

**IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO**

MED EXPRESS, INC.,	:	Case No. 13CIV0351
	:	
Plaintiff,	:	Judge Collier
	:	
v.	:	MOTION TO ENFORCE
	:	SETTLEMENT AGREEMENT;
AMY NICHOLLS, et al.,	:	AFFIDAVIT OF THOMAS G.
	:	HAREN ATTACHED
Defendants	:	

Defendants Nicholls and Rogan hereby move to enforce the settlement agreement that was reached by the parties and announced in the presence of the Court on March 27. The agreement was reduced to writing and counsel for both sides have agreed that the writing accurately reflects the oral agreement, but Med Express has refused to execute the settlement agreement or make any settlement payments. In fact, when pressed to execute the settlement agreement and begin making payments, Med Express fired its second attorney, Bruce Hall, and now has apparently retained a *third* attorney in these cases (whose identity is as yet unknown).

Med Express's evasive course of conduct is no surprise. Its principal, Richard Radey, twice admitted during his in-court testimony that his earlier statements related to these cases had been false—including statements sworn under oath in these cases. And pending before the Court is a motion seeking to reopen the record to submit evidence that conclusively establishes that Radey's January 23 live testimony before this Court included falsehoods as well.

This Court should not endorse Med Express's continued deceitful conduct. It should enforce the settlement agreement by entering judgment against Med Express, and should

award additional attorney's fees to Nicholls and Rogan for having to file yet another motion to conclude these cases.

Facts

The Court is familiar with the underlying facts. Med Express sold items on eBay.com to Nicholls, a South Carolina resident, and to Rogan, an eastern Pennsylvania resident. Nicholls's item arrived with postage due. She stated as much in her online feedback and rated the transaction as "negative" on eBay. Rogan's item never arrived because it was broken before shipment. He said so, and rated the transaction as "neutral." Despite the truth of these statements, Med Express, represented by James Amodio, sued them for defamation, and sought temporary restraining orders and preliminary injunctions to remove the true statements. The complaints were dismissed without prejudice only after intervention of counsel, including service of a counterclaim. Defendants moved for sanctions on May 20, 2013. A hearing was set, but then postponed after Med Express retained new counsel, Bruce Hall, who requested more time so that he could prepare for the hearing, which was duly scheduled for January 2014.

At the sanctions hearing Radey testified on behalf of Med Express. He admitted that he did not read the complaints before they were filed, even though he verified their contents under oath and filed an affidavit in support of the motions for injunctive relief. He admitted that his statements on the web regarding the cases were not true. And for the first time he shifted the focus of his cases from the "feedback" (the free-form commentary left by Nicholls and Rogan) to the Detailed Seller Ratings ("DSR"), the one-to-five star ratings regarding various aspects of the transaction). Radey further testified under oath that Nicholls and Rogan left DSRs of the lowest possible rating; he said that he was watching his "seller

dashboard” when their DSRs came in, and that “1’s appeared, the lowest rating possible on all of my -- all of those categories.”¹

Faced with this new argument, Nicholls and Rogan subpoenaed eBay’s records to document that they did not, in fact, leave “all 1s” for their DSRs. eBay’s records do indeed confirm this, and so Nicholls and Rogan moved to reopen the record to introduce that newly relevant evidence. That motion remains pending.

The Court scheduled a hearing or status conference on March 27. At that conference the Court strongly encouraged the parties to reach a settlement, and in fact they did so at that time. On the record, the parties acknowledged that (1) they had agreed to a monetary settlement amount, and (2) that settlement amount would be paid over a period of time. While perhaps not disclosed on the record (but later confirmed by Mr. Amodio), the parties further agreed that if Med Express failed to pay on that schedule, Nicholls and Rogan could tender agreed judgment entries for journalization by the Court. It was expressly agreed that only the amount of the total settlement would be confidential—and that Nicholls, Rogan, and their attorneys were only obligated to keep that amount confidential if Med Express fulfilled its obligations under the settlement agreement. All parties were represented by counsel during these negotiations (in fact, both of Med Express’s attorneys were present and participating).

At the conclusion of the hearing, Med Express’s second attorney, Mr. Hall, prepared a bare-bones memorialization of the payment schedule and amount on half a piece of paper, and handed it to Nicholls and Rogan’s attorney Tom Haren. That is attached as Exhibit 1 to Mr. Haren’s attached Affidavit.

¹ Transcript of 1/23/14 hearing (filed 2/28/14) at page 144, lines 5-6.

After the hearing, Nicholls and Rogan's attorneys prepared a more complete settlement agreement and tendered it to Mess'rs Amodio and Hall via email. The draft settlement agreement is attached as Exhibit 2 to the Haren Affidavit. The record shows that Exhibit 2 accurately reflects the oral settlement agreement: Mr. Haren so avers in his affidavit, and on May 8, Mr. Amodio stated via email that he agreed that the documents as drafted captured the terms of the agreement, stating in part "Tom: I haven't heard back from the client yet or from Bruce, but I think your documents are fine as far as they go." That email is attached as Exhibit 3 to the Haren Affidavit.

Twenty days after the settlement agreement was tendered, Med Express finally responded, through Mr. Amodio: "Tom: Just to update you, the only response I've had so far from my client is that he will not sign unless there is a confidentiality agreement signed by all parties. I've asked him to clarify this statement (i.e. who else he thinks should be signing other than Nicholls and Rogan) and he has not replied." That email is attached as Exhibit 4 to the Haren Affidavit.

Multiple attempts were made (via email and phone) to reach Mr. Hall to close the settlement, but no response was received. A last-ditch effort was made to reach Mr. Hall via telephone on May 13. But on May 14 Mr. Hall filed a motion for leave to withdraw as counsel for Med Express.

Settlement Agreements Are Enforceable Under Ohio Law.

Settlement agreements are favored under Ohio law.² When the parties enter into a settlement agreement, the agreement is a binding contract and should be enforced.³ "An

² *Walther v. Walther*, 102 Ohio App.3d 378, 383, 657 N.E.2d 332 (1st Dist. 1995).

³ *Spercel v. Sterling Indus., Inc.*, 31 Ohio St.2d 36, 39, 285 N.E.2d 324 (1972).

oral settlement agreement is enforceable with no more formality and no greater particularity than would be required for the enforcement of any binding contract.”⁴

A contract exists if there was a “meeting of the minds” on the terms of the agreement.⁵ This requires an offer on one side and an acceptance on the other. When these elements have been met, the court should enforce the settlement agreement so long as it was not procured by fraud, duress, overreaching, or undue influence.⁶ This is so regardless of the terms of the settlement agreement.⁷ Additionally, “[n]either a change of heart nor poor legal advice is a ground to set aside a settlement agreement,” and a party “may not unilaterally repudiate a settlement agreement.”⁸ Further, a repudiation of a contract is not a withdrawal of acceptance or consent, but rather a breach of the contract.⁹

The Parties Have an Enforceable Settlement, Which Med Express Has Breached.

The general terms of the settlement agreement were recited to the Court on the record on March 27. Mr. Hall confirmed the payment plan mechanism in the note attached as Exhibit 1. Mr. Amodio, in his email attached as Exhibit 3, confirmed the accuracy of the settlement documents as prepared by Nicholls and Rogan; and Mr. Haren’s affidavit shows that the written settlement terms reflect the oral agreement. There can be no question that there was a meeting of the minds sufficient to create an enforceable settlement agreement, even though it had not yet been reduced to writing.

And according to Mr. Amodio’s emails, Med Express has attempted to unilaterally repudiate the settlement agreement by requiring additional confidentiality terms or otherwise

⁴ *Cembex Care Solutions, LLC v. Gockerman*, 1st Dist. No. C-050623., 2006-Ohio-3173, ¶7.

⁵ *Noroski v. Fallet*, 2 Ohio St.3d 77, 79, 442 N.E.2d 1302 (1982).

⁶ *Walther*, 102 Ohio App.3d at 383.

⁷ *Id.*

⁸ *Id.*

⁹ *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty Bd. of Comm’rs*, 7th Dist. No. 00 CA 269, 2003-Ohio-1227, ¶46 (a “repudiation does not rescind a contract, but, rather, constitutes a breach of contract”).


bargain for a new deal. Perhaps Med Express has had a change of heart, or perhaps it believes it received bad advice in entering into the settlement agreement. But whatever its reason for the refusal to perform, Med Express has no grounds for setting aside and repudiating the agreement. Both the repudiation and the failure to make any installment payments constitute breaches of the terms of the settlement agreement.

Due to Med Express's breach, this Court has authority to enforce the settlement agreement. By its terms, this means that the Court should journalize the agreed judgment entry attached to the settlement agreement. Also by its terms, Nicholls and Rogan are entitled to recover additional attorney's fees and costs incurred in connection with this motion and collection.

Conclusion

For more than a year, Med Express has conducted itself in a manner that is an insult not only to Nicholls and Rogan but also to this Court. From filing meritless complaints in the first place, to submitting false verifications and affidavits in support of those meritless complaints, to conceding to past false statements even while making additional false statements under oath in the presence of the Court, to refusing to consummate the parties' duly negotiated settlement agreement, Med Express's conduct is contemptible and sanctionable. This Court should enforce the parties' agreement, enter the agreed judgment entry in accordance with that agreement, and award additional attorney's fees and costs as a compensatory and exemplary sanction.

Respectfully submitted,



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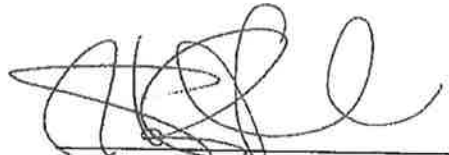
**Trial attorneys for defendants Amy Nicholls
and Dennis Rogan**

CERTIFICATE OF SERVICE


I hereby certify that a true and accurate copy of the foregoing was served upon Jim Amodio and Bruce Hall via email pursuant to Civ.R. 5(B)(2)(f) on May 19, 2014.



Thomas G. Haren


Thomas G. Haren, Esq.

Sworn to before me and subscribed in my presence by Thomas G. Haren, Esq., on this
~~16~~ day of May, 2014.


Notary Public

BRIAN C. CRUSE, ATTY
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date
Section 147.03 O.R.C.