

IN THE COURT OF COMMON PLEAS  
MEDINA COUNTY, OHIO

COMMON PLEAS COURT  
13 MAY 20 PM 3:07

MED EXPRESS, INC.,

Plaintiff,

v.

AMY NICHOLLS, et al.,

Defendants.

CASE NO. 13CIV00351

FILED  
DAVID B. WADSWORTH  
MEDINA COUNTY  
CLERK OF COURTS

JUDGE COLLIER

MOTION FOR AWARD OF  
SANCTIONS

Now comes Defendant Amy Nicholls, by and through undersigned counsel, and moves for sanctions pursuant to R.C. 2323.51 and Civ. R. 11 against Plaintiff Med Express Inc. and its counsel James Amodio.

A Memorandum in Support is attached and incorporated herein. Affidavits in support of this Motion have been filed contemporaneously under separate cover.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

Pursuant to Ohio Civil Rules 5(B)(2)(c) and 5(B)(2)(f), a true and accurate copy of the foregoing Motion for Award of Sanctions and the attached Memorandum in Support of Motion for Award of Sanctions was served upon the following via ordinary U.S. mail or electronic mail this 20<sup>th</sup> day of May, 2013.

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\_\_\_\_\_  
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COURT OF COMMON PLEAS  
MEDINA COUNTY, OHIO

MED EXPRESS, INC., )  
 )  
 Plaintiff, )  
 )  
 v. ) Case Nos. 13-CIV-0351  
 ) and 13-CIV-0352  
 AMY NICHOLLS, *et al.*, )  
 )  
 Defendants. )

**MEMORANDUM IN SUPPORT OF  
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In these cases, a local company sued for libel two former customers who had purchased goods from the plaintiff through eBay, and who then posted comments about the company that were mildly unflattering; the customers also expressed the opinion that they did not have a satisfactory experience with the seller. The customers' factual assertions were true; indeed, the plaintiff's 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. And, after their conduct was challenged, the plaintiff's president claimed publicly that his attorney had violated instructions in the claims brought and relief sought, contradicting the CEO's own sworn affidavit and verification; plaintiff's counsel stated that despite the adverse precedent, plaintiff would insist on proceeding to a preliminary injunction hearing unless the comments were taken off eBay or changed to being completely positive. 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.

Rule 11 and R.C. 2323.51 are aimed at precisely this sort of abuse of the legal process, and the plaintiff company has a sorry history of filing this sort of proceeding against online customers who post even mildly negative comments about the seller. Although plaintiff dismissed its complaint after it received a counterclaim, jurisdiction to impose sanctions survives dismissal, and reasons of both deterrence and compensation call for sanctions on the plaintiff, on counsel, or both.



## 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 in several respects. Nicholls Affidavit ¶ 2. Rogan's order never arrived 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' eBay "store" listings. Rogan Affidavit ¶ 2 and Exhibit E.

eBay provides a mechanism for users to communicate with each other about transactions, both to ask and answer questions in advance of possible transactions, and also to communicate 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 after placing orders and after

direct communications with the company that gave each additional reasons for dissatisfaction. On February 19, 2013, Nicholls told Med Express in a private message that her order had arrived with postage due. She explained that she would have had no problem paying an extra \$1.40 for the shipping of her order but 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’ 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 posted buyer feedback on February 26, 2013, 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. On March 15, Med Express sent Nicholls another private message on EBay, 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 know that they could not always rely on Med Express’s eBay listings as an actual portrayal of available equipment, Rogan Affidavit ¶ 6. Therefore, 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.

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. Nye Affidavit Exhibit Q. Inspection of the Court’s electronic docket reveals several similar lawsuits filed over the past few years, using very similar complaints and TRO papers, although a different lawyer represented Med Express on previous occasions. Nye Affidavit, ¶¶12, Exhibits M to P. The complaints and TRO papers in the other cases exhibit the same serious flaws as are discussed in greater detail with respect to this case. Nye Affidavit ¶¶ 12(a) to 12(g).

#### **B. Proceedings to Date.**

On March 25, 2013, Med Express filed complaints against both Nicholls and Rogan, and moved 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' 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. In attesting the affidavits, Radey did not qualify them as being based on information or belief. 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 "negative feedback and comments") and with giving Med Express "low dealer ratings in Ebay's Detailed Seller Ratings" sections, Complaints ¶ 7, and that "in so doing, [defendant] "has falsely and deliberately slandered the good name and reputation of Med Express." 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, plaintiff admitted that Nicholls' statement was true). Complaint ¶¶ 6 and 7; Affidavit ¶ 2. In the suit against Rogan, the complaint and the affidavit supporting the TRO motion contained different factual accounts. 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, and that Med Express 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, contrary to the PayPal feedback, asserting that 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 no irreparable injury. The Court set each case for a preliminary injunction hearing on May 2 and ordered Med Express to provide notice to each defendant. It was only at that point that Rogan and Nicholls learned that Med Express had sued them. Nicholls Affidavit ¶ 8; Rogan Affidavit ¶ 7. Nicholls contacted attorney Paul Alan Levy for help. Nicholls Affidavit ¶ 10; Levy Affidavit ¶ 2. Mr. Levy contacted counsel for Med Express, James Amodio, to discuss the legal principles in the case, including various reasons why the First Amendment barred the claim against Nicholls. Levy Affidavit ¶ 3. Mr. Amodio acknowledged that the complaint admitted that the only fact that Nicholls had stated about Med Express was true, and he did not dispute that the First Amendment bars libel claims over truthful statements. He said, however, that Mr. Levy could come to Medina County to argue what he wanted, and that the complaint would be pursued unless the negative feedback were taken down or turned into positive feedback. *Id.* ¶ 3. Mr. Amodio also explained that it was important to his client to eliminate the negative feedback because, true or not, such feedback could cost his client more in eBay fees. *Id.*

Mr. Levy then helped Nicholls find Ohio counsel. *Id.* ¶¶ 4-5 and Exhibits H, I. Jeffrey Nye and Thomas Haren, Ohio attorneys who had previously teamed up to defend a blogger in Steubenville, Ohio against a libel suit, answered this call for assistance and agreed to represent Nicholls and, later, Rogan. Haren Affidavit ¶ 8; Nye Affidavit ¶ 10. 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 transmitted to the Court. Nye Affidavit ¶ 13 and Exhibit V.

Meanwhile, in response to several blog posts and stories in the mainstream media about the case, Med Express President Radey stoutly defended his company's litigation 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 she was offered an apology and a refund:

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>; Levy Affidavit ¶ 6 and Exhibit J.

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, claimed that he had only learned of the wording from reading about it on blogs, 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; Levy Affidavit ¶ 7 and Exhibit I; Nye Affidavit ¶ 14 and Exhibit W.

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. Nye Affidavit ¶ 16.

Defendants’ counsel, however, warned Mr. Amodio that they were planning to move for an award of sanctions unless plaintiff promptly dismissed with prejudice and paid monetary sanctions. Nye Affidavit ¶ 23. Mr. Amodio responded that his client was not willing to take any such measures and warned that, if sanctions were sought, Med Express would re-file its lawsuit, claiming not over the negative feedback but only over the low Detailed Seller Ratings (one to five stars) which, Mr.

Amodio claimed, were false. Mr. Nye explained that such ratings were legally protected against libel claims because they are opinion, *id.* ¶ 24, and followed up with a letter citing several cases so holding, and urging Med Express to be reasonable by dismissing the case with prejudice and making a payment of attorney fees. *Id.* ¶ 25 and Exhibit X. Other than telling Mr. Nye that he would forward the letter to his client, Mr. Amodio has not responded to the request.

## **ARGUMENT**

### **I. The Court Should Award Attorney Fees for the Filing of a Frivolous Complaint and Frivolous Motion for Preliminary Relief.**

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:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(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.

(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

“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 (Ohio App. 1 Dist. 2002). 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 sufficient indicia of subjective bad faith support imposing Rule 11 sanctions as well.<sup>1</sup>

**A. The Complaint and Motion for Emergency Relief Were Legally 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.

First, the only 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; the Radey affidavit accompanying the motion simply said that the payment was refunded after the equipment was sold to Rogan. ¶¶ 2-3. 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. 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 false statement *See 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); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776 (1986)

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<sup>1</sup>Dismissal of the lawsuit does not prevent the Court from imposing sanctions for conduct that preceded the voluntary dismissal. *Ohio Civil Rights Comm'n v. GMS Management Co.*, 2000 WL 840495 (Ohio App. 9 Dist. 2000); *Lewis v. Celina Fin. Corp.*, 101 Ohio App.3d 464, 470, 655 N.E.2d 1333 (Ohio App. 3 Dist. 1995); *State ex rel. J. Richard Gaier Co. v. Kessler*, 97 Ohio App.3d 782, 785, 647 N.E.2d 564 (Ohio App. 2 Dist. 1994).

("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. 4 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 Pub. Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182 (1995); *Isquick v. Dale Adams Enters.*, 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 the customer was not required to share that view, especially given Med Express's acknowledgment that there had been postage-due problems with Postal Service shipments on other occasions. 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. *See 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 Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Svcs.*, 175 F.3d 848, 855 (10th Cir. 1999); *Castle Rock Remodeling v. Better Bus. Bureau of Greater St. Louis*, 354 S.W.3d 234, 241-243 (Mo. App. 2011), *Browne v. Avvo, Inc.*, 525 F. Supp.2d 1249, 1252-1253 (W.D. Wash 2007).

In addition, the TRO motion, which the court converted into a preliminary injunction motion after denying the TRO request, was likewise frivolous because, even putting aside that no relief was available to Med Express under the law, as discussed above, an emergency injunction would have been especially improper because 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 people who hear the statements would be coerced or intimidated into refusing to do business with the plaintiff. *Yood v.*

*Daly*, 37 Ohio App. 574, 576-577, 174 N.E. 779 (Ohio App. 1930). See also *O'Brien v. Univ. Cmty. Tenants Union*, 42 Ohio St.2d 242, 246, 327 N.E.2d 753, 755 (Ohio 1975).

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 Comm'rs 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 TRO's 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 the inability to give notice, nor efforts to give notice, were shown by affidavit or otherwise. Moreover, not only did Med Express have street addresses for both defendants, to which the complaint and moving papers could have been overnighted, but 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 had been visited upon Med Express (and surely there was not), such injury could have been redressed by a monetary award.

For all these reasons, plaintiff's motion for emergency relief was procedurally as well as substantively frivolous, and no reasonable attorney could have thought otherwise. 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 causing Nicholls to remove her feedback from the marketplace of ideas. Nicholls Affidavit ¶ 9.

Future potential customers are entitled to know about other customers' past experiences—including negative ones—with Med Express, so that they can decide whether to buy urgently needed medical equipment from the company. 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) 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.

Especially because of Med Express’s refusal to dismiss the cases with prejudice, 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, there is evidence that plaintiff based its action on sworn statements that it knew to be false. Plaintiff’s message to defendant Rogan asserted that the reason why the equipment had not been shipped to him was that it had been broken weeks before the order was placed, that the equipment should not have been listed for sale at the time the order had been placed, and, in fact, that plaintiff had removed the listing but that, for some unknown reason, the equipment remained in plaintiff’s eBay store as being available for purchase. If, in fact, the equipment was not available for shipment at the time Rogan placed the order, Med Express might well have been in violation of

the Mail or Telephone Order Rules of the Federal Trade Commission, 16 CFR Part 435; the verified complaint and TRO motion avoided public admission of that problem by averring specifically that the equipment was broken only after Rogan's order was placed. Second, Radey has 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.” Filing a verified complaint based on false statements would be a significant reason for finding bad faith.

If plaintiff's counsel filed a complaint seeking relief that the client did not want, that would also raise significant issues. Absent an explanation that clearly places the fault on one of the two, however, the Court is urged to impose joint and several sanctions liability.

Moreover, there is significant evidence of improper purpose. Both Radey and Mr. Amodio 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 every fact that each defendant had stated was true. But lawsuits cannot proceed against speech simply because the speech is harmful—it has to be tortious. Radey's online statements indicated that he sued Nicholls because eBay buyers should only express themselves based on cold calculation, not “emotion,” and because her statement (that the order arrived with postage due) was not about a fact that he deemed relevant. But Radey's opinions about Nicholls' opinions would be legally irrelevant except insofar as it shows a recognition that Nicholls was stating, in part, 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. And Med Express lawyer Mr. Amodio’s statement to Mr. Levy indicated that plaintiff was prepared to move forward with the litigation regardless of the lack of merit and 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 defend against a preliminary injunction hearing scheduled to be held in Medina. Levy Affidavit ¶ 3.

This strategy came close to succeeding, because Nicholls lives 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. 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. At the same time that Med Express filed this suit, it filed yet another case like this one, against another customer located in Guam. This Court’s online docket reveals that it has filed nearly identical defamation actions and TRO motions in the past, using a different lawyer. Nye Affidavit ¶ 12 and Exhibits M to T. Only by imposing sanctions on both attorney and client can the Court send the appropriate deterrent message.

## **II. The Court Should Award Defendants \$10,163.15 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-Cnty. 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).

Here, attorneys Nye and Haren seek to be awarded fees at their normal hourly billing rates — \$230 and \$175, respectively. 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. Counsel’s experience and qualifications are set forth in their affidavits, and Karen Lefton of Brouse McDowell in Akron, Ohio has averred that the hourly rates for both counsel are reasonable. Ms. Lefton was previously general counsel for the Beacon Journal Publishing Co., and is thus familiar with the market for legal services for First Amendment litigation in northeastern Ohio.

The time records for Mess’rs Nye and Haren reflect they spent 27.5 and 21.2 hours, respectively, litigating this case. The time for which an award of attorney fees is sought includes 3.6 and 5.7 hours, respectively, spent addressing the merits even after plaintiff filed its notice of voluntary dismissal because, even though counsel for Med Express had been notified the day before that Nicholls was represented by Ohio counsel, he served the notice of dismissal by regular mail on Nicholls herself in South Carolina. Nye Affidavit ¶¶ 16-20; Haren Affidavit ¶ 10; Nicholls Affidavit ¶ 23. The time also includes 7.9 and 11.2 hours spent to date on this motion for an award of fees, 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).<sup>2</sup> Consequently, the fees sought as sanctions are reflected in the following table:

Attorney	Hourly Rate	Hours Spent	Total Fee
Nye	\$230	27.5	\$6325
Haren	175	21.2	3710
Totals		48.7	10035

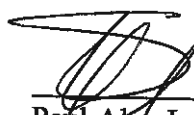
In addition, defendants' counsel incurred \$128.15 in expenses; the Lefton Affidavit avers that these fees and expenses are reasonable for this litigation. ¶ 11.

In summary, then, the Court should award reasonable attorney fees of \$10,163.15.

### CONCLUSION

The motion for an award of sanctions should be granted. The Court should award defendants \$10,163.15 in attorney fees and expenses, imposed jointly and severally on Med Express and its counsel unless one of them shows that the other should bear sole responsibility.

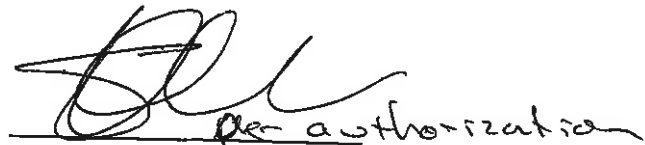
Respectfully submitted,

  
Paul Alan Levy (pro hac vice sought) *per authorized*  
Scott Michelman

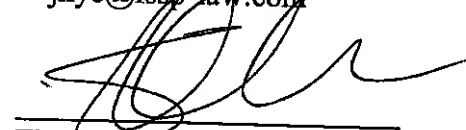
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<sup>2</sup> However, no fees are sought for time spent by Paul Alan Levy, who is appearing in this case only on the sanctions issue.

  
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