

**IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO**

MED EXPRESS, INC.,	:	Case No. 13CIV0351
	:	
Plaintiff,	:	Judge Collier
	:	
v.	:	<u>ANSWER AND COUNTERCLAIM OF</u>
	:	<u>DEFENDANT AMY NICHOLLS</u>
AMY NICHOLLS, et al.,	:	
	:	
Defendants	:	
	:	
v.	:	
	:	
RICHARD A. RADEY	:	
5478 Grafton Road	:	
Valley City, OH 44280	:	
	:	
Counterclaim defendant	:	

Now comes defendant Amy Nicholls, by and through counsel, and for her answer hereby states as follows:

FIRST DEFENSE

1. Admit ¶1.
2. Admit ¶2.
3. Deny ¶3 for lack of knowledge.
4. Admit ¶4.
5. Admit ¶5.
6. Admit that the item and shipping were paid for through PayPal. Deny for lack of knowledge where Med Express took the equipment or where it was weighed. Admit that it was shipped to and received at the appropriate location. Deny for lack of knowledge what Med Express paid. Admit that it was received with postage due.

7. Deny that Med Express “immediately” offered to reimburse the postage amount. Rather, Nicholls notified Med Express of the problem via eBay message on February 19, 2013. A true and accurate copy of that message is attached as Exhibit A. Med Express then acknowledged the error on February 20, 2013 (saying “no argument from us,” and also averring that “this”—the problem of postage due—“is happening to a lot of [Med Express’s] USPS packages lately.”) but did not offer to refund the postage, as also shown on Exhibit A. Admit that on February 26, 2013, Nicholls posted feedback and comments for the transaction. Further answering, Nicholls states that the feedback and comments included the truthful statement: “Order arrived with postage due with no communication from seller beforehand.” A true and accurate copy of a screenshot of the “Feedback profile” of Med Express on eBay.com, which includes that statement by Nicholls, is attached hereto as Exhibit B. Admit that Nicholls gave Med Express low ratings in the “Detailed Seller Ratings” section. Deny that Nicholls’s truthful statement “resulted in a negative feedback profile for Med Express.” Further answering, Nicholls states that the feedback profile in Exhibit B shows that Med Express has a feedback rating that is 99.3% positive. Deny that the foregoing conduct constitutes “falsely and deliberately slander[ing] the good name and reputation of Med Express”; a truth cannot be a slander, and Med Express’s own complaint alleges Nicholls’s statement to be true. Further answering, Nicholls states that Exhibit B, like Exhibit A additionally includes an admission from Med Express which concedes the truth of Nicholls’s statement and avers that Nicholls’s experience is not an isolated occurrence. Further answering, Nicholls states that because Med Express’s own complaint alleges the statements made by Nicholls to be true, the allegation that Nicholls “falsely and deliberately slandered” Med Express by making a true statement is frivolous conduct sanctionable under R.C. 2323.51. Further answering, Nicholls states that her ratings of Med

Express in the “detailed seller ratings” section of eBay are opinions and therefore are protected speech as a matter of law.

8. Deny ¶8.

ADDITIONAL DEFENSES

9. The complaint fails to state a claim upon which relief can be granted.

10. The complaint is barred by the First Amendment to the US Constitution, Section 11, Article I of the Ohio Constitution, and/or Article I, Section 2 of the South Carolina Constitution.

11. The complaint is barred by privilege.

12. The statements and ratings constitute opinions, which are protected speech and not actionable.

13. The complaint constitutes frivolous conduct and is sanctionable under R.C. 2323.51 and/or Civil Rule 11.

14. Any damage suffered by Med Express is the result of an intervening or superseding cause not attributable to Nicholls.

15. Med Express waived or release any right it may have had to claim damages from negative feedback by agreeing to eBay’s terms of service.

16. The claim in the complaint is barred by contributory negligence, Med Express’s own reckless or intentional conduct, estoppel, illegality, license, payment, release, and/or waiver.

17. This Court lacks personal jurisdiction over Nicholls.

COUNTERCLAIM

For her counterclaim against plaintiff Med Express, Inc., and new counterclaim defendant Richard A. Radey, Nicholls hereby states as follows:

1. Radey is the President of Med Express.

2. As alleged in the complaint and admitted in the answer, Med Express is in the business of selling goods on eBay and Nicholls purchased goods from Med Express at that site.

3. As alleged in the complaint and admitted in the answer, even though Nicholls paid in full for the item purchased, including shipping costs, before the item was shipped, Nicholls nevertheless received the item with postage due.

4. As alleged in the complaint and admitted in the answer, Nicholls published on eBay the true statement that she received the item with postage due.

5. Notwithstanding the truthful nature of Nicholls's statement, Med Express nevertheless sued her for "slander," or defamation, in the complaint in this case, and is seeking an injunction ordering her and defendant eBay, Inc., to remove her statement.

6. Notwithstanding Med Express's knowledge that Nicholls was a South Carolina resident with no relevant contact with Ohio other than this transaction, and notwithstanding Med Express's knowledge that Nicholls's truthful statement was made in and from South Carolina, Med Express sued her in Ohio in order to make the litigation more cumbersome and expensive to defend.

7. Med Express has engaged in a pattern of frivolous litigation by suing out-of-state defendants in cases calculated to chill their free speech rights. On the same day that South Carolina resident Nicholls was sued in Medina County, Med Express also sued Dennis Rogan of West Pittston, Pennsylvania, and Tan Jan Chan of Tamuning, Guam, in lawsuits which also seek damages and injunctive relief against those defendants for posting true statements on eBay.

8. The statements in the complaint were verified by Radey, meaning that he swore to their truth under oath and in the presence of a notary. Radey additionally executed an affidavit—after

“being first duly sworn according to law”—in support of Med Express’s motion for temporary restraining order, a true and accurate copy of which is attached hereto as Exhibit C.

9. The claim in the complaint has no basis in law. Its true purpose is to squelch public comment and discussion which is true but unflattering to Med Express. It serves merely to harass or maliciously injure Nicholls, and/or is improper for another purpose.

10. The claim in the complaint is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, and/or cannot be supported by a good faith argument for the establishment of new law. Despite reasonable opportunity for further investigation, the statements in Radey’s verification and affidavit have no basis in fact and no evidentiary support.

11. Civil Rule 11 provides in part as follows: “Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.”

12. The filing of the complaint and motion for temporary restraining order were made in violation of Civil Rule 11, in that there is no good ground to support the claim in the complaint and the request for a temporary restraining order or preliminary injunction.

**COUNT ONE – FRIVOLOUS CONDUCT UNDER R.C. 2323.51 BY
MED EXPRESS, RADEY, AND AMODIO**

13. Nicholls realleges and reincorporates all prior allegations.

14. The filing of the complaint, the verification of the complaint by Radey, the filing of the motion for temporary restraining order, and the execution and filing of the affidavit of Radey in support of the claim in the complaint and motion, constitute “frivolous conduct” as that term is

defined in R.C. 2323.51(A)(2). Each of the foregoing is sanctionable under R.C. 2323.51(B), and Nicholls is entitled to an award of court costs, attorney's fees, and other reasonable expenses incurred in connection with this civil action. Pursuant to R.C. 2323.51(B)(4), Nicholls is entitled to recover the foregoing award of costs, fees, and expenses, from Med Express, its counsel (James A. Amodio and Brown Amodio & Chandler, LPA), Radey, or a combination of two or all of them.

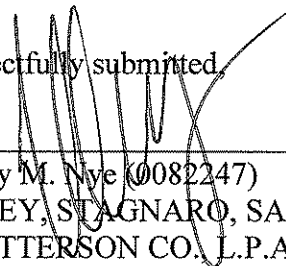
**COUNT TWO – PUNITIVE OR EXEMPLARY DAMAGES AGAINST
MED EXPRESS, RADEY, AND AMODIO**

15. Nicholls realleges and reincorporates all prior allegations.
16. The actions or omissions of Med Express and Radey demonstrate malice or aggravated or egregious fraud towards or against Nicholls. Radey, as principal or master of agent Med Express, knowingly authorized, participated in, or ratified actions or omissions of Med Express that so demonstrate.
17. Nicholls is entitled to an award of punitive or exemplary damages, including attorney's fees, as provided for in R.C. 2315.21.

Having fully pleaded her counterclaim, Amy Nicholls prays for the following relief:

- On Count One, a monetary judgment in the amount of Nicholls's court costs, reasonable attorney's fees, and expenses, as provided for in R.C. 2323.51;
- On Count Two, an award of punitive or exemplary damages, including attorney's fees, in an amount provided for in R.C. 2315.21;
- For sanctions and relief under Civil Rule 11; and
- For such other relief as Nicholls is entitled to under the law.

Respectfully submitted,



Jeffrey M. Nye (0082247)
FINNEY, STAGNARO, SABA
& PATTERSON CO. L.P.A.
2623 Erie Ave., Cincinnati, OH 45208
(513) 533-6714
(513) 533-6711-fax
jmn@fssp-law.com

Thomas G. Haren (#0088238)
Seeley, Savidge, Ebert & Gourash Co., LPA
26600 Detroit Road, Suite 300
Westlake, Ohio 44145
(216) 566-8200 | (216) 566-0213 (fax)
tharen@sseg-law.com

Trial attorneys for defendant Amy Nicholls

CERTIFICATE OF SERVICE

Pursuant to Ohio Civil Rules 5(B)(2)(c) and 5(B)(2)(f), the undersigned does hereby certify that a true and accurate copy of the foregoing was served upon the following via ordinary U.S. mail or electronic mail on this 17 day of April, 2013.



Jeffrey M. Nye (0082247)

Ebay, Inc
2145 Hamilton Avenue
San Joes, California 95125

James A. Amodio
109 West Liberty Street
Medina, OH 44256
Brownlaw@zoominternet.net
Attorney for Plaintiff Med Express Inc.

Hi, Amy! | Daily Deals

My eBay Sell Community Customer Support Cart

Shop by category

Search...

All Categories

Search

Advanced

Garden by eBay

New ideas are sprouting at eBay

Try out our new experiences and help us grow

Ad Feedback | AdChoice

Home | My eBay | Messages: Inbox | Message

My eBay chimera-studios (27 ☆)

Activity Messages (1) Account

Tell us what you think Change settings

Inbox

- All messages (1)
- From members
- From eBay (1)
- High priority
- Sent
- Trash
- Archive
- Folders
 - My Folder 1
 - Add a folder +

More options

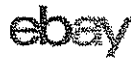
- Save your messages
- Find and contact member
- Messages Help
- Customer Support

Delete Archive Reply Forward Move to

Print | Back to inbox: All messages

Re: Shipping: chimera-studios sent a message about Olympus G92104 Microscope Light Source with Shutter Attachment #230849885366

From: med_express_sales
Sent: Feb-20-13 05:42 AM



eBay sent this message to Amy Nicholas (chimera-studios). Your registered name is included to show this message originated from eBay. Learn more.

Seller has responded to your question about this item

Do not respond to the sender if this message requests that you complete the transaction outside of eBay. This type of offer is against eBay policy, may be fraudulent, and is not covered by buyer protection programs. Learn More

Dear chimera-studios,

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!

Click "respond" to reply through Messages, or go to your email to reply

Respond

- med_express_sales

From: chimera-studios
To: med_express_sales
Subject: Shipping: chimera-studios sent a message about Olympus G92104 Microscope Light Source with Shutter Attachment #230849885366
Sent Date: Feb-19-13 13:50:13 PST

Dear med_express_sales,

We received delivery of this item today with \$1.40 postage due. I would have been happy to have had that amount included on the original payment if it had been communicated to me as it was terribly inconvenient to have the mail carrier arrive demanding cash which we do not keep at the office, esp. since the carrier had no means to provide me receipt for the postage payment which came out of my personal funds. I am not demanding a refund of the small amount, only stating my displeasure for how this transaction occurred with postage due.

- chimera-studios



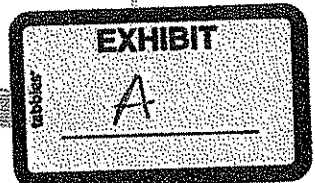
Olympus G92104 Microscope Light Source with Shutter Attachment
Item Id: 230849885366
End time: Feb-12-13 15:07:25 PST
Seller: med_express_sales (1609 ☆)

99.3% Positive Feedback
Member since Nov-13-03 in United States
Location: OH, United States


Listing Status: This message was sent while the listing was closed.

Here are more items from this seller

Shandon Mettler P10 Scale HP 5945 Guace Perkin Elmer Osaka Vacuum TH



Feedback profile


max_express_astes (1866)
 Positive Feedback (last 12 months): 98.3%
(How is Feedback percentage calculated?)
 Member since: Nov-13-03 in United States

Recent Feedback ratings (last 12 months)		Detailed seller ratings (last 12 months)	
Positive	Negative	Item as described	Communication
25	0	216	232
145	2	232	233
303	1	231	231

Feedback received (items 1-29)
 Show: All (1) Positive (145) Neutral (2) Negative (1) Warning (0)
 Order arrived with postage due with no communication from seller before hand.
 Buyer: [winners-ahudaa \(27\)](#)

Refined Feedbacks: 9
 Order: [Pay 16 months](#)
 Date: Feb-26-13 17:02
 View item



STATE OF OHIO
COUNTY OF MEDINA


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} SS:
}

AFFIDAVIT

Richard A. Radey, being first duly sworn according to law, deposes and states as follows:

1. I am the President of Plaintiff Med Express Inc. in the within matter.
2. On or about February 12, 2013, Med Express Inc. sold an Olympus G92104 Microscope Light Source with Shutter Attachment to Defendant Amy Nicholls in Ebay transaction number 230849885366, using a website owned and operated by Ebay, Inc.
3. Due to a dispute over \$1.44 in excess postage charges, and rather than accepting my offer for a full reimbursement of the postage due cost, Defendant Amy Nicholls falsely posted false and slanderous statements on the website owned by Ebay, Inc., in the form of negative feedback on the transaction and low ratings in Ebay's Detailed Seller Ratings section.
4. As a result of the false and libelous statements, Plaintiff has suffered damages and will continue to suffer damages into the future unless said comments, posts, feedback and ratings are removed from the website owned, operated and maintained by Defendant Ebay, Inc.

Further Affiant sayeth naught.


Richard A. Radey

Sworn and subscribed in my presence this 25th day of March, 2013.



TINA S. WINGFIELD
Notary Public, State of Ohio
My Commission Expires 1/24/2016
