COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

MED EXPRESS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 13-CIV-0351
	)	
AMY NICHOLLS,	)	
	)	
Defendant.	)	
MED EXPRESS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 13-CIV-0352
	)	
DENNIS ROGAN,	)	
	)	
Defendant.	)	

POST-TRIAL BRIEF SUPPORTING AWARD OF SANCTIONS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES AND RULES

MISCELLANEOUS

> [If I had been sued this way,] I too would have been outraged . . .. The only person to blame here is me. . . . A terrible wrong needs to be righted.
>
> Richard Radey, April 17, 2013, Exhibit 8, page 2.

Introduction and Summary of Argument

When an individual defendant is sued in the plaintiff's home court, hundreds of miles away from home, over relatively innocuous online statements in which the defendant has no financial stake, the defendant faces a conundrum. She may want to stand up for her free speech rights, but if she has to spend thousands of dollars to hire a lawyer to appear for her, or if she has to take days off from work to travel to the distant forum to defend herself pro se, the defendant has **already** lost. As a society, we count on public-spirited lawyers to offer pro bono services to spare defendants from having to sacrifice their free speech rights, and, indeed, to defend the marketplace of ideas from being skewed by litigation that suppresses only negative statements about businesses, and not the businesses's puffery about their services. As a society, we need customers to be willing to speak their minds; this process is especially important in the eBay marketplace, as defendants' testimony explained.

Here, Med Express sued for libel two former customers who had previously purchased goods from the plaintiff through eBay, and then posted comments about the company that were mildly unflattering; the customers also expressed the opinion that their experience with the seller was unsatisfactory. Defendants' factual assertions were true; indeed, the complaints and accompanying affidavits admitted facts that the customers had posted publicly. But the company nevertheless sued for defamation—despite black letter law that falsity is an element of a libel claim and that opinion is constitutionally protected. The company compounded its abuse of the legal system in several ways: (1) it sought a temporary restraining order and preliminary injunction, relief that is flatly forbidden by the First Amendment when sought as a remedy for defamation; (2) it made no effort

to give notice, again contrary to long-established First Amendment precedent; (3) it needlessly ran up defendants' costs in seeking sanctions, such as by submitting false exculpatory testimony at the initial sanctions hearing and by refusing to admit a litany of facts that it had no plan to contest.

By bringing its suit in the first place, and then by mounting a scorched earth defense against defendants' sanctions motions, Med Express took a calculated risk: first that the cost and inconvenience of the defendants having to defend themselves would lead to default judgments, and then that defendants would be discouraged from pursuing sanctions to a conclusion. Plaintiff has admitted that the reason it brought these legally frivolous proceedings was that any user comments which, however true, were less than fully flattering could cost it tens of thousands of dollars in additional sales fees on eBay. Now that the plaintiff has been caught filing frivolous defamation claims, and then submitting false testimony at the first sanctions trial, the Court should impose fully compensatory sanctions, compensating the two public-spirited lawyers who stepped forward to defend litigants who simply told the truth and related honest opinions, relating information on which other consumers could rely, and, at the same time, creating some real deterrence to misconduct by other, similarly situated companies. R.C. 2323.51 is aimed at precisely this sort of abuse of the legal process. Although plaintiff dismissed its complaint after it received a counterclaim, jurisdiction to impose sanctions survives dismissal. Reasons of both deterrence and compensation call for sanctions on the plaintiff.[1]

FACTS AND PROCEEDINGS TO DATE

A. Facts

Defendants Amy Nicholls and Dennis Rogan bought equipment from plaintiff Med Express

[1]Although sanctions were originally sought against both plaintiff and its counsel, James Amodio, Mr. Amodio has paid sanctions in a separate settlement. Consequently, defendants now pursue their sanctions motion only against the plaintiff itself.

on eBay, and both experienced problems with their orders. Nicholls' order arrived at her office in South Carolina with postage due, which was an inconvenience because she had to go to the post office to make payment. Nicholls First Affidavit ¶ 2. (The parties stipulated that Nicholls' and Rogan's affidavits would be admitted in evidence as if the two defendants had testified in person.) Rogan's order never came to him near Scranton, Pennsylvania, where he lives, because apparently the item had actually been broken a few weeks before Rogan ordered it, but had not been removed from Med Express's eBay "store" listings. Rogan First Affidavit ¶ 2 and Exhibit 5.[2]

eBay provides a mechanism for buyers and sellers to communicate with each other about transactions, both asking and answering questions in advance of possible transactions, and also communicating after an order has been placed. It also allows, and in fact encourages, buyers and sellers to post information about their experiences with each other, called "feedback," because "[l]eaving honest comments gives members a good idea of what to expect when dealing with other members." Nicholls First Affidavit ¶ 5 and Exhibit 2. All feedback is displayed on the eBay web site, and a summary of the statistics regarding each eBay member is available for review by other eBay users. Nicholls First Affidavit ¶ 6 and Exhibit 3. Users commonly take that feedback into account in deciding with whom they wish to do business. Nicholls First Affidavit ¶ 5; Rogan Affidavit ¶¶ 4-5. Feedback includes both text and a characterization as either positive, negative or neutral. These categories are pre-set by eBay but the user decides in which category the feedback

[2]In Exhibit 5, Med Express owner Richard Radey told Rogan, "This should not have been still listed—we removed this item a few weeks back—it broke."At trial, Radey testified that the breakage was discovered when his staff went to ship the item. Trial Transcript ("Tr.") 156. Yet a third version of the story appears in paragraph 6 of the complaint, which says the merchandise was broken after Rogan sent his payment ("was inadvertently broken during handling"). There is no explanation in the record for the contradiction among these three versions of the facts, apart from Radey's testimony that he verified the complaint but never "read it word for word." Tr. 165.

should be placed. Exhibit 2, also available at http://pages.ebay.com/help/feedback/howitworks.html and http://pages.ebay.com/help/feedback/ detailed-seller-ratings.html.

Both Nicholls and Rogan posted feedback about Med Express, but only after receiving private communications that compounded their dissatisfaction. On February 19, 2013, Nicholls told Med Express in a private message that its order had just arrived with postage due, and that she would have had no problem paying an extra $1.40 for the shipping of her order. However, she noted the inconvenience that the mistake had caused, concluding "I am not demanding a refund of the small amount, only stating my displeasure for how this transaction occurred with postage due." Med Express's February 20 response blamed the Postal Service but acknowledged that this was not the first time one of its shipments had arrived with postage due: "No argument from us—that was weighed with a calibrated scale and double checked at the PO. This is happening to a lot of our USPS packages lately. We are going to stop sending via the post office and go with Fed Ex. Apologies!" Nicholls Affidavit ¶¶ 3-4 and Exhibit A. Plaintiff later admitted that the reason why it uses the postal service for deliveries it that it is cheaper, Exhibit 43 (Transcript from First Sanctions Trial, at 166), but that it deliberately did not tell users about inaccurate shipping weights and consequent problems with postage due. *Id.* 167.

Nicholls was not satisfied by this response; on February 26, 2013, she posted buyer feedback noting that she had received her order postage due without warning from the seller: "Order arrived with postage due with no communication from seller beforehand." First Nicholls Affidavit ¶ 6 and Exhibit 3. She considered this to be a criticism of Med Express, and accordingly chose the "negative" feedback category. First Nicholls Affidavit ¶ 6. Med Express posted a public response to the feedback two days later: "Sorry—no idea there was postage due. This has happened alot from

USPS lately." Exhibit 3.[3] Nicholls also entered ratings in each of the four categories of "Detailed Seller Ratings" ("DSR") reflecting her evaluation of how Med Express had performed on each of the metrics that eBay asked buyer to rate from one to five stars, where five is the most favorable rating. The four categories, as described in Exhibit 2, are: "How accurate was the item description?"; "How satisfied were you with the seller's communication?"; "How quickly did the seller ship the item?"; and "How reasonable were the shipping and handling charges?" Ebay's own records, which confirmed Nicholls' own recollections, reflect that her ratings for the four categories were, in order,

> "as described" five stars,
> "communication" one star,
> "shipping time" five stars, and
> "shipping charges" three stars.

Exhibit 41, ¶¶ 2, 3; Exhibit 35 (Long Deposition), at 9-10.

On March 15, Med Express sent Nicholls another private message, offering to pay the postage due (even though Nicholls had already said, in her first private message, that it wasn't about the money but the inconvenience): "Please revise your feedback. It was USPS that originally weighed it—we had no idea it had postage due. I will gladly reimburse." Exhibit 4. The message did not, however, contain any request that Nicholls revise the numerical DSR entries. When Nicholls did not accede to this request, Med Express filed suit, alleging that her feedback was defamatory.

Rogan learned that his order would not be filled when Med Express refunded his payment through PayPal, along with the following explanation: "This should not have been still listed—we

[3] Radey's testimony at the first trial downplayed the frequency with which Med Express packages had postage due. Tr. 166-167 ("It did not happen as a rule, but it had happened.")

removed this item a few weeks back—it broke." Rogan First Affidavit ¶ 2 and Exhibit 5. Rogan was inclined to be forgiving, but still believed that other potential customers should have the information that they could not always rely on Med Express's eBay listings to be an actual portrayal of available equipment, Rogan Second Affidavit ¶ 6, so he posted the following public eBay feedback on January 10, 2013: "Order retracted." Rogan chose the "neutral" feedback category for this comment. *Id.* and Exhibit 6. On January 24, 2013, Med Express posted the following public response: "It was dropped and broke. Our fault and complete apologies." *Id.* Rogan also rated Med Express on one of the four DSR categories, "shipping charges," for which he gave five stars. Rogan Second Affidavit. Even though Med Express' private messages admitted its own fault, and without any further communication with Rogan, Med Express sued him for defamation.

At the first sanctions trial, Radey testified he considered Nicholls and Rogan to have provided false ratings on certain categories of DSR's for their two transactions with him. Exhibit 43, 146-159. Radey testified to his understanding of what factors a buyer should consider in assessing sellers' performance on each of these metrics. *Id.* 146-152. During his direct testimony, Radey swore that, while he was sitting at his computer, he actually saw Nicholls' and Rogan's DSR entries appear on his "seller dashboard," and that each of them entered the number "1" (that is, the lowest rating) for each of the four categories. *Id.* 146-159. On cross-examination, however, he acknowledged that he does not see actual ratings from individual buyers because his seller dashboard only shows him the total number of ratings he received in each of the four categories. *Id.* 168. He said that when new feedback is submitted by a buyer, eBay provides an alert to the seller, that sellers watch their feedback very carefully, and therefore that when he heard the "ding" on his dashboard he was able to infer that the change in the total number on each DSR category must have come from Nicholls; in attributing feedback ratings in specific categories to Nicholls (and Rogan), he was

inferring their feedback from changes in the overall number of "1" ratings for his company, which, he said, was relatively straightforward because so few users actually leave feedback. *Id.* Interestingly, perhaps because Radey had invoked attorney-client privilege to avoid being examined on what his attorney had told him about the law, Radey's testimony never addressed whether he had communicated any of these facts to his attorney before the complaint was drafted. In fact, he never said anything about what the factual basis was for the allegations of the complaint.

Evidence developed after the first trial reveals that Radey's testimony about defendants' DSR was a complete fabrication, even as qualified on cross-examination. First, eBay testified at its deposition that it does not, in fact, provide notifications on the seller dashboard that new DSR's have been entered, Exhibit 35 (Long Deposition Transcript) 16-19. Thus, Radey's testimony about how he came to see the aggregate numbers from which he claimed to have inferred what DSR's Nicholls and Rogan had left for him could not have been true. Second, although neither the buyer nor the seller can see the specific detailed ratings that any given eBay user gives for a transaction, eBay maintains electronic records, and eBay's own records flatly contradict what Radey said he was able to ascertain by inference. Nicholls and Rogan Second Affidavits; Exhibit 35 (Long Deposition Transcript), at 9-13. As noted above, those records reflect that Nicholls' ratings for the four categories were, in order, "as described" five stars, "communication" one star, "shipping time" five stars, and "shipping charges" three stars. Nicholls Second Affidavit ¶¶ 2-3; Exhibit 35 at 9-10. Rogan gave feedback on only one of the four categories, "shipping charges," for which he gave five stars. Rogan Second Affidavit ¶¶ 2-3; eBay Deposition Transcript at 13. Third, the feedback to which Radey testified could not possibly have been true, because Exhibit B shows that, if the seller meets certain deadlines for shipping times, "the seller will automatically receive a five-star shipping time detailed seller rating and you won't be able to change the rating." Assuming the truth of

Radey's testimony about when he shipped the item to Nicholls, Nicholls could not possibly have entered a one-star rating on this factor.

As this evidence began to accumulate, Med Express tried to characterize Radey's testimony in a way that would avoid a finding that he had perjured himself at the first trial. In opposing defendants' motion to reopen the record (at page 3), Med Express argued that Radey had never testified affirmatively that Rogan and Nicholls had left only "1" ratings for each of the DSR categories; instead, it argued, Radey had only sworn that he **believed** that low ratings had been given in category. At the second sanctions trial, Radey finally admitted that his testimony about the DSR's had been "mistaken," Tr. 190, 193, but proclaimed that it was an honest mistake, not a deliberate lie. *Id.* 190-191. (References to "Tr." are to the second trial, unless specifically indicated otherwise).

The suits against Rogan and Nicholls are not Med Express's only attempt to use the courts to prevent eBay customers from posting honest feedback. On the same day that it sued Rogan and Nicholls, it filed an almost identical lawsuit and TRO motion against an eBay customer in Guam. Tr. 91-92 and Exhibit 17. Inspection of the Court's electronic docket reveals several similar lawsuits filed over the past few years, again using very similar papers, but on previous occasions represented by Daniel Walker. Tr. 91-92 and Exhibits 13, 15, 16, 17, 19, 20, 21.

Defendants' evidence shows that the normal hourly billing rates for their counsel at the outset of the litigation were $230 per hour for Mr. Nye and $175 per hour for Mr. Haren; Mr. Haren's rate increased in the interim but fees for the entire period are sought at those rates. These are actual billing rates that are charged to and received from counsel's clients. Both attorneys carry a full caseload for their respective law firms, so that time spent on this litigation was time that could otherwise have been billed to paying clients. Tr. 89-90, 143. The evidence also shows that defendants' counsel spent 75.8 hours (Mr. Nye) and 109.7 hours (Mr. Haren) on this litigation,

although in the exercise of billing judgment they are seeking fees for only 65.8 hours and 95 hours, respectively. The testimony of Karen Lefton, who was tendered at trial as an expert without objection by plaintiff's counsel, Tr. 32, shows that both the rates and the hours were reasonable, and that the amount of fees sought was reasonable. Tr. 35-40. No contrary evidence was offered.

B. Proceedings to Date

On March 25, 2013, Med Express filed suit against both Nicholls and Rogan, and with the complaint filed motions for a temporary restraining order. The complaints and motions in the two cases are identical except for the details of the two transactions. Both complaints were verified under oath by Med Express's President, Richard Radey, who swore in each case that he had read the allegations and that "the same are true as he verily believes." The TRO motions were accompanied by affidavits that were, again, identical except for the descriptions of the transactions with the defendants. Neither complaint alleged that the factual statements that defendants had posted were false; rather, the complaints charged each defendant with posting "neutral feedback and negative comments" (or, in Nicholls case, "negative feedback and comments") and with giving Med Express "low dealer ratings in Ebay's Detailed Seller Ratings" sections, Complaints ¶ 7. Each complaint stated that "in so doing, [defendant] has falsely and deliberately slandered the good name and reputation of Med Express." *Id.* Paragraph 8 then alleged that "by posting the neutral feedback and comments" (in Rogan's case) and the "negative feedback and comments" (in Nicholls' case), the defendant had caused Med Express to incur damages from lost income and revenue as well as "additional charges from Ebay." Each complaint sought injunctive relief, compensatory and punitive damages and attorney fees.

The accounts of the facts in the complaint against Nicholls and in the affidavit supporting a TRO against her comment were largely consistent, including the admission that the package that

Med Express had sent to her arrived with postage due (that is, Med Express **admitted** that the only **fact** that Nicholls stated in her review was true). Complaint ¶¶ 6 and 7; Affidavit ¶ 2. The story told about Rogan was different in the complaint against him and the affidavit supporting the TRO against his comment. Paragraph 6 of the verified complaint stated that it was "[a]fter Rogan sent payment for the item [that] one of the two cylinders was inadvertently broken during handling." (That is, the complaint contradicted what Med Express told Rogan in the PayPal refund message.) The affidavit stated only that Rogan "receiv[ed] a prompt and full refund on the transaction," ¶ 3, without saying anything about the breakage of the equipment or the timing of the breakage.

Each motion for a temporary restraining order was accompanied by a memorandum stating that each defendant's statement had caused damages to Med Express, which would continue to incur damages in the future. Neither memorandum recited any efforts to give notice to the defendant about the filing of the TRO papers or why notice could not be given; nor did either memorandum explain why relief was needed before notice could be given. The memorandum seeking relief against Rogan repeated the story averred in the complaint, that, contrary to the PayPal feedback, it was only after Rogan sent payment that the equipment sold to him had been broken.

The Court denied TRO relief in each case, finding that no irreparable damage had been found, but setting each case for a preliminary injunction hearing on May 2 and ordering plaintiff to provide notice to each defendant. It was only at that point that Rogan and Nicholls learned that suit had been brought against them. Nicholls First Affidavit ¶ 8; Rogan First Affidavit ¶ 7. Nicholls contacted Mr. Levy for help. Nicholls First Affidavit ¶ 10; Tr. 62 Mr. Levy was unable to take the case, because of an office policy against handling the merits of libel cases at the trial court level, *id.* but contacted plaintiff through its counsel, Mr. Amodio, to discuss the legal principles in the case, including various reasons why the First Amendment barred the claim against Nicholls. Tr. 64 and

Exhibit 7. Plaintiff acknowledged that the complaint admitted that the only fact that Nicholls wrote about Med Express was true, and it did not dispute that the First Amendment bars libel claims over truthful statements. Still, it said that Mr. Levy could travel to Medina County to argue, and that the complaint would be pursued unless the negative feedback was taken down or, even better, turned into positive feedback. Tr. 64 and Exhibit G. Plaintiff also explained that it was important to eliminate the negative feedback because, true or not, the negative feedback could cost his client more in eBay fees. *Id.* *See also* Tr. 180-181, 182, 184

Jeffrey Nye and Thomas Haren, two Ohio attorneys, agreed to represent Nicholls and, later, Rogan. Tr. 66. 90. 140. They attempted unsuccessfully to recruit co-counsel in Medina County to work with them on the case. Tr. 112. On April 17, at 4:54 PM, Mr. Nye emailed Mr. Amodio a courtesy copy of the answer and counterclaim that he and Mr. Haren had prepared on Nicholls' behalf and sent to the Court. Tr. 92-93; Exhibit V.

Meanwhile, several other blogs as well as the mainstream media had begun to cover the story, and Radey began responding to the criticism. Initially, he stoutly defended his position, explaining that he had been compelled to sue because Nicholls had responded emotionally to the postage due instead of retracting the negative feedback once he offered an apology and a refund. For example, he sent this message, which was posted to a blog (and later confirmed by its recipient):

> Buyers must realize that leaving feedback must be done in a factual way and not based on emotion. This had nothing to do with the product, the shipping charges or the ship time, but was the result of Ms. Nichols being "upset" over postage due. Her reaction can potentially cost us tens of thousands of dollars over the course of the next year – all over $1.44.
>
> We tried everything to resolve this issue with her. We explained the financial reasons behind our request to revise her feedback. We apologized and offered to make this up to her. She ignored our requests and Ebay will not amend the complaint unless by court order.
>
> http://www.popehat.com/2013/04/15/the-popehat-signal-stand-against-rank-thugg

ery-in-ohio/#comment-1022736; Tr. 67 and Exhibit 6; Response to First Request for Admissions ¶ 93.

But shortly after his counsel received the answer and counterclaim, Radey reversed course and announced that he had instructed his counsel to drop the litigation. Indeed, Radey claimed that his lawyer had filed the lawsuit without Radey's having read its wording, and that he had only learned of the wording from reading about it on blogs. Radey blamed the wording of the lawsuit on his lawyer who, he complained, had violated his instructions, and admitted that, had he been the recipient of such a lawsuit, he "too would have been outraged":

> I hope all of you will accept this as an open letter of apology from Med Express.
>
> Please understand that our customer was never the target of this lawsuit. We had instructed our attorneys to ask for only $1.00 in damages. Her feedback was also never an issue. We fully support her right and all of our customers right to leave any feedback they desire – true or otherwise!
>
> The issue involved "Detailed Seller Ratings" or DSR's. The low ratings caused us to lose our "Top Rated Seller Plus" standings. Based on our current volume, this was a potential fee increase of tens of thousands of dollars over the course of a year.
>
> The only way DSR's are removed is by court order, and I was told that such court orders were not uncommon. I do deeply regret the wording of the lawsuit. I had not read it and only learned of the wording on the blogs. I too would have been outraged and for that I also sincerely apologize. It is the addendum attached ordering Ebay to remove the DSR's that was our only goal.
>
> The only person to blame here is me. You have spoken and I have listened. A terrible wrong needs to be righted. I am instructing our attorneys to drop the lawsuit. I want to assure everyone that you may feel free to leave any feedback on our company without fear of reprisal. I have learned my lesson.
>
> http://www.popehat.com/2013/04/15/the-popehat-signal-stand-against-rank-thuggery-in-ohio/#comment-1024366, posted April 17 at 5:51PM; Tr. 68 and Exhibit 29.

Plaintiff filed a notice dismissing the suit against Nicholls without prejudice on the morning of April 18, about ninety minutes before the answer and counterclaim arrived at the Clerk's office by Federal Express. A notice of dismissal for Rogan's case was filed later that afternoon. Tr. 84. Plaintiff did

not serve the dismissal directly on defendants' counsel, however; they were mailed directly to the defendants themselves in South Carolina and Pennsylvania. Tr. 85, 96, 94, 142; Nicholls First Affidavit ¶ 13. By the time defendants received the dismissal documents and told their attorneys that the dismissals had been received, counsel had spent an additional 9.9 hours on the litigation. Exhibits 33, 44.

Defendants made repeated efforts to avoid the need to litigate a sanctions motion before the Court, and to reduce the amount of time that would have to be spent on the litigation; plaintiff, for its part, refused to admit many simple facts that it had no intention of contesting, thus imposing on defendants the need to undertake additional effort and additional expense to bring the sanctions proceeding to a fair conclusion. Defendants' counsel began by asking plaintiff to avoid the need for defendants to move for sanctions by taking prompt ameliorative measures. Tr. 95 and Exhibit 24. Counsel suggested that, instead of paying attorney fees to defendants' counsel, plaintiff might pay the bulk of a sanction in the form of a tax-deductible donation to a free speech charity such as the American Civil Liberties Union of Ohio. Exhibit 24. Plaintiff responded that it was unwilling to take any such measures and warned that, if sanctions were sought, Med Express would re-file its lawsuit. Tr. 95.

In preparation for the first sanctions trial, defendants served a set of requests for admissions about the underlying facts, about the course of the litigation, and about the reasonableness of the hours spent on the litigation and the reasonableness of the hourly rates of defense counsel. Tr. 96; Exhibit 27. Although plaintiff admitted some of the facts, it denied many of the other facts for lack of information, or outright, even though plaintiff not only had no contrary information, but introduced no conflicting evidence on many of the specific factual points either at the first or the second sanctions hearing. *Id.* and Tr. 76-77. Plaintiff thus forced defendants to prove facts that it

had no intention of contesting.[4]

Once defendants learned that Radey's claims about what eBay has showed him about the defendants' DSR entries must have been false, they used written discovery to obtain evidence from eBay about its business records, then asked plaintiff to admit the accuracy or authenticity of documents taken from eBay's business records. Plaintiff refused make any such admissions, Exhibit 36, thus forcing defendants to take eBay's deposition to establish these facts for the second trial. Exhibit 35 (Transcript of Deposition of Rebekah Long). And even though defendants had produced an expert witness to testify at the first sanctions trial, plaintiff again refused to admit the reasonableness of the hours and rates, thus forcing defendants to bring their expert witness back for the second trial. Tr. 76.

In the period leading up to the second sanctions trial, plaintiff served extensive written discovery requests, including both interrogatories and requests for the production of documents. The requests came with a letter that began "Please find attached my discovery to your clients. **I would have hoped that this matter would have been dismissed since it has and will continue to soak up substantial resources of the Court and parties**." Exhibit 37 (emphasis added). Although many of the discovery requests had relevance to the sanctions issues, others were completely irrelevant,

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[4]Similarly, after the first sanctions hearing, after the court urged the parties to try to settle the sanctions claim, defendants were willing to sacrifice a considerable amount of the fees for work that plaintiff had forced defendants' counsel to do in return for a promise of prompt payment. Discussions between counsel resulted in an agreement between counsel; however, even though Radey knew what agreement his counsel had reached on his behalf, plaintiff then refused to pay as agreed because it was unwilling to accept the very limited amount of confidentiality to which his counsel had agreed. Motion to Enforce Settlement and Opposition to that Motion. Consequently, the Court was unwilling to enforce the settlement because there was inadequate evidence of a meeting of the minds. Order Denying Motion to Enforce Settlement. Defendants have excluded time spent on the settlement enforcement motion from the hours on which attorney fees are sought. However, the course events shows both defendants' reasonable efforts to minimize litigation and the bad faith manner in which plaintiff has approached this litigation.

apparently having been reprinted from some other litigation. Tr. 70-71. Mr. Levy urged plaintiff to review the written requests and withdraw the irrelevant ones, *id.* 71-72 and Exhibit 38, but plaintiff did not do so, it "just blew it off." Tr. 72, 80, and Exhibit 39. Plaintiff apparently acknowledges that some of the served discovery was irrelevant, but has never explained why, in response to a request to review the discover requests and withdraw the irrelevant ones, it simply ignored the request and hence imposed additional time of defendants' counsel.

ARGUMENT

I. The Court Should Award Attorney Fees for the Time Needed to Respond to the Complaint and the Motion for Preliminary Relief, and to Seek Sanctions.

R.C. 2323.51(B)(1) provides that "any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorneys' fees, and other reasonable expenses incurred in connection with the civil action or appeal." This award "may be made against a party, the party's counsel of record, or both." R.C 2323.51(B)(4). R.C. 2323.51(A)(2)(a) defines conduct as frivolous if "any of the following" obtains:

> * * *
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

"Whether a claim is warranted under existing law is an objective consideration. The test . . . is whether no reasonable lawyer would have brought the action in light of the existing law. In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim." *Riston v. Butler*, 149 Ohio App.3d 390, 2002–Ohio–2308, ¶ 30 (1st Dist. 2002); *Kozar v. Bio-Medical Applications of Ohio,* 2004-Ohio-4963, ¶ 16 (Ohio Ct. App. 9th Dist.,

Sept. 22, 2004). This is "a decidedly objective measure" that does not take intent into account. *Id.*

Sanctions can be awarded against a lawyer or a represented party or both. *See, e.g.*, *State ex rel. Bell v. Madison Cty Bd. of Commrs.*, 9 N.E.3d 1016 (Ohio 2014); *Carasalina, L.L.C. v. Bennett*, 2014 WL 7274354, 2014-Ohio-5665 (Ohio Ct. App. 10th Dist. 2014); *Bilbaran Farm, Inc. v. Bakerwell, Inc.*, 2014 WL 4627807, 2014-Ohio-4017 (Ohio Ct. App. 5th Dist. Sept. 15, 2014); *Bell v. Nichols*, 2013 WL 3193682 (Ohio Ct. App. 10th Dist. June 20, 2013); *Linetsky v. DeJohn*, 2012 WL 6727618 (Ohio Ct. App. 8th Dist. 2012), *appeal not accepted*, 987 N.E.2d 704 (Ohio 2013); *Master v. Chalko*, 794 N.E.2d 144 (1999) (Cuyahoga County Com. Pl. Feb. 3, 1999), *aff'd*, 2000 WL 573200 (Ohio Ct. App. 8th Dist. 2000). Even though the standard for judging conduct as not being warranted under existing law depends on what a reasonable lawyer would or would not do, a client may be held vicariously liable for sanctions under § 2323.51(A)(2)(a)(ii) due to frivolous legal claims promoted by his attorney even without any direct participation in the misconduct by the client. In *Schock v. Brown*, 2005 WL 1026333, 2005-Ohio-2159 (Ohio Ct. App. 9th Dist. 2005), the Ninth District upheld a theory of vicarious liability under § 2323.51(A)(2)(a)(ii). The majority reversed a district court's denial of attorney's fees against a represented litigant based on his attorney's frivolous conduct, invoking the "broad. . . proposition that an attorney's sins may in fact be visited upon the client."*Id.* at ¶ 9. Sanctions can be sought against *only* a represented party without pursuing sanctions against that party's attorney. *Dudley v. Dudley,* 2010 WL 5834451 (Com. Pl. Butler County Apr. 1, 2010), *aff'd*, 196 Ohio App.3d 671, 2011-Ohio-5870, 964 N.E.2d 1119 (Ohio Ct. App. 12th Dist. 2011). The *Dudley* court found "that the defendants did not have a good-faith argument. . . [and] engaged in conduct that constitutes frivolous conduct under R.C. § 2323.51 and, therefore, the plaintiffs are entitled to an award of reasonable attorney fees."). The motion for attorney's fees that was granted and then upheld requested that the fees be paid out of the business

interest at stake in the underlying litigation,

A. The Complaint and Motion for Emergency Relief Were Frivolous.

The complaint and the motion for emergency relief each warrant statutory sanctions under subpart (ii) of R.C. 2323.51(A)(2)(a) because they were legally frivolous, and under subpart (iii) because the allegations of falsity had no evidentiary support.

1. The Lawsuit Was Legally and Factually Frivolous.

The only specific facts stated by Rogan and Nicholls were completely true and the complaints in each case admitted that these facts were true. Rogan stated "Order retracted," and both the complaint, ¶ 6, and the TRO motion, page 2, admitted that the equipment was broken and hence not sent after Rogan paid; paragraphs 2 and 3 of the affidavit accompanying the motion simply said that the payment was refunded after the equipment was sold to Rogan. Nicholls stated that the equipment arrived with postage due without prior notice from Med Express, and the complaint, ¶¶ 6 and 7, and TRO motion, page 2, both admitted that the package arrived with postage due; indeed, Med Express claimed that it had no idea that there would be postage due, from which it follows that Med Express could not have alerted Nicholls to expect postage to be due. But it is black letter law that a libel claim can only proceed if the plaintiff can both allege and prove that the defendant has made a statement that is both false, and substantially false. This is true not only as a matter of Ohio law, *American Chem. Soc. v. Leadscope*, 133 Ohio St.3d 366, 389, ¶ 77, 978 N.E.2d 832, 852 (Ohio 2012), quoting *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (Ohio Ct. App. 1 Dist. 1996), but as a matter of First Amendment imperative. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776 (1986) ("[T]he plaintiff [must] bear the burden of showing falsity, as well as [the defendant's] fault, before recovering damages"). Pursuit of a defamation claim in which the truth of the accused statements was "never denied" has specifically been found to merit sanctions under

R.C. 2323.51. *Oakley v. Nolan*, 2007 WL 2702832, 2007-Ohio-4794, ¶¶ 16-18 (Ohio Ct. App. 5 Dist. 2007).

Second, to the extent that the complaint rests on the fact that Rogan categorized his feedback as "neutral" and that Nicholls classified it as "negative," these were defendants' opinions, and "[u]nder the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). Moreover, Section 11, Article I of the Ohio Constitution is even more protective of opinion than the First Amendment is. *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182 (1995); *Isquick v. Dale Adams Enterprises*, 2002-Ohio-3988, ¶ 25 (Ohio Ct. App. 9 Dist. 2002). It is apparent both from the complaint, and from Radey's public statements since the complaint was filed, that the lawsuit against Nicholls was filed on the theory that the postage due was not plaintiff's fault, and that both suits were filed on the theory that, once it offered refunds and apologies, plaintiff had met its obligations and should not be faulted for its conduct. But not every buyer is required to take that view, especially given Med Express's acknowledgment that there had been postage-due problems with Postal Service shipments on other occasions, enough so that Med Express was planning to change shippers. Defendants' opinions were not actionable, and no reasonable lawyer or plaintiff could have argued otherwise.

Finally, to the extent that the complaint and TRO motion were based on the allegation that defendants had given plaintiff "low ratings in eBay's [DSR] section," the complaint was sanctionable both as a matter of law—because ratings are non-actionable opinions—and as a matter of fact, because not only is there no evidence whatsoever that defendants gave plaintiff any undeservedly low ratings (plaintiff now concedes that their ratings were not low), but the evidence strongly suggests that plaintiff's principal fabricated the contention that defendants gave low ratings to justify bringing suit.

The evidence at trial showed that eBay customers are encouraged to assign from one to five stars to rate their overall experience with a given seller. These ratings are also matters of opinion that cannot be the basis of a libel claim, because they are inevitably based on a series of highly subjective assessments. Courts have repeatedly rejected claims that assigning low grades on ratings systems of this sort can properly form the basis for a defamation action. *Compuware Corp. v. Moody's Investors Services*, 499 F.3d 520, 529 (6th Cir. 2007) ("rating is a predictive opinion, dependent on a subjective and discretionary weighing of complex factors" and "even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of [the] ratings calculation"); *Aviation Charter v. Aviation Research Group/US*, 416 F.3d 864, 870-871 (8th Cir. 2005); *Jefferson County School Dist. No. R-1 v. Moody's Investor's Services*, 175 F.3d 848, 855 (10th Cir. 1999); *Castle Rock Remodeling v. Better Business Bureau of Greater St. Louis*, 354 S.W.3d 234, 242-243 (Mo. Ct. App. 2011); *Browne v. Avvo, Inc.*, 525 F. Supp.2d 1249, 1252-1253 (W.D. Wash 2007).

Moreover, even though Radey gave his opinion about what the various categories of detailed seller ratings represented, buyers were not required to share his interpretation. For example, Radey testified during the first sanctions trial that the rating for "communication" refers only to whether he responded by email to any questions that were posed to him, Tr. 148; but a buyer might well have a different view, under which "communication" included the accuracy of statements about the items and the shipping process. When Radey failed to inform his buyers candidly that there was a significant likelihood of postage due, and when he listed on his store an item that had already been broken, that was a failure to communicate that a buyer might well have decided merited a low rating.

At the first sanctions trial, in fact, Radey testified that even though he knew that incorrect weighings had been a problem at the post office, he deliberately withheld that information from his description of the item and from his explanation of his shipping charges. Tr. 167. He also testified

that he and other eBay sellers prefer to use the United States Postal Service because it is less expensive than other shipping services. Tr. 166. Using the USPS allows eBay sellers to increase their profit margins because, in effect, they profit on their fixed shipping charges as well as on the items themselves. To get the increased profit margins and numbers of buyers that could be obtained by withholding this detail, Radey was taking a calculated risk of infuriating whichever buyers suffered from this problem, and of leading them to give him a low rating for accuracy of description, communication, and reasonableness of shipping charges. Even if it were true that Nicholls had given him "1" ratings in all categories, this would have been a defensible opinion produced by Radey's calculated risk. Similarly, listing an item that was already cracked, and imposing any shipping charges for such an item, could all have been treated by a buyer like Rogan, as a matter of his opinion, as meriting a "1" rating for these categories as well as for "communication" and for "shipping time."[5] The indeterminacy of each of the categories supports defendants' argument for applying the general rule that the assignment of positions on scaled rating systems represents a personal opinion that is outside the scope of a proper claim for defamation. Thus, the filing of the complaint constituted frivolous conduct as a matter of law.

But it was also frivolous conduct as a matter of fact, because the evidence shows that the allegation that defendants entered false DSR's was false. To be sure, at the first sanctions trial, plaintiff introduced evidence that was apparently intended to support an argument that defendants' detailed seller ratings were false statements of fact, and not expressions of non-actionable opinion. Tr. 147-161. There were, however, several flaws in the intended argument. First, Radey's assertions

[5] Radey testified at trial that the information he included in his first post-sale message to Rogan, that the item had been broken "a few weeks ago," was incorrect. Tr. 170. Rogan was certainly entitled to give a low rating for communication when the seller gave him false information to explain non-shipment.

about the specific DSR ratings that each of the two defendants left was false, even perjurious. Under direct examination by his lawyer, Radey swore under oath that he saw both Nicholls and Rogan leave all 1 ratings, the very lowest ratings possible; but even during the cross-examination at that first trial he began to back away from that testimony: he admitted that he did not actually see the 1's, but simply inferred them because eBay notifies sellers through a system of "ding's" when new feedback has been given, and testified that his testimony about the "1" ratings was based on his inferences about the change in the total number of low ratings he had received. As the truth began to emerge after trial, Radey claimed that he had never affirmatively testified about what DSR ratings Nicholls and Rogan had actually given. Seeking to avoid a civil finding about perjury, he claimed that he had only testified his "belief" about what DSR ratings they had given him. And at the second sanctions trial, he **admitted** that he had no factual basis for accusing Nicholls and Rogan of giving him number 1 ratings—this testimony, he repeatedly omitted, was "mistaken." Tr. 190, 193. For purposes of the Court's ruling in this case, Radey's concession that his testimony about the specific DSR's left by the defendants was mistaken leaves the record devoid of any evidence that either defendant left false DSR's—even if the DSR's could be treated as factual statements—over which a tenable libel claim could have been filed.

Perhaps Med Express plans to argue against sanctions based on the proposition that, even if the DSR's were true, Radey's claimed **belief** that the DSR's were all 1's and therefore false is enough to protect Med Express against a sanctions award. That argument, however, is belied both by precedent and by the language of the frivolous conduct statute. The *Dudley* decision cited above squarely rejected the arguments of the parties in that case that they could not be sanctioned "because [of what] they believed [about the facts of the case]. However, the finding of frivolous conduct under R.C. 2323.51 is **determined without reference to what the individual knew or believed**. *Bikkani*

v. Lee, Cuyahoga App. No. 89312, 2008-Ohio-3130, 2008 WL 2536983, ¶ 22 (Ohio App. 8 Dist. 2008), *citing Ceol v. Zion Indus.*, 81 Ohio App.3d 286, 610 N.E.2d 1076 (Ohio. App. 9 Dist. 1992)." *Dudley v. Dudley*, 2011-Ohio-5870, ¶ 12, 196 Ohio App. 3d 671, 674-75, 964 N.E.2d 1119, 1122 (Ohio. Ct. App. 12 Dist. 2011) (emphasis added); *Hardin v. Naughton*, 2013-Ohio-2913, ¶ 14 (Ohio Ct. App. 8 Dist. 2013). Similarly, the Ninth District decision in *Zion Industries*, cited in *Dudley* above, overturned a trial court ruling that refused to award sanctions based on the conclusion that the party and its attorney had proceeded based on a good faith mistake, ruling that "the trial court erred, as a matter of law, by treating ignorance as an exception" to the sanctions statute. *Ceol v. Zion Indus*., 81 Ohio App. 3d at 293. The Court of Appeals said, "No references are made to what the targeted individual actually knew or believed." *Id.* at 291.

Indeed, although the subsection of R.C. 2323.51 that provides for sanctions against conduct "not warranted under existing law" contains an exception for arguments that can be supported by a "good faith argument" to change or reverse the law, R.C. 2323.51(A)(2)(a)(ii), there is no good faith exception for "allegations or factual contentions that have no evidentiary support." R.C. 2323.51(A)(2)(a)(iii). A plaintiff can plead facts based on the hope or expectation of obtaining evidentiary support through "further identification or discovery," *id.*, but even then the factual contention must have been "specifically so identified" and obtaining evidentiary support must have been "likely." *Id.* In this case, the complaint did not identify any allegations about false DSR's as being based on the hope of securing evidentiary support through investigation or discovery; hence, even if Med Express had been justified in treating DSR's as actionable statements of fact, Radey's concession in his testimony at the second sanctions trial that he was mistaken in his claimed belief that the defendants had left him unfairly low DSR's condemned Med Express's conduct in bringing this action to a finding of frivolous conduct under the literal language of the statute.

Not only does the record contain no evidence that the defendants left any DSR's that could be considered false even on the theory that DSR's state facts rather than opinions, but evidence at the first sanctions trial and developed afterward showed that Radey deliberately gave false testimony about the ratings from defendants. Radey claimed at the first trial that he could infer the defendants' DSR entries by noting the numbers of one-star ratings that he had received immediately after each of the defendants entered feedback for their transactions with him. Tr. 168. He claimed that he was able to detect there changes because he received a notification from eBay, in the form of a "ding" on his seller's dashboard, telling him that new feedback has been provided. Tr. 168-169. EBay's representative, however, flatly denied that any such notification is provided. Exhibit 35 (Long Deposition) at 13-14. Moreover, even though individual detailed seller ratings are not visible either to the buyer or to the seller, eBay records the actual rating entries by each buyer, and inspection of those electronic records shortly after Radey claimed, for the first time, that defendants had entered "1" ratings for each detailed seller rating category, revealed that they did nothing of the kind. Nicholls Second Affidavit; Rogan Second Affidavit; Exhibit 35 at 9-13.

At the second sanctions trial, Radey invented yet another basis for claiming that Nicholls and Rogan gave him false detailed ratings — he claimed to have had a telephone conversation with some unidentified eBay staff member who allegedly told him that low detailed seller ratings from Nicholls and Rogan "contributed" to "drastic drops in our numbers" that had cost his company its "top-seller ratings." Tr. 193. Considering that eBay's records do **not** show low numeric ratings from either Nicholls or Rogan, and considering as well Radey's admission that his testimony about having seen low DSR's was "mistaken," the Court should see Radey's testimony about an oral conversation with an eBay representative about Nicholls and Rogan for what it is: another fabrication to try to avoid sanctions.

Inspection of eBay's own web site explanations of the operation of the detailed seller rating

system provides yet another reason for finding that Radey's testimony about what he claimed to have seen in the form of DSR entries was false; these explanations show that, **if** it were true that Radey had fully met eBay's expectations with respect to communication, shipping rates, and shipping times, it would have been impossible for Nicholls or Rogan to have left any rating lower than 5 stars. Exhibit B shows that, for each category besides "item description," eBay informs sellers that if they meet certain standards for that category, eBay will "automatically" assign five-star ratings to that category for the transaction, and "and you [the buyer] won't be able to change the rating." *Id.* at 3-4. It follows that, if either of these buyers was able to enter a rating of less than five stars, the seller **could not have met** eBay's expectations for seller performance in these categories. Radey's trial testimony may reflect a self-congratulatory mood with respect to his performance on these transactions, but he cannot sue for defamation simply because Rogan and Nicholls believed otherwise.

Additional evidence in the record supports the inference that Radey's testimony about false DSR's was a last-minute invention fabricated to justify litigation, and not something about which Radey was worried when the initial exchanges with defendants occurred. Radey exchanged several messages with Nicholls, in which he asked her to change the negative written feedback about the postage due, but none of his messages made reference to allegedly false DSR's; similarly, in writing to Rogan, Radey addressed his written feedback "order retracted," but he never said anything to Rogan about allegedly false DSR's that Radey claims to have believed, at that time, Rogan had left.

Finally, the record contains evidence that shows Radey's **motive** for fabricating claims about the DSR's. At the second sanctions trial, Radey testified to the court that he believed that it was unfair for Rogan make the true statement that the order was "retracted" because the statement did not offer Radey's own explanation for the order not having been filled that Radey apparently believes would have made him look better, and that even calling the feedback "neutral" harmed his standing

with eBay. Tr. 192. It is apparent that Radey was unhappy about Nicholls' and Rogan's **true** written statements—that Nicholls' order came with postage due and that Med Express could not fulfill Rogan's order because Med Express had only a broken piece of equipment—and made up a claim about false DSR's on unrelated aspects of the transaction as a post-hoc rationale for suing them.

Finally, even if there were some merit to Med Express's apparent contention that the DSR's were actionably false statements of fact, the complaint against each of the defendants **also** alleged defamation claims based on the selection of "negative" or "neutral" for overall ratings of the transaction, and based on Nicholls' textual complaint about having received her package postage due. Each of these claims was a completely frivolous basis for suing for defamation, and plaintiff does not argue otherwise.

2. The Effort to Obtain Injunctive Relief Was Procedurally Frivolous.

Apart from the frivolous nature of the lawsuit, the temporary restraining order motion, which the court converted into a preliminary injunction motion after denying a TRO ex parte, was even worse, because not only was no relief available, as shown above, but an emergency injunction would have been especially improper. The United States Supreme Court squarely held that preliminary injunctions against allegedly defamatory statements are prior restraints forbidden by the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("No prior decisions support the claim that the 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."); see also *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990) (First Amendment allows injunction against repetition of a libel but only those statements found by the jury to be false). Moreover, Ohio law forbids 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 N.E. 779 (Ohio Ct. App. 9 Dist. 1930).

At trial, plaintiff's counsel asked several questions about the fact that the TRO and preliminary injunction were sought only against eBay, and not against Rogan and Nicholls individually, Tr. 94-96, implying that counsel had no reason to spend their time opposing the motion for emergency injunctive relief. But it was the defendants' speech that was sought to be enjoined, and defendants were entitled to have the opportunity to oppose the requested injunction so that their constitutionally protected speech would not be restrained. Moreover, to the extent that injunctive relief was sought against eBay, the claim was doubly frivolous, because a federal statute squarely forbids tort actions from being filed against, and remedies obtained from, a provider of interactive computer services based on content authored by one of its users. 47 U.S.C. § 230; *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 599 n.8 (6th Cir. 2013); *Doe v. SexSearch.com*, 502 F. Supp.2d 719, 725 (N.D. Ohio 2007), *aff'd*, 551 F.3d 412 (6th Cir. 2008). Under federal law, the individual defendants were the **only** proper parties to this case.

Finally, the TRO proceeding was procedurally frivolous. The First Amendment forbids ex parte restraining orders that restrict speech "where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968). Similarly, even in situations not involving First Amendment freedoms, Ohio Civil Rule 65 allows ex parte TROs only if two conditions are met:

> (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

Here, neither of these conditions was met. Neither inability to give notice nor efforts to give notice were shown by affidavit or otherwise. Med Express had street addresses for both defendants, to which the complaint and moving papers could have been overnighted, and eBay has a private messaging function that Med Express had already used to communicate with Nicholls.

Indeed, there was no showing of irreparable injury, not to speak of irreparable injury occurring before either defendant could be heard. An injury is only "irreparable" if it is "an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *Franks v. Rankin*, 2012 WL 1531031, 2012-Ohio-1920, ¶ 36 (Ohio Ct. App. 10th Dist. 2012). Here, there is nothing to indicate that money damages would be impossible, difficult, incomplete, or inadequate, even if some legally cognizable harm were visited upon Med Express (and surely there was not).

In its written opposition to defendants' motion for sanctions, plaintiff argued that it was entitled to believe that it could succeed in this action because, in one of Med Express's previous lawsuits, it obtained a preliminary injunction, and then a default award of damages. *Med Express v. Independent Dental*, No. 11CIV0536. In *Independent Dental*, however, unlike this case, the record revealed that the buyer's feedback contained a false statement of fact: specifically, the buyer falsely claimed that Med Express refused to pay a refund, even though, according to Radey's affidavit, Med Express had actually provided a refund in that case. Exhibits 16, 19. Moreover, the TRO in *Independent Dental* was obtained ex parte, after Med Express's lawyer in that case withheld relevant authority about the role of the First Amendment in TRO proceedings for defamation. Med Express and its counsel had no reasonable basis for relying on this unreported decision in their conduct of the litigation against Nicholls and Rogan.

For these reasons, plaintiff's emergency motion was procedurally and substantively frivolous; no reasonable attorney could have thought otherwise. Vigorous application of the rule against

frivolous litigation is needed to ensure that similar litigation is not repeated.

B. Sanctions Should Also Be Awarded Because Plaintiff Proceeded in Bad Faith and for Improper Purposes.

Sanctions should also be imposed under subpart (i) of R.C. 2323.51(A)(2)(a) because of evidence that plaintiff proceeded with this action in subjective bad faith and for the improper purpose of compelling defendants to remove speech simply because the truth hurt it, even though it knew that true speech is not actionable.

First, Radey publicly stated that the lawsuit was filed without his having read the allegations, and that his attorney violated his instructions by seeking forms of relief against defendants — compensatory and punitive damages, as well as attorney fees — that he did not want, because all he really wanted was an injunction against eBay. Yet he signed a verification of each complaint, attesting that he had read "the allegations contained in the foregoing Complaint." In his testimony at the first sanctions trial, Radey said that he "glanced at" the papers before he signed them, but did not read them word for word. Tr. 165. Filing a complaint based on averments that Radey admits he did not read, and whose falsity was on this account a product of his having a cavalier attitude toward his obligation to tell the truth when under oath, is alone a significant reason for finding bad faith.

Moreover, there is significant evidence of improper purpose on plaintiff's part. Plaintiff indicated that the purpose of the litigation was to secure removal of feedback that had the potential for increasing the sales fees charged by eBay, even though it knew that the **facts** that each of the defendant had stated in their eBay feedback was true. Exhibits G, J. But lawsuits cannot proceed against speech simply because the speech is harmful — it has to be tortious, as well. Radey's online statements indicated that he felt he was entitled to pursue Ms. Nicholls because eBay buyers should only express themselves based on cold calculation, but that she had based her post on "emotion," and

that the suit against her was not based at all on the facts she had stated. Exhibit J. This consideration would be legally irrelevant except insofar as it shows a recognition that Nicholls was stating nonactionable opinion, and implies a recognition that Nicholls believed that she was telling the truth, thus negating the allegation in the complaint that she "deliberately slandered" Med Express. Similarly, Mr. Amodio's statement to Mr. Levy, during their initial telephone conversation reflected in Mr. Levy's trial testimony and in Mr. Levy's letter, Exhibit G, which Mr. Levy verified as accurate during his testimony, Tr. 64, indicated that plaintiff was prepared to move forward with the litigation regardless of the lack of merit. Mr. Amodio's statements also indicated that he was relying on the inconvenience and expense that a South Carolina resident, assisted by a lawyer based on Washington, DC, would incur to defending against a preliminary injunction hearing scheduled to be held in Medina. Tr. 64; Exhibit 7. Plaintiff is properly held responsible for Mr. Amodio's statements; as the Ninth District Court of Appeals said in *Schock v. Brown*, "an attorney's sins may in fact be visited upon the client." 2005-Ohio-2159, ¶ 9.

This strategy came close to succeeding, because Nicholls lives far away from Medina and could not have afforded either to travel to Medina to defend herself pro se or to hire a lawyer. Had she not been able to obtain pro bono counsel in Ohio, she would have had to remove her feedback. Indeed, just paying for a pro hac vice fee and covering Mr. Levy's travel expenses to Ohio would have imposed a cost greater than the case was worth. Nicholls Affidavit ¶ 9. Plaintiffs like Med Express count on defendants engaging in such a calculus; an award of sanctions is needed to deter such misconduct.

The frivolous conduct statute's deterrence objectives, see *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 435 (2002) ("The plain language of the statute discloses a purpose to prevent abuse of process during the course of litigation by providing a means for immediate judicial determination and sanctioning of such abuse."), counsel strongly in favor of sanctions, especially

because these two lawsuits are not an isolated phenomenon. Med Express filed another case like this one at the same time that it sued Nicholls and Rogan, against another online detractor in Guam. This Court's online docket reveals that it has filed nearly identical defamation actions in the past, using a different lawyer. Tr. 91-92; Exhibits 13, 15, 16, 17, 18, 19, 20, 21. Only by imposing sanctions can the Court send the appropriate deterrent message.

C. The Conduct of the Sanctions Litigation Provides an Independent Reason Supporting Sanctions and Justifies a Fully Compensatory Award Including the Time Spent Litigating the Sanctions Issue.

Although the utter frivolousness of the complaint and motion for a preliminary injunction are alone a sufficient basis for awarding defendants their attorney fees, the manner in which plaintiff opposed the motion for sanctions provides an additional basis for awarding attorney fees, both on a sanctions theory and based on the refusal to make admissions of fact that could have streamlined the sanctions litigation had plaintiff not been so obstreperous. On three separate occasions—before the first sanctions trial, after the falsity of Radey's testimony about eBay but before defendants went to the trouble and expense of pursuing written and deposition discovery from eBay, and before the second sanctions trial when defendants tried to avoid having to have their expert witness return to repeat her testimony—plaintiff refused to make admissions of fact that it never intended to contest at trial. (Civil Rule 36 provides an alternate ground for awarding attorney fees for refusal to admit facts). Plaintiff served several written discovery requests that had no relevance to the litigation, under cover of a letter that boldly warned that pursuing sanctions would "continue to soak up substantial resources of the Court and parties," and refused to withdraw the irrelevant requests after the problem was called to its attention. And plaintiff offered false exculpatory testimony at the first sanctions trial and even at the second trial, in an apparent effort to avoid sanctions through

obfuscation and even perjury.[6]

As we argue in the last section of this brief, fees should be awarded for time spent on the sanctions motion simply because of the general rule that fees are to be awarded for time bringing a successful attorney fee motion, but the amount of fees has ended up being far more than the time needed to resolve the merits of the litigation, and it was the deliberate choices made by the plaintiff which, as the most recent of his lawyers candidly omitted in demanding dismissal of the sanctions motion, "has and will continue to soak up substantial resources of the Court and parties." The Court should take that conduct into account in ruling on the sanctions motion.

D. Sanctions Should Be Awarded to Protect the Public Interest in Access to Useful Information About the Performance of Sellers.

The Ohio Supreme Court has repeatedly recognized the chilling effect that libel litigation can have on the exercise of free speech rights, holding, for example, that summary judgment and directed verdict procedures play an especially important role in protecting defendants in defamation cases. *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90, 509 N.E.2d 399, 404 (Ohio 1987); *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 120, 413 N.E.2d 1187, 1191 (Ohio 1980). "Self-censorship affecting the whole public is hardly less virulent for being privately administered." *Id.*, 64 Ohio App.2d at 121. "Unless persons . . . desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." *Stepien v. Franklin*, 39 Ohio App.3d 47, 50, 528 N.E.2d 1324, 1329 (Ohio Ct App. 8 Dist. 1988), quoting

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[6]In addition to his lying about the allegedly false DSR's and how the DSR's allegedly came to his attention, Radey's cross-examination at the second sanctions trial revealed several contradictions between his testimony at the first trial and his testimony at the second. Transcript 199-220. Radey's claims that he was not a "liar" in court and that he did not "intentionally lie" in his testimony, Tr. 190. 219. reflects his recognition of the difference between lying and telling the truth, and of the possible consequence for lying, but the course of his public statements as well as his testimony shows that he has no compunction about saying whatever will most likely protect his personal interests regardless of his oath to tell the truth.

Dupler. In this very case, the harassing impact of the litigation very nearly had the effect of removing Nicholls' valuable information from the marketplace of ideas. Nicholls First Affidavit ¶ 9.

Future potential customers are entitled to know about past problems in dealing with Med Express, so that they can decide whether it is a company on which they should rely for equipment that is urgently needed. That is, indeed, why eBay asks its users to leave feedback. Nicholls Second Affidavit, Exhibit 2 ("how feedback works" page). Similarly, the eBay page explaining its DSR explains that "Because detailed seller ratings are anonymous, sellers can't see which buyer gave them which rating. This means that buyers should feel free to be honest and open about their buying experience so sellers can get a more complete picture of their performance." *Id.* ("Detailed Seller Ratings" page). At the first sanctions trial, Radey testified that only ten percent of his customers leave feedback for his transactions with them, a figure which, he claimed, is even lower than the average of seventeen percent as he claimed eBay has stated. Tr. 168. (At the second trial, he contradicted this testimony by swearing that "fifty to seventy percent" of his buyers leave feedback; Tr. 201; when confronted with his previous testimony, he ulitmately retreated into saying that "I was guessing. as I'm guessing now." Tr. 206). Litigation that forces eBay customers to choose between removing honest accounts of their dealings with sellers and finding lawyers to defend themselves against frivolous litigation in effect deprives the eBay community of valuable information that eBay wants them to have, and puts at a disadvantage eBay sellers who accept the possibility that they may be criticized.

Expert witness Karen Lefton, the former general counsel of the *Akron Beacon-Journal* and a media lawyer in the region, Tr. 72-73, also explained the important public policy implications of the sanctions motion in this case. She indicated that there has been a new set of defamation cases responding to the fact that ordinary people are able to give their assessments of businesses in ways

they never did before, and that protecting that forum against abusive litigation is important because so many people rely on it. Tr. 38-40.

Given the cost and difficulty generally involved in defending against a libel case brought several hundred miles away, it is the rare defendant who is able to stand up for his or her rights. When, as in this case, the defendants insist on their day in court, and the lawsuit proves to be a frivolous one that was brought for improper purposes, the courts should respond by imposing sanctions and rewarding the public spirited lawyers, Thomas Haren and Jeffrey Nye, who made that defense possible, by awarding them their attorney fees.

* * *

Radey admitted that the lawsuits whose filing he authorized, and that he verified under oath, albeit only after "glancing" at them, were an "outrage," and that "[a] terrible wrong needs to be righted." Exhibit 9. The way to right that wrong is to impose sanctions.

II. The Court Should Award Defendants $35,209.39 in Attorney Fees and Expenses.

The amount of attorney fees is set by calculating the "lodestar" amount, which is derived by multiplying the number of hours reasonably spent by the reasonable hourly rate for each of defendant's counsel, and then adjusting the lodestar if necessary to account for such special factors as the difficulty of the case or the contingency of payment. *Bittner v. Tri-County Toyota*, 58 Ohio St.3d 143, 145, 569 N.E.2d 464 (Ohio 1991); *Turner v. Progressive Corp.*, 140 Ohio App.3d 112, 116, 746 N.E.2d 702, 705 (Ohio Ct. App. 8 Dist. 2000). The fact that the lawyers in this case worked pro bono instead of charging defendants for their services does not alter the determination of the market rate for their services. *Mikhael v. Gallup*, 2006 WL 2141177, 2006-Ohio-3917, ¶¶ 18-22 (Ohio Ct. App. 9 Dist. 2006). See also *Blum v. Stenson*, 465 U.S. 886, 895-896 (1984); *Gibney v. Toledo Bd. of Educ.*, 73 Ohio App.3d 99, 109-110, 596 N.E.2d 591, 598 (Ohio Ct. App.

6 Dist. 1991).[7] Messr's Haren and Nye as well as Ms. Lefton explained that the agreements with the defendants provided that the defendants would pay no fee, but that if the court awards fees as a sanction then the lawyers were entitled to the fees awarded. Tr. 105 (Nye explaining that defendants are not obligated to pay unless and to the extent that the court awards fees as a sanction), Tr. 150 (Haren, same), Tr. 87 (Levy: "It's pro bono in that the clients are never going to have to pay, but it's contingent in that it's contingent on ultimately an award by the Court or not.")

Here, Messr's Nye and Haren seek to be awarded fees at their normal hourly billing rates — $230 and $175, respectively. Tr. 89, 106, 143-144. As the Court of Appeals for the Sixth Circuit said in *Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir.1995), "normal billing rates usually provide an efficient and fair short cut for determining the market rate." Moreover, counsel's experience and qualifications are set forth in their testimony. Karen Lefton, an attorney with broad experience litigating media cases in Northeast Ohio, as well as hiring outside counsel for her clients to litigate such cases, averred that the hourly rates for both of defendants' counsel are entirely reasonable, being well within the normal range of fees billed for this sort of work in the area. Tr. 38. Plaintiff accepted without objection the tender of her testimony as an expert. *Id.* 32.

Counsel's time records reflect they spent more than 185 hours (combined) litigating this case. *Id.* 102, 144; Exhibits 33, 44, although they are seeking compensation for only a combined 160.8 hours (plus expenses). The time for which an award of attorney fees is sought includes some time spent addressing the merits even after plaintiff filed its notice of voluntary dismissal because, even though its counsel had been notified the day before that Nicholls was represented by Ohio counsel,

[7]Thus, the questions from Med Express counsel emphasizing this point, Tr. 37-39, 112-113, were simply addressed to irrelevancies. Moreover, both of defendants' Ohio attorneys testified that they maintain full dockets, Tr. 30-31, 100, so that time spent on a pro bono case takes time for which their firms would otherwise have been receiving their regular hourly rate.

he deliberately transmitted the notice of dismissal by regular mail to Nicholls herself in South Carolina. Tr. 85, 86, 94, 142; Nicholls First Affidavit ¶ 23. The time also includes time spent up to the second sanctions trial this past spring, which is also compensable time. *Village of West Unity ex rel. Beltz v. Merillat*, 169 Ohio App.3d 71, 78, 861 N.E.2d 902, 2006-Ohio-5105 ¶¶ 37-38 (Ohio Ct. App. 6 Dist. 2006). It is surely regrettable that the great bulk of the fees sought are for work in the sanctions proceeding, but that is only because of the obstreperous manner in which plaintiff litigated this case through the four lawyers that it hired in succession after Mr. Amodio stopped defending Med Express against that motion.

Both defense attorneys explained that they had avoided duplication of effort where possible. Although Med Express's counsel Mr. Hall cross-examined defense counsel on this point at the first sanctions trial, and although Med Express's counsel Mr. Cardenas asked some general questions hinting at an argument about duplication at the second sanctions trial, neither was unable to identify a single time entry that was unreasonable. Defendants' expert witness testified that she had reviewed the billing records in the case and found the fees and expenses reasonable, Tr. 34-38, and based on her extensive experience she rejected the effort of plaintiff's counsel to argue that the use of two lawyers constituted improper duplication of effort. *Id.* 46-48.

Moreover, even though fees can be awarded for all time spent on a successful defense against frivolous litigation, defendants have reduced the amount of time for which they are seeking to have fees awarded by reducing their hours to eliminate time spent on certain unsuccessful motions. *Id.* 103, 147. Thus, they have eliminated from their application all time spent on their motion to enforce the settlement agreement that was reached with plaintiff's counsel under the Court's auspices, and have eliminated a few other time entries shown in their billing records. The markings on the

attached billing records show which hours are not included in the final fee application.[8]

Finally, defendants were able to minimize the amount of time they spent on this litigation, and particularly the motion for sanctions, because they had the pro bono assistance of a nationally-recognized First Amendment litigator, Mr. Levy, *see* Mullins, *Paul Levy, the Web Bully's Worst Enemy*, WASHINGTONIAN (Feb. 2014), accessible at http://www.washingtonian.com/articles/people/paul-levy-the-web-bullys-worst-enemy, and his colleagues. And although plaintiff counsel's questions at trial implied an intent to argue that it was duplicative for defendants to use Mr. Levy's services to litigate the sanctions issue, that argument has no bearing on the amount of sanctions because **no** attorney fees are sought for the time Mr. Levy has spent on the litigation.

In addition, defendants' counsel incurred $2,804 in expenses ($2,000 by Mr. Nye and $804 by Mr. Haren, Exhibit 41).

The following table summarizes the fees and expenses, totaling $35,209.39.

Summary of fee application	Fees sought from Med Express	Part for which Amodio is jointly and severally liable (before 11/7/13)	Not sought from any respondent (motion to enforce)	Total fees and hard expenses incurred
Total	**$35,209.39**		**$4,912.00**	**$40,121.39**
Haren fees	$17,248.39		$2,635.00	$19,883.39
Haren hard expenses	$804.00	**settled**		$804.00
Nye fees	$15,157.00		$2,277.00	$17,434.00
Nye hard expenses	$2,000.00			$2,000.00

CONCLUSION

The motion for an award of sanctions should be granted. The Court should award defendants

[8] After the hearing and during preparation of this brief, the attorneys determined that it would be appropriate to remove two additional time entries relating to the motion to enforce settlement from each of their time records from the application, thus reducing the application by $896 from what was requested at the hearing

$35,209.39 in attorney fees and expenses.

Respectfully submitted,

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July 1, 2015

CERTIFICATE OF SERVICE

I hereby certify pursuant to Civ.R. 5(B)(2)(f) that a copy of the foregoing was served on counsel for the plaintiff by email on this 1st day of July, 2015.

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Thomas Haren