

COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

COMMON PLEAS COURT
19 FEB 28 AM 9:56

FILED
DAVID B. WAUSWORTH
MEDINA COUNTY
CLERK OF COURTS

MED EXPRESS, INC.,)
)
Plaintiff,)

v.)

Case No. 13-CIV-0351

AMY NICHOLLS,)
)
Defendant.)

MED EXPRESS, INC.,)
)
Plaintiff,)

v.)

Case Nos. 13-CIV-0352

DENNIS ROGAN,)
)
Defendant.)

**POST-TRIAL MEMORANDUM
IN SUPPORT OF DEFENDANTS' MOTION FOR SANCTIONS**

Table of Authorities iii

Introduction and Summary of Argument 1

Facts and Proceedings to Date 2

 A. Facts 2

 B. Proceedings to Date 7

Argument 11

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. 11

 A. The Complaint and Motion for Emergency Relief Were Frivolous. 11

 1. The Lawsuit Was Legally and Factually Frivolous. 12

2. The Effort to Obtain Injunctive Relief Was Procedurally Frivolous. 16

B. Sanctions Should Also Be Awarded Because Plaintiff and/or Its Counsel Proceeded in Bad Faith and for Improper Purposes. 19

C. Sanctions Should Be Awarded to Protect the Public Interest in Access to Useful Information About the Performance of Sellers. 21

II. The Court Should Award Defendants \$19,303.46 in Attorney Fees and Expenses. 23

Conclusion. 26

TABLE OF AUTHORITIES

CASES

American Chemical Social v. Leadscope,
133 Ohio St. 3d 366, 978 N.E.2d 832 (Ohio 2012). 13

Aviation Charter v. Aviation Research Group/US,
416 F.3d 864 (8th Cir. 2005). 14

Beltz v. Merillat,
169 Ohio App.3d 71, 861 N.E.2d 902, 2006-Ohio-5105 (Ohio App. 6 Dist. 2006). 26

Bittner v. Tri-County Toyota,
58 Ohio St. 3d 143, 569 N.E.2d 464 (Ohio 1991). 25

Blum v. Stenson,
465 U.S. 886 (1984).. 25

Browne v. Avvo, Inc.,
525 F. Supp. 2d 1249 (W.D. Wash 2007). 14

Carroll v. President and Commissioners of Princess Anne,
393 U.S. 175 (1968).. 18

Castle Rock Remodeling v. Better Business Bureau of Greater St. Louis,
354 S.W.3d 234 (Mo. Ct. App. 2011). 14

Compuware Corp. v. Moody's Investors Services,
499 F.3d 520 (6th Cir. 2007). 14

Doe v. SexSearch.com,
502 F. Supp. 2d 719 (N.D. Ohio 2007),
aff'd, 551 F.3d 412 (6th Cir. 2008). 18

Dupler v. Mansfield Journal Co.,
64 Ohio St. 2d 116, 413 N.E.2d 1187 (Ohio 1980). 23

Franks v. Rankin,
2012 WL 1531031, 2012-Ohio-1920 (Ohio App. 10th Dist. 2012). 19

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974).. 13

<i>Gibney v. Toledo Board of Education,</i> 73 Ohio App. 3d 99, 596 N.E.2d 591 (Ohio App. 6 Dist. 1991).....	25
<i>Grau v. Kleinschmidt,</i> 31 Ohio St. 3d 84, 509 N.E.2d 399 (Ohio 1987).....	23
<i>Hadix v. Johnson,</i> 65 F.3d 532 (6th Cir.1995).....	25
<i>Isquick v. Dale Adams Enterprises,</i> 2002-Ohio-3988 (Ohio App. 9 Dist. 2002).....	13
<i>Jefferson County School District No. R-1 v. Moody's Investor's Services,</i> 175 F.3d 848 (10th Cir. 1999).....	14
<i>Lothschuetz v. Carpenter,</i> 898 F.2d 1200 (6th Cir. 1990).....	17
<i>Medical Express v. Independent Dental,</i> No. 11CIV0536.....	19
<i>Mikhael v. Gallup,</i> 2006 WL 2141177, 2006-Ohio-3917 (Ohio App. 9 Dist. 2006).....	25
<i>Moss v. Bush,</i> 105 Ohio St. 3d 458 (2005).....	22
<i>O'Brien v. University Community Tenants Union,</i> 42 Ohio St. 2d 242, 327 N.E.2d 753 (Ohio 1975).....	18
<i>Oakley v. Nolan,</i> 2007-Ohio-4794, 2007 WL 2702832 (Ohio App. 5 Dist. 2007).....	13
<i>Organization for a Better Austin v. Keefe,</i> 402 U.S. 415 (1971).....	17
<i>Philadelphia Newspapers v. Hepps,</i> 475 U.S. 767 (1986).....	13
<i>Pollock v. Rashid,</i> 117 Ohio App. 3d 361, 690 N.E.2d 903 (Ohio App. 1 Dist. 1996).....	13
<i>Riston v. Butler,</i> 149 Ohio App. 3d 390, 2002-Ohio-2308 (Ohio App. 1st Dist. 2002).....	12

<i>Seaton v. TripAdvisor LLC</i> , 728 F.3d 592 (6th Cir. 2013).....	18
<i>Stepien v. Franklin</i> , 39 Ohio App. 3d 47, 528 N.E.2d 1324 (Ohio App. 1988).....	23
<i>Turner v. Progressive Corp.</i> , 140 Ohio App. 3d 112, 746 N.E.2d 702 (Ohio App. 8 Dist. 2000).....	25
<i>Vail v. The Plain Dealer Publishing Co.</i> , 72 Ohio St. 3d 279, 649 N.E.2d 182 (1995).....	13
<i>W. Unity ex rel. Beltz v. Merillat</i> , 169 Ohio App. 3d 71, 861 N.E.2d 902, 2006-Ohio-5105 (Ohio App. 6 Dist. 2006) . . .	26
<i>Yood v. Daly</i> , 37 Ohio App. 574, 174 N.E. 779 (Ohio App. 1930).....	18

CONSTITUTION, STATUTES AND RULES

United States Constitution	
First Amendment.....	passim
47 U.S.C. § 230.....	18
R.C. 2323.51.....	2, 11, 12
R.C. 2323.51(A)(2)(a).....	11
R.C. 2323.51(A)(2)(a)(i).....	19
R.C. 2323.51(A)(2)(a)(ii).....	11
R.C. 2323.51(B)(1).....	11
Ohio Rules of Civil Procedure	
Rule 11.....	2, 11, 12, 19, 21
Rule 65.....	18

MISCELLANEOUS

Mullins, <i>Paul Levy, the Web Bully’s Worst Enemy</i> , WASHINGTONIAN (Feb. 2014), accessible at http://www.washingtonian.com/articles/people/paul-levy-the-web-bullys-worst-enemy	26
---	----

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 their own 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 the 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 by seeking a temporary restraining order and preliminary injunction, relief that is flatly forbidden by the First Amendment when sought as a remedy for defamation, and by making no effort to give notice, again contrary to long-established First Amendment precedent.

In bringing suit, Med Express took a calculated risk: that the cost and inconvenience of

having to defend themselves would lead to default judgments or, indeed, submission on the defendants' part. The president and lawyer have both admitted that the reason they had brought these legally frivolous proceedings was that any user comments that were less than fully flattering could cost the company tens of thousands of dollars in additional sales fees on eBay. Now that the plaintiffs have been caught filing frivolous defamation claims, the Court should impose sanctions, compensating the two public-spirited lawyers who stepped forward to defend litigants who simply told the truth, relating information on which other consumers could rely, and, at the same time, creating some real deterrence to misconduct by other, similarly situated companies and their lawyers. Moreover, the plaintiff company has a sorry history of filing this sort of proceeding against online customers who post less-than-fully-flattering comments about the seller. Rule 11 and R.C. 2323.51 are aimed at precisely this sort of abuse of the legal process, and 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 and its counsel.

FACTS AND PROCEEDINGS TO DATE

A. Facts

Defendants Amy Nicholls and Dennis Rogan bought equipment from plaintiff Med Express 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 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 Affidavit ¶ 2 and

Exhibit E.¹

eBay provides a mechanism for users 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 Affidavit ¶ 5 and Exhibit B. 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. *Id.* ¶ 6 and Exhibit C. Users commonly take that feedback into account in deciding with whom they wish to do business. *Id.* ¶ 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 should be placed. Nicholls Affidavit Exhibit B, 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

¹In Exhibit E, 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.

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.

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.” *Id.* ¶ 6 and Exhibit C. She considered this to be a criticism of Med Express, and accordingly chose the “negative” feedback category. *Id.* 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 C.² 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.” *Id.* Exhibit D. When Nicholls did not accede to this request, Med Express filed suit.

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 removed this item a few weeks back—it broke.” Rogan Affidavit ¶ 2 and Exhibit E. Rogan was inclined to be forgiving, but still believed that other potential customers should have

² Radey’s trial testimony 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.”)

the information that they could not always rely on Med Express's eBay listings to be an actual portrayal of available equipment, Rogan 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 F. On January 24, 2013, Med Express posted the following public response: "It was dropped and broke. Our fault and complete apologies." *Id.* Despite this admission of its own fault, and without any further communication with Rogan, Med Express sued him for defamation.

At trial, Radey testified he considered Nichols and Rogan to have provided false ratings on certain categories of the "detailed seller ratings" for their two transactions with him. The four categories, as described in Exhibit B, 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?" Radey testified to his understanding of what factors a buyer should consider in assessing sellers' performance on each of these metrics. Tr. 146-152. During his direct testimony, Radey swore that, while he was sitting at his computer, he actually saw Nicholls' and Rogan's direct seller ratings 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. Tr. 144-145. On cross-examination, however, he acknowledged that he does not see actual ratings from individual buyers because his dashboard only shows him the total number of ratings he received in each of the four categories; in attributing feedback ratings in specific categories, 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. Tr. 168.

Even as qualified on cross-examination, Radey's testimony about defendants' detailed seller ratings was inaccurate. First of all, 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. Those records reflect that Nicholls' ratings for the four categories were, in order, "as described" five stars, "communication" one star, "shipping time" five stars, "shipping charges" three stars. Nicholls Second Affidavit.³ Rogan gave feedback on only one of the four categories, "shipping charges," for which he gave five stars. Rogan Second Affidavit. Moreover, 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.

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, also represented by its counsel in these cases, James Amodio. Tr. 22, 23, 183 and Exhibit Q. 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. 21-23, 182-183 and Exhibits L, M, O, P, Q, R, S, T.

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

³ Unfortunately, a decision on defendants' pending motion to reopen the record was delayed by plaintiff's motion for an extension of time to respond until after this brief was due. Defendants hope to be able to submit the actual electronic records from eBay with their reply brief.

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 Affidavit ¶ 8; Rogan Affidavit ¶ 7. Nicholls contacted Mr. Levy for help. Nicholls Affidavit ¶ 10; Tr. 12-13. 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 Mr. Levy contacted Mr. Amodio to discuss the legal principles in the case, including various reasons why the First Amendment barred the claim against Nicholls. Tr. 13-14. Mr. Amodio acknowledged that the complaint admitted that the only fact that Nicholls about Med Express was true; nor did he dispute that the First Amendment bars libel claims over truthful statements. Still, he said, 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. 14 and Exhibit G. Mr. Amodio also explained that it was important to his client to eliminate the negative feedback because, true or not, the negative feedback could cost his client more in eBay fees. *Id.*

Jeffrey Nye and Thomas Haren, two Ohio attorneys, agreed to represent Nicholls and, later, Rogan. Tr. 19-20, 101. On April 17, at 4:54 PM, they emailed Mr. Amodio a courtesy copy of the answer and counterclaim that they had prepared on Nicholls' behalf and sent to the Court. Tr. 23-24; 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-thuggery-in-ohio/#comment-1022736>; Tr. 17-18 and Exhibit J; Response to 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-thugger-y-in-ohio/#comment-1024366>, posted April 17 at 5:51PM; Tr. 16-17 and Exhibit I.

Documents dismissing the suits against Rogan and Nicholls without prejudice were filed in this Court on the morning of April 18, about ninety minutes before the answer and counterclaim arrived at the Clerk’s office by Federal Express. Tr. 25.

Defendants’ counsel warned Mr. Amodio that they would seek sanctions unless plaintiff promptly took ameliorative measures. Tr. 29, 30, 184 and Exhibit X. Mr. Amodio responded that his client was unwilling to take any such measures and warned that, if sanctions were sought, Med Express would re-file its lawsuit, complaining not about the negative feedback but only about low Detailed Seller Ratings that, Mr. Amodio claimed, were false. Mr. Nye explained that such ratings were legally protected against libel claims because they are opinion, *id.*, and followed up with a letter citing cases so holding, and urging Med Express to be reasonable by

dismissing the case with prejudice and making a payment of attorney fees. *Id.* Other than telling Mr. Nye that he would forward the letter to his client, Mr. Amodio did not respond. Tr. 29.

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.” 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.). Rule 11, by contrast, requires a finding of subjective bad faith. That the complaint and TRO motion were frivolous is clear, warranting an award of fees under R.C. 2323.51, and there are sufficient indicia of subjective bad faith that the Court should consider imposing Rule 11 sanctions as well.

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 for several reasons.

1. The Lawsuit Was Legally and Factually Frivolous.

First, 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 so 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 App. 1 Dist. 1996), but as a matter of First Amendment imperative. *Philadelphia Newspapers 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”). Pursuit of a defamation claim in which the truth of the accused statements was “never denied” has specifically been found to merit sanctions under both Rule 11 and R.C. 2323.51. *Oakley v. Nolan*, 2007-Ohio-4794, ¶¶ 16-18, 2007 WL 2702832 (Ohio 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 “Under the First Amendment there is no such thing as a false idea.” *Gertz v.*

Robert Welch, Inc., 418 U.S. 323, 339-340 (1974). Ohio law 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 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 its fault, and that both suits were filed on the theory that, once it offered refunds, 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 Detailed Seller Ratings section," the complaint also ran afoul of the legal protection for expressions of opinion. On the eBay web site, customers are allowed 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).

At 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, although 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 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 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. In effect, 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.”⁴ 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.

Moreover, evidence at trial and developed immediately afterward showed that Radey gave false testimony about the ratings from defendants, which he claimed to have been able to infer by noting the numbers of one-star ratings that he had immediately after each of the defendants entered feedback for their transactions with him. Tr. 168. 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. Moreover, inspection of eBay’s own web site explanations of the operation of the detailed seller rating system shows 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

⁴ 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.

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, he 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.⁵

Finally, even if there were some merit to Med Express’s apparent contention that the detailed seller ratings 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 the Nicholls’ textual complaint about having received her package postage due. Each of these claims was a completely frivolous basis for suing for defamation, and neither plaintiff nor Mr. Amodio argues 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

⁵Another aspect of the record casts doubt on the veracity of Radey’s trial claim that Nicholls entered one-star ratings for the transaction. The record contains Radey’s messages to Nicholls asking her to change her negative feedback, but the **only** respect in which Radey asked for a change in feedback was his assertion that his offer to pay the postage due should lead Nicholls to forgive his errors. Exhibits C, D. He never asked Nicholls to change her ratings of the accuracy of the item description, the adequacy of the shipping time, and the reasonableness of the shipping charges.

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 App. 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 and 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, none 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 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), such injury could be redressed by a monetary award.

In their written opposition to defendants’ motion for sanctions, plaintiff and his counsel argued that they were entitled to believe that they 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 *International 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 P, S. 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 and/or Its Counsel Proceeded in Bad Faith and for Improper Purposes.

Sanctions should also be imposed under Rule 11 and subpart (i) of R.C. 2323.51(A)(2)(a) because of evidence that plaintiff and its counsel proceeded with this action in subjective bad faith and for the improper purpose of compelling defendants to remove speech simply because the truth hurt them, even though they 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 trial testimony, 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.

If plaintiff's counsel filed a complaint seeking relief the client did not want, that would also raise significant issues. Mr. Amodio did deny Radey's contentions about what he told Mr. Amodio to do. Radey's testimony that he has no legal education, Tr. 123, also apparently a predicate of an argument that Mr. Amodio, and not Med Express, should be held responsible for the legally frivolous aspects of the complaint and TRO motion in this case. It appears, however, that the impropriety in this case involved both frivolous legal theories and false factual bases for the litigation. Consequently, the Court should impose joint and several sanctions liability.

Moreover, there is significant evidence of improper purpose on part of both Radey and Mr. Amodio. Both of them 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 they 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 because 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. 14, 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. 14; Exhibit G.

This strategy came close to succeeding, because Nicholls lives too far 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 Rule 11 sanctions is needed to deter such misconduct.

Rule 11's deterrence objectives, see *Moss v. Bush*, 105 Ohio St.3d 458, 2005-Ohio-2419 (2005) (opinion of Chief Justice) counsel strongly in favor of sanctions because these two lawsuits are not an isolated phenomenon. Med Express filed yet another case like this one, at the same time that it sued Nicholls and Rogan: it sued 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. 20-23; Exhibits L, M, O, P, Q, R, S, T. Only by imposing sanctions on both attorney and client can the Court send the appropriate deterrent message.

C. 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 App. 1988), quoting *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 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 Affidavit, Exhibit B (“how feedback works” page). Similarly, the eBay page explaining its Detailed Seller Ratings 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). 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. Litigation that forces eBay customers to choose between removing honest accounts of their dealings with sellers and finding lawyers to defend themselves against staying free of 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, Tr. 78-79, and that protecting that forum against abusive litigation is important because so many people rely on them. Tr. 78-80. “In this case, it seemed particularly egregious to me because it seemed from the complaint that they acknowledged that there was no false statement of fact. And in that case, it seemed very frivolous and abusive to me.”

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 insisted on their day in court, and the lawsuit proved 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 their attorney fees.

* * *

After his counsel received the counterclaim in this case, 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.” Tr. 16-17 and Exhibit I. The way to right that wrong is to impose sanctions.

II. The Court Should Award Defendants \$19,303.46 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 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 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 App. 6 Dist. 1991).⁶

Here, Messrs Nye and Haren seek to be awarded fees at their normal hourly billing rates — \$230 and \$175, respectively. Tr. 33, 100. As the Court of Appeals 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 at Brouse McDowell, averred that both the hourly rates for defendants’ counsel are entirely reasonable, being well within the normal range of fees billed for this sort of work in the area. Tr. 77-78.

Counsel’s time records reflect they spent 42.3 and 52 hours, respectively, litigating this case. Tr. 33; Exhibits GG, HH. 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 that day before the Nicholls was represented by Ohio counsel, Tr. 101, he deliberately transmitted the notice of dismissal by regular mail to

⁶Thus, 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.

Nicholls herself in South Carolina. Tr. 54, 101-102; Nicholls Affidavit ¶ 23. The time also includes time spent through mid-January on this motion for an award of sanctions, which is also compensable time. *W. Unity ex rel. Beltz v. Merillat*, 169 Ohio App.3d 71, 78, 861 N.E.2d 902, 2006-Ohio-5105 ¶¶ 37-38 (Ohio App. 6 Dist. 2006). Both attorneys explained that they had avoided duplication of effort where possible, and although Med Express’s counsel cross-examined on this point, he 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. 76-77, and rejected the effort of plaintiff’s counsel to argue that some of the time entries were unreasonable because they reflected improper duplication of effort. Tr. 82-84.

Moreover, 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. No fees are sought for Washington counsel’s time.

Attorney	Hours spent	Hourly Rate	Fees
Nye	42.3	230	\$ 9,729
Haren	51	175	8,925
Totals	93.3		\$18,654


In addition, defendants’ counsel incurred \$649.46 in expenses (\$220.57 by Mr. Nye, Exhibit GG, \$58.30 by Mr. Haren, Exhibit HH, and \$370.59 for Mr. Levy’s travel expenses and pro hac vice fees, Exhibit FF).

In summary, the reasonable attorney fees and expenses are \$19,303.46.

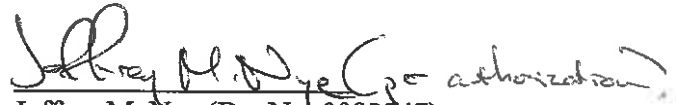
CONCLUSION

The motion for an award of sanctions should be granted. The Court should award defendants \$19,303.46 in attorney fees and expenses, imposed jointly and severally on Med Express and its counsel.


Respectfully submitted,


Paul Alan Levy (pro hac vice)
Scott Michelman

Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org


Jeffrey M. Nye (Bar No. 0082247)

STAGNARO, SABA &
PATTERSON CO., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208
(513) 533-6714
(513) 533-6711 (fax)
jnye@ssp-firm.com


Thomas Haren (Bar No. 0088238)

SEELEY, SAVIDGE, EBERT &
GOURASH CO., L.P.A.
26600 Detroit Road, Suite 300
Westlake, Ohio 44145
(216) 566-8200
(216) 566-0213 (fax)
THaren@sseg-law.com

February 28, 2014

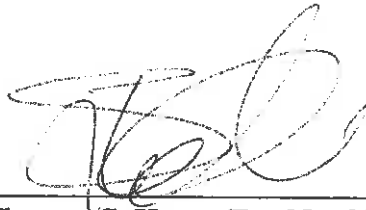
Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), I certify that a copy of the foregoing was sent via email to the following on this 28th day of February, 2014:

Mr. James Amodio
109 W. Liberty St.
Medina, Ohio 44256

Mr. Bruce Hall
229 W. Liberty St.
Medina, OH 44256



Thomas G. Haren (Bar No. 0088238)

COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

MED EXPRESS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 AMY NICHOLLS, *et al.*,)
)
 Defendants.)

Case Nos. 13-CIV-0351
and 13-CIV-0352

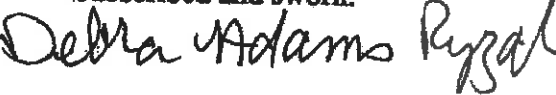
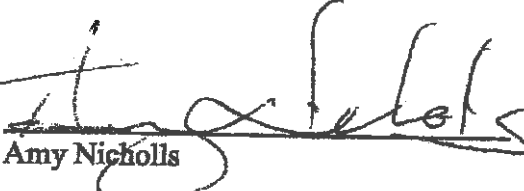
AFFIDAVIT OF AMY NICHOLLS

1. My name is Amy Nicholls. I am a defendant in this case. This affidavit is made on personal knowledge in support of my motion for sanctions.

2. I understand that Richard Radey testified at the sanctions hearing in this case that I entered detailed seller ratings ("DSR") for my transaction with Med Express of one star in each of four categories. This claim seemed wrong to me, but I was unable to view individual DSR entries through my own eBay account.

3. On January 24, 2014, I contacted eBay customer service, and spoke to "Joe," Employee Reference # 1-20566558353, who was able to look up individual DSR entries associated with my account. According to Joe, eBay's records show the following to have been my entries for Med Express:

- Item Description: 5 Stars
- Communication: 1 Star
- Shipping Time: 5 Stars
- Shipping/Handling Charges 3 Stars

Subscribed and sworn:
)
)
 Amy Nicholls

My Commission Expires
September 1, 2016



COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

MED EXPRESS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 AMY NICHOLLS and DENNIS ROGAN)
)
 Defendants.)

Case Nos. 13-CIV-0351
and 13-CIV-0352

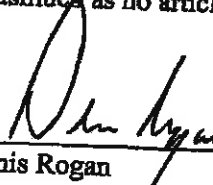
AFFIDAVIT OF DENNIS ROGAN


1. My name is Dennis Rogan. I am a defendant in this case. This affidavit is made on personal knowledge in support of my motion for sanctions.

2. I understand that Richard Radey testified at the sanctions hearing in this case that I entered detailed seller ratings ("DSR") for my transaction with Med Express of one star in each of four categories. This claim seemed wrong to me, but I was unable to view individual DSR entries through my own eBay account.

3. On January 26, 2014, I contacted eBay customer service, and spoke to an individual who was able to look up individual DSR entries associated with my account. According to this individual, eBay's records show that I gave Med Express five stars with respect to shipping and gave no rating on the other specifics. I am not sure to which "shipping" category he was referring, but I assume that it would have been the shipping and handling charges (which I must have thought were entirely reasonable), rather than shipping time inasmuch as no article was actually shipped.

Subscribed and sworn:


Dennis Rogan

 JAN 28, 2014

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
JOHN MINETOLA, NOTARY PUBLIC
WYOMING BORO., LUZERNE COUNTY
MY COMMISSION EXPIRES AUG 26, 2017

ALL-STATE LEGAL
B