 599.

The Court then discussed restrictions on speech to the matter of fair trial rights:

Trial judges, the government, lawyers and the public must tolerate robust and at times acrimonious or even silly public debate about litigation. The courts are public institutions funded with public revenues for the purpose of resolving public disputes, and their right of publicity concerning their operations goes to the heart of their function under our system of civil liberty. The courts have available other less restrictive approaches for insuring a fair trial. They may, for example, consider a change of venue or the sequestration of the jury or a searching voir dire examination of the jury. On this record, these remedies are sufficient to preserve the conditions of a fair trial in the instant case.

Id.

Finally, the Court concluded that the issuance of the gag order in this case violated the First Amendment:

The order in the present case is clearly overbroad and fails to meet the clear and present danger standard in the context of a restraint on a defendant in a criminal trial. Such a threat must be specific, not general. It must be much more than a possibility or a "reasonable likelihood" in the future. It must be a "serious and imminent threat of a specified nature, the remedy for which can be narrowly tailored in an injunctive order. . . . In the instant case, no facts were found which would suggest "a serious and imminent threat," and the order was not narrowly tailored nor directed to any specific situation. Nor was there any specific consideration of the less burdensome alternatives of voir dire, sequestration or change of venue.

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Circuit's decision in *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970), to the effect that, "We hold that before a trial can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is a 'serious and imminent threat to the administration of justice.'" 522 F.2d at 239. It is this standard that must be utilized if, for example, this Court felt that the limitations placed upon an attorney pre-trial publicity in the Michigan Rules of Professional Conduct (MRPC 3.6) were applicable in the present case.

Id. at 600.

As Ford makes clear, the issuance of a gag order against a party to the litigation violates the prior restraint doctrine unless the court finds that specific public statements by a party create a "serious and imminent threat" to a fair trial, and that this threat cannot be obviated by less burdensome alternatives. See also The Proctor & Gamble Co. v. Bankers Trust Co., where the Sixth Circuit held unconstitutional an order that enjoined a business magazine from publishing materials that had been obtained by the parties during discovery proceeds and that had been designated by the parties as "confidential,"

Applying the above Supreme Court and Sixth Circuit precedents, it is clear that the issuance of an injunction against the dissemination of the plaintiffs' leaflets in the instant case would constitute an impermissible prior restraint. Dissemination of the leaflets will not create a "serious and imminent threat" to the defendants' fair trial rights. The leaflets make no reference whatsoever to the pending lawsuit between the plaintiffs and the defendants. Their dissemination is to the public at large and not to persons summoned for jury duty in this Court. They are no different from a newspaper story about events that could or in fact have resulted in litigation. In the same manner as a newspaper story, the leaflets could come to the attention of potential jurors, but again as with respect to a newspaper story about events that could result in litigation, any influence of the leaflets on the impartiality of potential jurors could be determined during the voir dire. Indeed, the events underpinning this lawsuit have already been the subject of a variety of both print and

electronic media attention.<sup>7</sup> Since the dissemination of the leaflets does not create a "serious and imminent threat" to fair trial rights, and since any possible impact of the leaflets on potential jurors could be determined on voir dire, the prior restraint doctrine precludes the issuance of an injunction against the dissemination of the leaflets.

The present case does not involve the issuance of a gag order against the plaintiffs' attorney or any other restriction on his public statements about the case. Nonetheless, in the context of the present case, it may be appropriate to discuss the First Amendment rights of lawyers to make public statements on issues presented in pending litigation in which they are involved. That is to say, a gag order issued against a lawyer must also satisfy the requirements of "serious and imminent threat to a fair trial."

Because of the lawyer's involvement in the case and the public assumption of the lawyer's "inside knowledge," it is possible that the lawyer's public statements - or at least certain ones - would in fact create such a threat and so could be prohibited. But the trial judge still must make a finding to that effect, supported by the record. It would be impossible for Defendant to establish that the distribution of the challenged flyers presents a "serious and imminent threat to a fair trial." Even if such a finding could be made this court must also find that the threat cannot be obviated by less burdensome alternatives, such as extensive

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<sup>7</sup>A "search" of both the Detroit News and Detroit Free Press identifies three stories in each newspaper. WDIV television is known to have shown a portion of the Meijer "security tape" when reporting on the story. These publications will reach a far greater number of the public than Plaintiff's flyers. Assuming their objectivity, these publications, by themselves, would be a significant counterbalance to the alleged disinformation contained in Plaintiffs' leaflets. Meijer's, of course, is also free to publish its own leaflets or other form of rebuttal.

voir dire. In the absence of such findings the First Amendment precludes the issuance of gag orders against attorneys. In this connection, it may be noted that the Supreme Court has held that an attorney may be disciplined for making public statements about pending litigation only where the statements could create a "substantial likelihood of material prejudice" in the case. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

Finally, as regards the ethical obligations of lawyers with respect to public statements, the defendants cite Rule 7.1 of the Michigan Rules of Professional Conduct, which prohibits lawyers from making public statements that "contain a material representation of fact or law or omit a fact necessary to make the statement considered as a whole not materially misleading." First, it must be noted that the cited provision relates strictly to attorney advertising of services. If Defendants believe that these leaflets violate that provision of the Michigan Rules of Professional Conduct, their remedy lies with the Michigan Attorney Grievance Commission - not with this Court. Additionally, it would seem that defendants are not aware of the fact that nearly identical provisions of the both Minnesota and Michigan Rules of Judicial Conduct have been held to be void on their face, in violation of the First Amendment. See Minnesota Republican Party v. White, 536 U.S. 765, 153 L.Ed.2d 694 (2002) and In re Chmura, 461 Mich 517, 608 N.W.2d 31 (2000).

**CONCLUSION**

For the reasons stated herein, the Defendants' motion for injunctive relief should be DENIED.

Respectfully submitted,

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