

PUBLIC CITIZEN LITIGATION GROUP

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April 13, 2013

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109 West Liberty Street
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Dear Mr. Amodio:

I am writing to follow up our telephone conversation on Thursday evening about the lawsuit that you have filed on behalf of Med Express against Amy Nicholls and eBay, complaining about the posting of eBay negative feedback about the \$1.40 in postage due that she had to pay out of her own pocket for delivery of a package from Med Express, containing equipment that it sold to her employer and sent by mail. Your complaint alleges defamation and seeks injunctive relief, compensatory and punitive damages, and an award of attorney fees. In addition, you have filed a motion seeking a temporary restraining order (“TRO”) against eBay, although not, interestingly enough, against Nicholls.

Your lawsuit, and your TRO motion, are completely frivolous, and I hope your client will agree to drop both of them without further proceedings.

First, and perhaps most important, the eBay feedback about your client is true, as you admitted when we spoke on Thursday. Your client sent a package; the amount of postage placed on the package was insufficient; and as a result in order to get the piece of equipment, Nicholls had to pay postage due of which the seller had not warned, in the amount of approximately \$1.40.¹ I pointed out that not only is truth a defense to a libel action, but the falsity of the comment is one element of a libel claim, hence the burden of proving falsity is on your client). *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (“the plaintiff [must] bear the burden of showing falsity, as well as [the defendant’s] fault, before recovering damages”). You admitted that the facts stated in the feedback were true—in fact, you acquiesced in my comment that your complaint itself admits that the statements in the feedback are true—and you did not dispute my characterization of the relevant legal principles, but also indicated that you didn’t care, that is, that I could come up to Medina Ohio and argue anything I wanted, but that what is needed for the case to go away is for the negative feedback to be removed or, even better, changed to positive.

¹Although the buyer’s message put the amount at \$1.40, your complaint and affidavits put the amount due at \$1.44. This difference is not material.

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Your concern, you said, is with the characterization of the feedback as “negative,” which, you said, implies that the postage due was your client’s fault. You insisted that it wasn’t your client’s fault because, you claimed, the package was weighed when your client brought it in for mailing, and your client put the amount of postage that the it was told was needed. There are several reasons why this reasoning cannot save your defamation claims. First, the question of “fault” is not a factual question, but a matter of opinion, and not only the First Amendment but indeed Ohio law, which is more protective of opinion than the First Amendment, prevents your client from suing over an assertedly false opinion. *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182 (1995). Moreover, whether the postage due is your client’s fault is at least debatable—your client chose the shipper, and if the shipper made a mistake in calculating the postage due, then it is more your client’s responsibility than the buyer’s. Indeed, your client’s response to the negative feedback suggests that your client might have been aware of the problem—it stated, “This is happening to a lot of our USPS packages lately,” and indicated that, as a result, it is going to change shippers. (Has it, in fact, changed shippers?).

In a sense, what you and your client seem to be contending is that your client’s offer to pay the \$1.40 is a sufficient display of contrition that Nicholls ought to be forgiving. But the point that she made in her message to you was that the problem wasn’t the money but the hassle. She indicated that she would have been willing to pay \$1.40 more in shipping up front, but that she was posting feedback because a company that ships products ought to be able to do a better job. That opinion might be right, or it might be wrong, but harboring it and expressing it is not a tort. And it is certainly no reason to seek damages, attorney fees, and an injunction. Consumers might well take this sort of bullying into account when they are thinking about whether to do business with Med Express.

You also suggested when we spoke that, even if there cannot be a valid claim for defamation because everything in the negative feedback is true, you might have a valid “false light” claim. However, the Supreme Court has held that a plaintiff cannot avoid meeting the constitutional standards for libel claims by changing the label of the tort. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Stepien v. Franklin*, 39 Ohio App.3d 47, 528 N.E.2d 1324 (Ohio App.1988). The tort of false light is among the torts subject to these limits. *Barr v. Clinton*, 370 F.3d 1196, 1203 (D.C. Cir. 2004); *Yohe v. Nugent*, 321 F.3d 35, 45 (1st Cir. 2003).

Not only your complaint but also your request for a temporary restraining order or preliminary injunction are frivolous. The order you are seeking is a constitutionally impermissible prior restraint. The First Amendment does not authorize a preliminary injunction to protect a business against reputational injury from defamatory statements. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990) Indeed, Ohio law appears to forbid even a permanent injunction against the repetition of statements found by a jury to be actionably defamatory, unless the hearers are being coerced or intimidated into refusing to do business with the plaintiff. *O'Brien v. University Community Tenants Union*, 42 Ohio St.2d 242, 246, 327 N.E.2d 753, 755 (Ohio 1975); *Yood v. Daly*, 37 Ohio App. 574, 576-577 174

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N.E. 779 (Ohio App. 1930). The relief would also violate federal law because eBay—the only party you are seeking to enjoin—is immune under 47 U.S.C. § 230 from being sued over content posted by a user, and that immunity bars injunctive relief as well as damages. *Giordano v. Romeo*, 76 So.3d 1100 (Fla. App. 3 Dist. 2011).

Moreover, the relief you are seeking would be injurious to consumers. Your client's other potential buyers have an interest in knowing the history – that, for a period of time, your client was repeatedly using a shipper knowing of problems that could result in users having to pay postage due. If similar problems recur, perhaps the buyers may choose to doubt your client's explanations. Or, potential customers might just want to choose a seller that doesn't have this history.

When I spoke to you yesterday, you seemed to suggest that the feedback over which you are suing is the only negative feedback that your client has on its record at eBay, and that it is particularly disadvantageous to your client to have negative feedback because eBay insists that all feedback be either negative or positive, and negative feedback can adversely affect its business by increasing eBay's charges, or even leading to a suspension of your client's status as a seller. For all we know, the reason your client has so little negative feedback might be that it bullies critics by filing or threatening to file frivolous lawsuits every time negative feedback appears, thus artificially inflating its seller rating. And even if your concerns are accurate, it seems to me that this complaint is with eBay, not with Nicholls. If your client finds eBay's rules not to its liking, it should sell on some other platform.

In the end, it appears to me that you, and your client, are counting on the fact that a South Carolina resident will have to incur expenses to come to Ohio to defend herself, even if it is against a frivolous lawsuit, and hoping that the need for such expenses will induce her to take the easy course by removing the negative content, thus making it appear to future customers— falsely— that Med Express is company with which they will never have a problem. Unfortunately, Ohio does not have an anti-SLAPP statute that would guarantee an award of attorney fees if Nicholls defends herself. On the other hand, in light of your admission that everything stated in the feedback itself is true, there is some reason to question whether serious implications follow from the fact that you submitted an affidavit from your client's president averring that Nicholls made false statements. I have not looked at Ohio's procedural rules carefully yet, but I assume that Ohio has some version of Federal Rule 11, and your having filed this case and motion may run afoul of the prohibition on filing frivolous papers.

I hope you will do the right thing at this point, and dismiss the lawsuit immediately.

Sincerely yours,


Paul Alan Levy