IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

MED EXPRESS, INC.,	:	
	:	
Plaintiff,	:	Case Nos. 13CIV0351
	:	and 13CIV0352
v.	:	
	:	Judge Collier
AMY NICHOLLS	:	
	:	
Defendant	:	
	:	
MED EXPRESS, INC.,	:	**REPLY MEMORANDUM IN**
	:	**SUPPORT OF DEFENDANTS'**
v.	:	**MOTIONS FOR SANCTIONS AND**
	:	**TO REOPEN RECORD, AND**
DENNIS ROGAN,	:	**MEMORANDUM IN OPPOSITION**
	:	**TO MOTION TO STRIKE**
Defendant	:	

The motion for sanctions should be granted. Respondents Med Express and its counsel, James Amodio, do not respond in any meaningful way to either the facts in the record or the law set forth in Amy Nicholls' and Dennis Rogan's opening brief. Rather than make a bona fide effort to explain what basis they had in law or fact for filing their frivolous complaints and motions—or why the record should not be re-opened to confirm that Richard Radey testified falsely before this Court—Med Express and Mr. Amodio instead try to nitpick some of the record citations, rely on a default judgment in a prior (potentially frivolous) case as exculpatory authority, and otherwise dodge responsibility for their conduct.

As explained in defendants' opening brief, the lawsuits against defendants were legally and factually frivolous in that they were sued for libel over three separate aspects of the "feedback" they left on eBay following their purchase transactions with plaintiffs Med Express:

1. Nicholls was sued for making factual statements (about postage due) that plaintiff

admitted were entirely true.

2. Both defendants were sued for expressing the constitutionally protected opinion that plaintiff's conduct of the sale was either "negative" or "neutral."

3. Both defendants were sued for "ratings" they left about plaintiff under the "detailed seller rating" ("DSR") rubric which were constitutionally protected opinion and, if factual, were in any event true (because plaintiff's CEO, Richard Radey, gave false testimony about the DSRs that defendants left).

Plaintiff also pursued a legally frivolous claim for a temporary restraining order and preliminary injunction, and followed patently illegal procedures in seeking that emergency relief. Finally, the opening memorandum showed that the extrajudicial statements of both plaintiff's principal and its counsel, respondent Amodio, not to speak of Radey's testimony at trial, showed good reason to question whether they had pursued this action in bad faith, for improper purposes, and in disregard of the obligation of candor to the tribunal.

Respondents Med Express and James Amodio have filed separate memoranda of law opposing sanctions; plaintiff has also objected to expanding the record to include eBay's records proving that Radey gave false testimony about the contents of defendants' DSR's.[1] The most glaring flaw in respondents' briefs is what they do **not** argue: that they had any justification for suing defendants over their feedback (other than the DSR's), or that there was any cognizable authority for their efforts to obtain preliminary relief. Instead, they pick here and there at defendants' record citations, they claim that two unreported trial court decisions entitled them to ignore the wealth of binding appellate rulings that made their lawsuit frivolous, and they claim that there is no precedent in Ohio forbidding their suit over the DSR's on the facts here. They also argue that defendants

[1]Defendants agree with Mr. Amodio that he was entitled to rely on whatever his client may have told him about the DSR's when he drafted the complaint. However, there was no testimony about what information Radey gave him.

cannot be awarded fees because they are not obligated to pay their own counsel, an argument unwarranted under Ohio law. But as we show in this reply brief, none of these arguments is sound. Sanctions should therefore be imposed, jointly and severally.

I. The Factual Assertions in Defendants' Opening Brief Are Supported by the Record.

A. Amodio Memorandum

On page 2 of his memorandum, Mr. Amodio identifies several factual assertions in our opening brief that he claims are unsupported. Thus, he asserts that there is no support in the record for the proposition that he and Med Express admitted that the only fact stated by Nicholls about Med Express was true. Amodio Mem. 2. However, Mr. Levy testified, confirming the statements in his April 13, 2013 letter to Mr. Amodio, that these admissions were made orally shortly after the complaint was filed. Tr. 14 (confirming the account of a conversation between counsel as set forth in Exhibit G, page 1, final paragraph). No record evidence contradicts this testimony.

Similarly, Mr. Amodio claims that there is no support for the proposition that Mr. Amodio had explained that his client needed to eliminate the negative feedback because negative feedback could cost his client more in eBay fees. Again, this fact was memorialized in Mr. Levy's letter to Mr. Amodio, Exhibit G , as well as in Radey's own statement to another eBay user, wes33, in the record as Exhibit J and authenticated both at pages 17-18 of the trial transcript and in response to paragraph 93 of the requests for admissions.

Mr. Amodio questions the record support for various conversations with Mr. Nye (discussed in the paragraph spanning pages 10 and 11 of the defendants' post-trial memorandum). However, those facts are supported by the letter in the record as Exhibit X, recounting Jeffrey Nye's conversation with Mr. Amodio, whose veracity is confirmed for the record by Mr. Nye's testimony

at page 30 of the transcript.

Generally, Mr. Amodio had every opportunity to contest the accuracy of the accounts of the conversations he had with opposing counsel. He was present at the trial, and could have testified—defendants' counsel were ready for the cross-examination. He chose not to testify, and submitted denials in his brief, and his conclusory assertions of what he thought, Amodio Mem at 9-10, are not an acceptable substitute.

B. The Med Express Memorandum

Med Express' memorandum, for its part, takes issue with the undeniable facts in defendants' opening brief that the suits against Rogan and Nicholls were not Med Express' only effort to sue over honest feedback. Med Express Mem., page 3 ¶ 6. It also challenges defendants' characterization of the evidence as showing that Med Express "has a sorry history of filing this sort of proceeding against online customers. " *Id,* 3-4 ¶ 13. These challenges are baseless. Defendants put several prior lawsuits by Med Express into evidence. To be sure, during the trial, Radey tried to minimize this evidence in his trial testimony, pages 127-128, and again in its brief, ¶ 6, by saying that it has only sued a "small percentage" of its many customers. But that argument is undercut by Radey's assertion on cross-examination that barely ten percent of his customers leave feedback, and most of them say that he was wonderful seller. Tr. 168. It thus appears that Med Express may have sued a significant fraction of its critics.

II. Med Express' Suit Over Defendants' Feedback Was Frivolous

The bulk of the argument against sanctions is devoted to the proposition that Med Express had a non-frivolous defamation claim about defendants' DSR entries. However, the complaints were not just directed to negative DSR's— its complaint against Nicholls alleged that Nicholls

posted "negative feedback and comments **and** low dealer ratings", ¶ 8, that resulted in "an unfavorable feedback profile." ¶ 7. The complaint against Rogan said that he defamed Med Express by posting "neutral feedback and negative comments" as well as low DSR's. But neither respondent makes any attempt to argue that they had a legally or factually tenable basis for filing suit over the neutral/negative feedback or the comments. In that respect, at least, they implicitly admit that the claims were frivolous.

Nor do respondents mount a legally sufficient basis for suing over the DSR's. First, and most important, eBay's business records establish that Radey gave false testimony when he swore that he saw "1" entries appear in his DSR's from both Nicholls and Rogan. Respondents address this problem in two ways. First, they ask the Court to refuse to reopen the record to accept eBay's business records. But Radey's attempt to offer false testimony is an affront to the Court. Defendants urge the Court to allow the record to include evidence of that falsity. Respondents' second argument is that it really doesn't matter what DSR's defendants actually gave Radey's company, because its evidence shows that Radey **believed** that low ratings had been given in each category. Opposition to Motion to Reopen, at page 3. [2]

Frivolousness, however, is tested objectively (the bad faith aspect of a sanctions motion is separate). By now recharacterizing Radey's testimony as indicating only that he believed, albeit erroneously, that defendants left low ratings for his company, respondents necessarily admit there

[2] The Court should be wary of what Radey claims to have believed. In addition to the false testimony which is the subject of the motion to re-open the record, Radey has already admitted to making false statements. On pages 164 to 165 of the trial transcript he admitted that his affidavits in support of the motions for TRO or verifications of the complaints were false. And on page 164 he also admitted that statements he made on the Popehat and Public Citizen blogs were false. Simply put, even if what Radey believed were relevant—and it is not—this Court should discount what he claims to have believed.

is no evidence in the record that there was a factual basis for the allegations in the complaints about low DSR's. The motion for sanctions should be granted for that reason alone.

Respondents' other argument about the DSR's is that they are statements of fact, not constitutionally protected opinions about the relative quality of Med Express's performance. But defendants' opening brief (at 13-14) cited several cases showing that similar rating systems are opinions; and respondents only response is that none of these cases dealt specifically with DSR's. Respondents argue that the above cases are factually distinguishable, yet they make no meaningful attempt to distinguish them. Instead, respondents rely on Radey's self-serving trial testimony about what each category of the eBay DSR system means to him. Med Express then argues that the Court has only Radey's testimony to show what the DSR's mean. Med Express Mem., p. 4, 17. But the actual language of the DSR's, combined with documentation from eBay's own web site, establish that the categories are not so clear about what they mean. Defendants' Opening Mem. 5-6, 14-15. Thus, the great wealth of case law on point here establishes that, as a matter of law, scaled ratings are inherently matters of opinion and receive constitutional protection. Even though the cases cited in our opening brief do not involve eBay DSRs, it is not necessary to have cases that are **factually** on all fours for Med Express' claims to reach the conclusion that complaints in this case were so clearly lacking in any legally supportable basis to warrant an award of sanctions.

III. Med Express TRO and Preliminary Injunction Motion Was Frivolous

Both respondents rely on the course of proceedings in Med Express' suit against Independent Dental to support the proposition that they had a tenable basis for seeking preliminary relief against the posting of defendants' feedback on eBay; respondent Amodio also claims that he relied on the outcome of Med Express's lawsuit against Aeronentregas based on documents that he claims are in

the record. These arguments cannot protect respondents against sanctions.

First, neither *Independent Dental* nor *Aeroentregas* was anything more than an uncontested default ruling from another trial court, and as a result it is not binding authority upon which Med Express and Amodio were entitled to rely as the basis for their complaints against Nicholls and Rogan, especially in light of appellate and Supreme Court authority to the contrary. "Intra-court comity" isn't applicable here; that is an informal practice in which judges of the same court defer to other, earlier, substantive decisions from that court. But that practice only applies if (1) the earlier rulings were both substantive and substantively correct, and (2) there is no appellate authority to the contrary. There is no basis whatsoever for this Court to defer to an uncontested default ruling, especially if that uncontested ruling is wrong as a matter of substantive law, as *Independent Dental* and *Aeroenttregas* certainly were to the extent that they allowed a **preliminary** injunction against alleged defamation. *See*, *e.g,.*, *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987) (trial courts "must not treat decisions by other district judges, in this and a fortiori in other circuits, as controlling, unless of course the doctrine of res judicata or of collateral estoppel applies. Such decisions will normally be entitled to no more weight than their intrinsic persuasiveness merits. . . . [T]he responsibility for maintaining the law's uniformity is a responsibility of appellate rather than trial judges," and trial courts must follow applicable appellate precedent). Unreported trial court decisions that have been obtained ex parte, based on briefs that withheld adverse controlling authority from the tribunal, have no persuasive weight whatsoever, and the fact that a different lawyer for Med Express managed to get away with obtaining preliminary relief once, in litigation before a different judge in Medina County, provided Mr. Amodio and Med Express with no license to ignore that authority in a later case. *See also United States v. Anaya*, 509 F. Supp. 289, 293 n.2

(S.D. Fla 1980), *aff'd on other grounds*, 685 F.2d 1272 (11th Cir. 1982) (noting that not only are trial court decisions not binding on other judges on the same court, but even that decisions of three-judge panels are not binding on other judges of the same court).

Second, with respect to *Independent Dental*, our opening brief argued (Br. 19) that the case was distinguishable because the lawsuit there was over a false statement of fact—whether Med Express had refused to pay a refund. Respondents argue that the case is not distinguishable because, in these cases, Med Express also alleged a false statement of fact. However, in this case the complaint admits that Nicholls' only factual statement (that she had to pay postage due) was true; and respondents have offered no argument that the selection of the "negative" or "neutral" feedback categories was anything other than opinion. Moreover, there was no allegation about DSR's in the *Independent Dental* complaint. So nothing about the litigation of that case provides any support for the proposition that the court decision there gave either respondent reason to think they could prevail here.

Third, contrary to Mr. Amodio's assertion, defendants did not offer any documents in *Aeroentregas*, other than the complaint, for the record here. The only reason why defendants looked for the actual court rulings in *Independent Dental*, and submitted them for the record, was that Mr. Amodio relied on the rulings there in his memorandum in opposition to sanctions filed last year. Had Mr. Amodio indicated any intent to rely on *Aeroentregas* as well, counsel would certainly have put them in the record.[3] In any event, based on the complaint itself, which is in the record, and on

[3] In an effort to respond to Mr. Amodio's arguments, we tried to download additional documents in *Aeroentregas* from the Court's electronic docket, to check the accuracy of the citation, but were unable to do so because of a problem with the functionality of the docket. Defendants are open to the concept of reopening the record so that the Court can consider the documents that Mr. Amodio claims can be found in the docket, so long as defendants have an opportunity to file a brief

Mr. Amodio's quotation from the documents that he has apparently seen, but that are not in the record, it appears that *Aeroentregas* is distinguishable from this case for the same reasons as *Independent Dental.* The issue in that case was the buyer's false statement of a **fact:** whether all parts were delivered. That is not comparable to the opinions at issue in this case. There was no claim in that case about DSR's. And Mr. Amodio's recitation of the TRO in that case suggests that it was issued against Aeroentregas itself. It provides no basis for Med Express having sought a TRO against eBay: respondents have not responded to the argument in our opening brief that this claim was frivolous in light of a federal statute, 47 U.S.C. § 230, and established federal case law.[4] Nor is there any showing that the TRO's were sought ex parte in *Aeroentregas*, and without a showing of why the defendants there could not be notified.

Finally, even to the extent that there were something about the TRO's sought or obtained in those cases that provided any support for seeking such relief (such as the granting of TRO's in a defamation case at all), these unreported trial-court level decisions, obtained without opposition, provided respondents with no justification for continuing with their efforts after counsel had explained why the First Amendment forbade such relief in **this** case. Mr. Amodio's response

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addressing the documents after they are furnished.

[4]Mr. Amodio argues that because the TRO was sought only against eBay, it was no concern of defendants. Our opening brief explained (at 17) defendants' interest in the TRO and preliminary injunction: it was their speech that was to be enjoined, while eBay was only a stakeholder with not interest of its own in the dispute between buyer and seller. Mr. Amodio does not respond to that point. During his testimony, Radey testified that he knows little about the law, but when counsel tried to cross-examine him on that point by asking whether Mr. Amodio talked to him about section 230, he asserted his attorney-client privilege. Radey had every right to assert that privilege, but the Court is also free to draw an adverse inference about his supposed ignorance of the legal limitations on his claims from his assertion of the privilege. *See Baxter v. Palmigiano*, 425 U.S. 308, 317-320 (1976) (Fifth Amendment not violated by drawing adverse inference from assertion of privilege in a civil proceeding).

showed that he cared not a whit about the law—he told Mr. Levy that he could argue anything he wanted, but would have to come to Medina to do it. By taking this position, he forced defendants to retain counsel, and those counsel had to spend time preparing to oppose the complaint and the motion for a preliminary injunction. Sanctions should be awarded for imposing that work on defendants' counsel even after Mr. Amodio had been told about the contrary law.

IV. Counsel's Pro Bono Status Does Not Defeat the Motion for an Award of Attorney Fees

Finally, Mr. Amodio argues that no attorney fees can be awarded because the defendants were represented pro bono, counsel having promised that defendants would not owe any fees if none were awarded against plaintiff and its counsel. But *Lakeview Holding,* the case he cites for that proposition, does not support his argument. Fees were denied in *Lakeview Holding v. Haddad*, 2013 Ohio 1796, 2013 WL 1859034 (8th Dist. 2013), because the party seeking fees was defending pro se, and courts routinely deny fee awards in that circumstance. Indeed, one of the decisions cited in our opening brief expressly distinguished cases in which fees are denied because the party was pro se. *Mikhael v. Gallup*, 2006 WL 2141177, 2006-Ohio-3917, ¶¶ 15-17 (Ohio App. 9 Dist.).

In their opening brief (at 24), defendants cited two Ohio appellate decisions and one United States Supreme Court case holding that a party can be awarded fees, and indeed at normal market rates, when the party is represented pro bono, such as by a legal services organization which, like Messr's Haren and Nye, does not charge the client a fee. Mr. Amodio does not respond to this authority; his argument against sanctions on this ground is contrary to law.[5]

[5]Med Express's opposition brief (at 2-3 ¶ 6) asserts that Exhibit HH shows that Mr. Haren did not bill any time before April 18; it implicitly asserts that only time spent through April 18 was devoted to the merits of the litigation, and that the rest of the fees are for time spent on the issue of sanctions, because April 18 was when the actions were dismissed against each defendant. In fact, there are **two** separate billing statements in Exhibit HH, and the statement dated May 17 shows

CONCLUSION

The Court should impose sanctions on plaintiff and its counsel, jointly and severally, and award attorney fees in the amount of $19,303.46, as proved at trial, plus such further amounts that will be justified by time sheets presented at the hearing next week. The Court should reopen the record to accept the eBay business records submitted with defendants' opening brief, and should not strike them.

Respectfully submitted,

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several hours billed before April 18. Time expended by Mr. Haren is also reflected in Exhibit K, which is ignored by Med Express. Moreover, both attorneys testified that they continued to work on the merits after April 18 because, even though Mr. Amodio knew as of April 17 that Mess'rs Haren and Nye were representing defendants, he served the dismissal notices only on the defendants, and counsel did not learn for several days that the case had been dismissed. Tr. 54, 60, 107. This point was addressed in defendants' opening brief, at 24-25, with no answer by either respondent. The assertion (Br. 2-3 ¶ 6) that $13,797.37 of the $18,558.37 in fees sought relates solely to the sanctions issue, is therefore incorrect.

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March 21, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via email on Bruce Hall and James Amodio on March 21, 2014, in accordance with Civ.R. 5(B)(2)(f).

Jeffrey M. Nye