UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION
Civil Action No. 8:20-cv-00513-CEH-SPF

TRAVIS TAAFFE **Plaintiff,** **vs.** **ROBINHOOD MARKETS, INC., ROBINHOOD FINANCIAL LLC, and ROBINHOOD SECURITIES, LLC,** **Defendants.**	:	**CLASS ACTION**

PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Fed.R.Civ.P. Rules 23(d) and 65, Plaintiff Travis Taaffe, individually and on behalf of all other similarly situated ("Plaintiff" or "Taaffe"), by and through his undersigned counsel, respectfully moves this Court for issuance of an emergency temporary restraining order and preliminary injunction against Defendants Robinhood Financial, LLC ("Robinhood Financial"), Robinhood Securities, LLC ("Robinhood Securities"), and Robinhood Markets, Inc. ("Robinhood Markets") (collectively, "Defendants" or "Robinhood") that:

(1) Enjoins Robinhood from sending any further misleading communications to prospective class members;

(2) Requires Robinhood to make each prospective class member aware of this lawsuit and to provide Plaintiff's counsel with contact information for each prospective class member including the email address of each prospective class member; and,

(3) Requires that any releases entered into by and between prospective class members and Robinhood since the filing of this lawsuit be voided, with prospective class members given the opportunity to affirm any release after being informed of this litigation and having an opportunity to consult with counsel.

In support hereof, Plaintiff submits the incorporated memorandum of law, and alleges as follows:

I. INTRODUCTION

On March 3, 2020, Robinhood announced publically that it was at fault for its system outages which prevented trading during the then-largest single-day point gain in all three major U.S. stock market indices (March 2, 2020). Plaintiff filed suit on March 4, 2020 on behalf of himself and the Class of others similarly situated against Defendants, seeking recovery of damages that were proximately caused by Defendants' failure to provide and maintain a suitable platform for its users.

Plaintiff has discovered that despite Defendants' clear awareness of this litigation – **or more likely due to the existence of this litigation** – Defendants sent misleading communications in the last approximately thirty-six hours to prospective class members in an effort to obtain a waiver of the claims brought in this case. Specifically, Defendants offered its users a "goodwill credit of $75" in exchange for their signatures on a "DocuSign"

document. Unfortunately for the prospective class members, this DocuSign document includes a complete waiver of rights which is not identified or referred to in any way by Defendants to its users. Neither the instant class nor the fact that customers may have putative class claims is referenced in these communications. Defendants' correspondence to its users reads, in part, as follows:

> Thanks so much for your patience as we evaluated the impact of the outage on your account. Based on our review, we're able to offer you a goodwill credit of $75.00.
> To accept this offer, please review and sign the agreement that will be sent to you from Robinhood via DocuSign, which includes reference to your incoming credit.

An example of this correspondence is attached to the Declaration of Class Member Jared Ward ("Ward's Declaration") attached hereto as **Exhibit 1**. As stated in Ward's Declaration, the acceptance document Robinhood provides to users contains a broad waiver of claims that class members have against Robinhood without providing notice of the class action's existence. This is a misleading attempt to secure a waiver after the filing of this lawsuit without class members fully understanding their rights.[1] Many users who sign on their phone via Docusign may not even realize they are executing a release.

The undersigned counsel has received numerous phone calls and electronic communications from class members related to these misleading communications. See Declaration of Michael S. Taaffe attached as **Exhibit 2**. It is very clear from the volume and

[1] In addition to the proposed class members not being informed of the existence of this lawsuit in the communication seeking their waiver of all claims, Robinhood is also not agreeing to provide any programmatic relief sought by this lawsuit. Specifically, Robinhood is not offering to ensure that users are provided with a functioning trading platform moving forward or any assurance of further remuneration were the platform to suffer additional outages causing damage.

nature of these communications by class members to the undersigned that Robinhood's communications are misleading and that this Motion is thus necessary.

Defendants are attempting to mislead the putative class members into unknowingly waiving their rights to participate in the class action—whether they know it exists or not—in exchange for as little as a $75 credit. Defendants' conduct must not be allowed to continue. **Neither the letter nor the release mentions this class action lawsuit.**

Further, the compensation offered by Defendants is grossly inadequate. Class members have incurred significant monetary damages as a result of the Defendants' systems outage; many in the tens of thousands of dollars. However, Defendants have offered only $75 to settle all of their claims. This $75 offer appears to be a very intentional determination of remuneration by Robinhood, **as that is the amount of money that Robinhood charges its users to withdraw their funds from its platform**.

Unless Defendants' conduct is immediately enjoined by this Court, the putative class members will suffer severe and irreparable harm by way of unwittingly forfeiting their rights in exchange for inadequate compensation and no programmatic relief. Not only will putative class members suffer irreparable harm without the injunctive relief sought, but the injury is so imminent that notice and a hearing on the application for preliminary injunction is impractical, if not impossible. Accordingly, immediate injunctive relief should be granted by this Court to preserve the status quo.

II. BACKGROUND

As set forth in the Complaint, Robinhood is an online brokerage firm whose users place securities trades mainly through the firm's website and mobile application.

Furthermore, Robinhood permits many of its users to engage in the buying and selling of option contracts. However, on March 2, 2020, Robinhood's systems went down. This of course not only rendered Robinhood's trading platform and services inaccessible the entire day and through the next morning, but also specifically prevented users from buying or selling securities, which included but was not limited to an inability for customers to exercise options positions in their portfolios or buy or sell new option contracts or the premiums on already-owned options contracts. Moreover, during this outage, users were also unable connect with Robinhood customer service and therefore could not obtain information or support specific to their individual investment needs.

As pled in the Complaint, this resulted in particularized damages for Robinhood users. Unable to exercise their option contracts or trade them to capitalize on the market's recent historic gains and losses, Plaintiff and putative class members were forced to sit idly by while incurring preventable monetary losses. Many in-the-money (exercisable) option contracts expired unexercised and worthless, and those that did not expire worthless surely decreased in value from the many variables that impact the contract value, such as time-value and implied-volatility.

It is important to note that at the time of the outage Robinhood likely affected over 10 million unique users, all of whom likely suffered losses to some degree. *See* Maggie Fitzgerald, *Start-up Robinhood tops 10 million accounts even as industry follows in free-trading footsteps*, CNBC.COM (DEC. 4, 2019, 10:12 AM), https://www.cnbc.com/2019/12/04/start-up-robinhood-tops-10-million-accounts-even-as-industry-follows-in-free-trading-footsteps.html. As such, the number of putative class members for the instant case is

enormous. On March 25, 2020, it came to the undersigned counsel's attention that Defendants were attempting to undermine the rights of these putative class members.

MEMORANDUM OF LAW

I. The Court's Authority under Rule 23(d) to Prohibit Defendants' Conduct and to Grant the Relief Sought by Plaintiff

A. This Court Has Broad Discretion to Enter Orders Governing the Conduct of Counsel.

The Supreme Court of the United States held in *Gulf Oil Co. v. Bernard* that, pursuant to Fed.R.Civ.P. Rule 23(d), this Court has "both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel."[2] Though the Supreme Court did not enumerate specific standards in *Gulf Oil* for restraining communications by parties or counsel, District Courts have started a pattern of issuing orders limiting communications after a finding of either: (1) misleading, deceptive, or coercive communications; or (2) communications that undermine the class action by convincing potential class member to avoid the representative suit.[3] This power to restrict communications between parties and potential class members extends to the time before a class is certified.[4]

The Court's authority to enjoin abusive communications exists pursuant to both Fed.R.Civ.P. Rule 23(d) as well as Rule 65 (governing preliminary injunctions and restraining orders). However, when seeking an order under Rule 23(d), a party does not have

[2] *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).
[3] *See e.g. Zwerin v. 533 Short North, LLC*, 2011 WL 2446622, *2 (S.D. Ohio 2011); *Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 667 (E.D. Tex. 2003).
[4] Friedman v. Intervet Inc., 730 F.Supp.2d 758 (N.D. Ohio 2010).

to establish the four preliminary-injunction factors required under Rule 65 to obtain such an injunction.[5]

B. The General Standard for Entering an Order Restricting Communications Pursuant to Rule 23(d)

According to *Gulf Oil*, parties seeking an order limiting communications must establish "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."[6] In compliance with *Gulf Oil*, courts have routinely recognized that the moving party must present an evidentiary showing of actual or threatened abuse by the party sought to be restrained.[7] Two kinds of proof are required. First, the movant must show that a particular form of communication has occurred or is threatened to occur.[8] Second, the movant must show that the particular form of communication at issue is abusive in that it threatens the proper functioning of the litigation. Abusive practices which have been considered sufficient to warrant a protective order include communications that contain false, misleading or confusing statements.[9] Restrictions on the communication of settlement offers are subject to the same proof requirements.[10]

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[5] *Tolmasoff v. Gen. Motors, LLC*, No. 16-11747, 2016 WL 3548219, at *10 (E.D. Mich. June 30, 2016); *see Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1201 (11th Cir. 1985) (An order enjoining abusive communications is a "directive[ ] to counsel in their capacity as officers of the court, pursuant to the court's inherent power to manage its cases. ...The more relaxed prerequisites of Rule 23[ ] therefore appl[y]....").
[6] *Gulf Oil Co.* at 101.
[7] *Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc.*, 214 F.R.D. 696, 697–98 (S.D. Ala. 2003)
[8] "An order 'involv[ing] serious restrictions on expression [must be] justified by a likelihood of serious abuses." *Gulf Oil* at 104.
[9] *See, e.g., In re School Asbestos Litigation*, 842 F.2d at 683; *Lester v. Percudani*, 2002 WL 1460763 at *2 (M.D.Pa.2002); *Basco v. Wal–Mart*, 2002 WL 272384 at *3; *Jenifer v. Delaware Solid Waste Authority*, 1999 WL 117762 at *2; *O'Neil v. Appel*,1995 WL 351371 at *2; *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630, 632 (N.D.Tex.1994).
[10] *E.g., Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D.Iowa 2000).

C. Courts Have Held that Communications between Defense Counsel and Prospective Class Members are Misleading When the Communications Could Result in Unknowing Waivers by Prospective Class Members of Their Rights.

Based on the authority and responsibility conferred by Rule 23(d), district courts have imposed restrictions on communications by defense counsel with prospective class members when misleading communications have taken place. Importantly, courts throughout the country have repeatedly held that settlement communications to prospective class members which do not reference to the pending class action are misleading and are therefore subject to restrictions.

For example the Southern District of New York addressed this issue in *Ralph Oldsmobile Inc. v. General Motors Corporation.*[11] In that case, the plaintiff had filed a class action on behalf of all General Motors dealers in New York State relating to the issue of reimbursement for warranty repairs. While the class action was pending, GM contacted dealers, who were prospective class members, concerning transition payments resulting from the discontinuance of the Oldsmobile line. To obtain the transition payments, the dealers had to sign a release of claims; however, GM did not inform the prospective class members about the pending class action litigation. The district court concluded that the record supported a finding of "potentially unknowing waivers of the rights asserted" in the class action. To remedy this problem, the court ordered GM to send notice to members of the putative class of the existence of the class action. The court noted that generic communications from Plaintiffs to the prospective class members regarding the class action, even if mailed directly

[11] *Ralph Oldsmobile Inc. v. General Motors Corp.*, 2001 WL 1035132 (S.D.N.Y).

to the putative class members, are not enough to establish that the class members ever received or read the notices so as to inform their decision about executing a release.[12]

The Northern District of Ohio addressed this topic in *Friedman v. Intervet Inc.*[13] In that case, the defendant—after receiving notice of the lawsuit—affirmatively reached out to prospective class members both in writing and via telephone concerning resolution of the same claims that were addressed in the class action lawsuit. However, the communications, the offer of settlement, and the release of claims all failed to make any mention of the pending class action lawsuit. Moreover, the settlement offer from the defendant constituted nothing more than a refund of the unused product purchased by the prospective class members. The Court held that "defendant's failure to notify putative class members of this litigation before obtaining settlements and releases from them […] constituted a misleading communication."[14] In response, the court ordered pursuant to Rule 23(d) that the defendant must notify the individuals from whom it seeks or received a settlement about the class action lawsuit as well as provide the name and contact information for plaintiff's counsel.

In *Westerfield v. Quizno's Franchise Co., LLC*, Quizno's and a Quizno's-affiliate sent releases to prospective class members that did not mention the pending class action.[15] The district court concluded that "there exists a potential for unknowing waivers resulting from a lack of information in the [releases]. Neither [communication] mentions the instant action." Therefore, the district court required Quiznos to provide notice of the class action to any of

[12] *Id.* at *4.
[13] Friedman v. Intervet Inc., 730 F.Supp.2d 758 (N.D. Ohio 2010).
[14] 730 F. Supp. 2d 758, 762–63 (N.D. Ohio 2010).
[15] Westerfield v. Quizno's Franchise Co., LLC, No. 06-C-1210, 2007 WL 1062200 (E.D. Wis.)

its Wisconsin franchisees from whom it sought a release of claims while the class action was pending.

D. Defendant's Communications Constitute Misleading Conduct that Must be Restricted under Rule 23(d)

The communications by Defendants are misleading and designed to undermine the class action by obtaining releases from unknowing prospective class members at a significant discount to what the claims are actually worth. The record clearly establishes that (i) the communications have already occurred and may be ongoing, and (ii) the particular form of misleading communication is abusive as a matter of law. Accordingly, Rule 23(d) authorizes the Court to enjoin Robinhood's behavior and to grant Plaintiff the relief sought in this Motion.

First, the record clearly shows that Defendants have engaged in a campaign of misleading communications with prospective class members of this lawsuit. Specifically, Defendants have begun offering its users a "goodwill credit of $75" in exchange for their signatures on a "DocuSign" document. (*See* Ward's Declaration, Exhibit 1). Unfortunately for the prospective class members, this DocuSign document includes a complete waiver of rights which is not identified or referred to in any way by Defendants to its users.

Second, these communications by Defendants qualify as abusive practices. In the present matter, Defendants have solicited and potentially obtained releases from prospective class members relating to the exact conduct at issue in this class action. The release and all accompanying communications do not mention this pending class action. Thus, just as in *Friedman*, *Ralph Oldsmobile*, and *Westerfield*, there is a high probability of Defendants

obtaining unknowing waivers on the part of prospective class members of their class action rights.

To remedy this problem, Plaintiff requests that Robinhood be: (1) enjoined from sending any further misleading communications to prospective class members; (2) required to make each prospective class member aware of this lawsuit and to provide Plaintiff's counsel with contact information for each prospective class member including the email address of each prospective class member; and, (3) required to void any releases entered into by prospective class members and Robinhood since the filing of this lawsuit. This relief is sought so as to offset the damage that may have resulted from this ex parte abusive communication.

E. This Court Has the Power to Void Releases that Were Entered into by Prospective Class Members Who Were Not Made Aware of the Pending Class Action Litigation.

The Court, in exercising its "broad authority to exercise control over a class action,"[16] has the power to void releases that were improperly gained as a direct result of Defendants' misleading communications. As an example of that authority, the Northern District of Ohio has voided offers of judgment in circumstances in which the offerees were "deprived of the opportunity to make an informed decision to accept or reject the offers of judgment[.]"[17]

In *Murton v. Measurecomp, LLC*, the defendant sent offers of judgment to 122 individual class members. The underlying claim was a class action for unpaid overtime. At the time the offers of judgment were made, the plaintiffs had not received the relevant time records. The Murton court found that the appropriate remedy was "to nullify the effect of all

[16] Gulf Oil, *supra*.
[17] Murton v. Measurecomp, LLC, No. 1:07CV3127, 2008 WL 5725628 (N.D. Ohio Dec. 2, 2008)

offers of judgment issued to date, whether accepted or not, subject to certain conditions[.]" In reaching that decision, the court noted the potential prejudice stemming from the "offerees having been deprived of the opportunity to make an informed decision to accept or reject the offers of judgment" after consulting with an attorney. The same potential prejudice exists in this case. Nothing indicates that prospective class members contacted by Defendants in this case know about the pending litigation. Certainly, Defendants have not told them about it. Therefore, any releases signed by prospective class members should be voided, with the prospective class members having the option of affirming the release after they have had the opportunity to confer with legal counsel.

II. The Court's Authority under Rule 65 to Prohibit Defendants' Conduct and to Grant the Relief Sought by Plaintiff

Beyond its authority under Fed.R.Civ.P Rule 23(d), this Court also has the authority to issue preliminary injunctions and temporary restraining orders pursuant to Fed.R.Civ.P. Rule 65. Concerning Rule 65, "the four factors to be considered in determining whether temporary restraining or preliminary injunctive relief is to be granted . . . are whether the movant has established: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225–26 (11th Cir. 2005). "At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials[.]" *Levi Strauss & Co. v. Sunrise Intern. Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

A. Plaintiff Has a Substantial Likelihood of Prevailing on the Merits

As outlined above in Section I, *supra*, Defendants' conduct is the exact type of conduct that federal courts around the country have either prohibited or limited. Defendants are fully aware that they face multiple class actions, whereas the average Robinhood user has no idea that potential class action relief exists for them. Courts have found that communicating with a prospective class member regarding a release—without informing the prospective class member of the existence of a class—has been found to be "misleading" and therefore not covered by First Amendment protections.[18] As the Court can see, Defendants' conduct in the instant case is identical to the conduct discussed by the courts cited above and therefore warrants the Court's intervention. Moreover, due to the incredible similarity of the conduct, Plaintiff has a substantial likelihood of prevailing on the merits.

B. Plaintiff Will Suffer Irreparable Injury If Immediate Injunctive Relief Is Not Granted

If undisturbed, Defendant's misconduct will result in—and likely already has resulted in—the unknowing waiver of rights by putative class members. It is not necessary to show that irreparable harm has already been done but only that there is a reasonable probability that harm will occur unless the action is prevented.[19] After being tricked into signing a waiver, these prospective class members would then be unable to participate in the class, would lose out on the opportunity to collect monetary damages accordingly, and therefore would have no method of being made whole. Such an outcome constitutes irreparable injury.

[18] *See generally Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981).
[19] *City of Pompano Beach v. Yardarm Rest., Inc.*, 509 So. 2d 1295, 1297 (Fla. Dist. Ct. App. 1987).

C. The Threatened Injury to Plaintiff Outweighs Any Harm that Injunctive Relief Would Inflict on Defendant

The injury to Plaintiffs is severe, whereas the harm to Defendants is minimal. Accordingly, this factor weighs in favor of supporting a temporary restraining order.

If the Defendants are *not* enjoined from making these misleading communications, then prospective class members who sign a release will unknowingly give up all rights to recovery under the class action without the opportunity to make an informed decision of whether to remain eligible for the potential class. When taking into consideration the low offer made by Defendants to the prospective class members, the harm to these prospective class members is substantial.

In contrast, if the Defendants *are* enjoined from making misleading communications, the harm is minimal. As a preliminary matter, the speech which Plaintiff seeks to restrict does not come under the protections of the First Amendment—for commercial speech to come within the First Amendment, it at least must concern lawful activity and must not be misleading.[20] Accordingly, with such an order having no impact to Defendants' rights to speech, the only harm to Defendants would be one of the costs in controlling or limiting communications with customers and former customers. Here, the restriction sought by Plaintiffs is specifically limited to those communications to prospective class members which relate to the March 2020 outages and which seek a settlement and/or release of claims. All other communications to customers and former customers, relating to the normal business

[20] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 557, 100 S. Ct. 2343, 2346, 65 L. Ed. 2d 341 (1980).

operations of the services provided by Defendants, would be unaffected by such an order. For that reason, the burden on the Defendants is minimal.

D. Entry of Injunctive Relief Would Serve the Public Interest

The public interest is served by enforcing fair and reasonable communications between large corporations and their customers regarding their rights to bring suit. To be effective, a waiver must be clear and unequivocal. *Submersible Sys. Tech., Inc. v. 21st Century Film Corp.*, 767 F. Supp. 266, 267 (S.D. Fla. 1991); *see also Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 6–7 (Tex. 2014) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Moreover, the United States Supreme Court has defined waiver as an "intentional relinquishment or abandonment of a known right or privilege." *Id.*

Defendants' attempts at misleading the class members into signing a waiver fly in the face of well-settled law regarding enforceability of waiver provisions as well as notions of good faith and fair dealing. Consequently, it is in the public interest of equity Defendants be required to communicate in an honest and fair manner with putative class members, if at all.

III. CONCLUSION

By obtaining releases from prospective class members without informing them of the pending class action litigation, Defendants are intentionally obtaining unknowing waivers from prospective class members. To prevent any prospective class member from being denied his or her legal rights under the pending class action litigation, Plaintiff requests that this Court take three actions. First, Plaintiff requests that the Court enjoin Robinhood from

sending any further misleading communications to prospective class members. Second, Plaintiff requests that the Court order Robinhood to make each prospective class member aware of this lawsuit and to provide Plaintiff's counsel with contact information for each prospective class member including the email address of each prospective class member. Third, Plaintiff requests that any releases entered into by prospective class members and Robinhood since the filing of this lawsuit be voided, with prospective class members given the opportunity to affirm any release after being informed of this litigation and having an opportunity to consult with counsel.

Plaintiff is ready and willing to hold a hearing at the Court's earliest convenience, but, in the interim, respectfully requests that the Court immediately issue a temporary restraining order to prevent further harm pending such a hearing. If immediate injunctive relief is not entered in favor of Plaintiff, it will be gravely prejudiced because Defendants will continue to mislead putative class members, thereby irreparably harming Plaintiff and class members, and deliberately destroying the status quo before injunctive relief can be granted.

WHEREFORE, Plaintiff requests that this Court grant this Motion and enter the relief requested in the Proposed Injunction Order submitted herewith and such other relief as the Court deems just and appropriate.

this 27th day of March, 2020.

Respectfully Submitted,

By: *_/s/Michael S. Taaffe____*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system. I further certify that I served the foregoing document to the following:

this 27th day of March, 2020.

By: *_/s/Michael S. Taaffe____*
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RULE 3.01(g)
CERTIFICATE OF GOOD FAITH CONFERENCE

Counsel for Plaintiff hereby gives notice that it has attempted to confer with counsel for the Defendants on March 26, 2020 via email and via telephone regarding the relief requested in Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction. Counsel for Defendants did not respond to either attempt to communicate.

By: *_/s/Michael S. Taaffe____*
Michael S. Taaffe